

AGAINST FLEXIBILITY

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Contemporary legal thinking is in the thrall of a cult of flexibility. We obsess about avoiding decisions without all possible relevant information while ignoring the costs of postponing decisions until that information becomes available. We valorize procrastination and condemn investments of decisional resources in early decisions.

We should understand public and private law as a productive activity converting information, norms, and decisional and enforcement capacity into outputs of social value. Optimal timing depends on changes in these inputs' scarcity and in the value of the decision they produce. Our legal culture tends to overestimate the value of information that may become available in the future while discounting declines over time in decisional resources and the utility of decisions. Even where postponing some decisions is necessary, a sophisticated appreciation of discretion's components often exposes aspects of decisions that can and should be made earlier.

Disaster response illustrates the folly of legal procrastination as it shrinks the supply of decisional resources while increasing the demand for them. Specifically, the failure to evacuate tens of thousands of vulnerable low-income people from New Orleans before Hurricane Katrina struck resulted largely from undervaluing decisional resources in the years leading up to the disaster and overvaluing the information that officials would gain as the disaster approached. After Hurricane Katrina, programs built around flexibility failed badly through a combination of late and defective decisions. By contrast, those that appreciated the scarcity of decisional resources and had developed detailed regulatory templates in advance provided quick and effective relief.

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INTRODUCTION

One of law's most basic functions is to displace decisions across time. A system without temporal displacement is one of will, not of law. Even when the law makes decisions of immediate, or retroactive, effect, it is relying on rules of recognition established at some point in the past. Invocations of "the rule of law" may be demands for consistent treatment, but they are just as likely to be pleas to resolve issues under rules specified in advance. Locking in our own past decisions allows us to override our own fleeting impulses without submitting to the rule of others.

Legal discourse is deeply ambivalent about the proper timing of decisions. It declares, for example, that a condition on the ownership of land that could take effect more than twenty-one years after the end of all relevant "lives in being" is an invalid attempt by the dead hand of the past to control the future.¹ Yet the country eagerly defers to a constitution written over two centuries ago by barely a quarter of the states that are now in the Union and at a time when politics, commerce, and society were fundamentally different—and when a substantial majority of the people was denied any voice whatsoever.² Commentators attribute much of this country's fabulous wealth to the law having encouraged people to make contracts committing themselves in advance to courses of action they may later regret.³ Yet the current economic crisis resulted in part from individuals and businesses over-committing themselves in a future they only dimly understood—some commitments which the law is now setting aside through bankruptcy and bailouts.

Debates about when decisions should be rendered or reserved are both ancient and ubiquitous. They underlie familiar jurisprudential debates about the relative merits of rules and standards and, to an extent, debates on the importance of generality in law.⁴ The early

¹ The rule against perpetuities is the "common-law rule prohibiting a grant of an estate unless the interest must vest, if at all, no later than 21 years (plus a period of gestation to cover posthumous birth) after the death of some person alive when the interest was created." BLACK'S LAW DICTIONARY 1447 (9th ed. 2009).

² See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 634–35 (2008) ("Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.")

³ See, e.g., JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* 10–18 (1956) ("[I]t does not exaggerate the role of law to see that its procedures and compulsions were inextricably involved in the growth of our market economy. By providing authoritative forms of dealing and by enforcing valid agreements, we loaned the organized force of the community to private planners.")

⁴ Compare FRANZ NEUMANN, *THE RULE OF LAW: POLITICAL THEORY AND THE LEGAL SYSTEM IN MODERN SOCIETY* 212 (1986) (arguing that exercising discretion across a broad range of subjects, rather than with particular events in mind, is essential for maintaining personal freedom), and E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK*

Federalists believed that deciding important questions by election was improper; they thought those matters should await the convening of the legislature.⁵ On the other hand, modern constitutional law cautions (albeit rather unpersuasively) that the legislature's failure to exercise sufficient discretion itself may render its delegations of discretion to the executive unconstitutional,⁶ more meaningfully, it warns against the vagueness resulting from insufficient exercises of discretion.⁷ Administrative law, for example, sees this question as the trade-off between rule making and adjudication, leaving the choice largely to the executive but prescribing a different course of procedural remedies depending on the path the executive selects.⁸

Accordingly, precommitment in policymaking is appealing in large part because it is *not* well-informed and can serve as a sort of "veil of ignorance"⁹ to filter out some self-serving biases. For example, someone advocating expanded powers for the current president knows that future presidents of the other party will receive the same

ACT 266 (1975) (finding the rule of law an unqualified good), with JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 224 (1979) (rejecting this view by asserting that "the rule of law is a negative virtue in two senses: conformity to it does not cause good except through avoiding evil and the evil which is avoided is evil which could only have been caused by the law itself").

⁵ Thus, for example, Roger Sherman condemned specific instructions from constituents for interfering with the "duty of a good representative to inquire what measures are most likely to promote the general welfare." 1 ANNALS OF CONG. 764 (Joseph Gales ed., 1834); cf. Mark A. Graber, *Enumeration and Other Constitutional Strategies for Protecting Rights: The View from 1787/1791*, 9 U. PA. J. CONST. L. 357, 371 (2007) ("Conceptualizing tyranny as a rule dedicated to private interests, members of the framing generation believed that the people's representatives could waive the fundamental rights of their constituents when doing so promoted social ends.").

⁶ See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537–38 (1935) ("Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry.").

⁷ See, e.g., *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) ("[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited . . ."); *Lanzetta v. New Jersey*, 306 U.S. 451, 458 (1939) ("The challenged provision condemns no act or omission; the terms it employs to indicate what it purports to denounce are so vague, indefinite and uncertain that it must be condemned as repugnant to the due process clause of the Fourteenth Amendment.").

⁸ See, e.g., *Heckler v. Campbell*, 461 U.S. 458, 466–67 (1983) (allowing the Social Security Administration to issue rules foreclosing issues that claimants for disability benefits might otherwise raise in adjudications); *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 243–46 (1973) (deferring to agency's choice to proceed by rulemaking rather than by adjudication absent evidence that it had singled out particular entities); *SEC v. Chenery Corp.*, 332 U.S. 194, 201–02 (1947) (refusing to "stultify the administrative process" by requiring agencies to proceed by rule).

⁹ See JOHN RAWLS, *A THEORY OF JUSTICE* 136–37 (1971) (advocating decision making behind a "veil of ignorance" in order to "nullify the effects of specific contingencies which put men at odds and tempt them to exploit social and natural circumstances to their own advantage" by forcing them "to evaluate principles solely on the basis of general considerations").

powers. That is, courts will enforce contracts no matter which party turns out to have made the better deal. Yet this preference for decisions that are in significant respects uninformed flies in the face of the modern administrative state's strong drive toward ever more informed decisions. More broadly, this preference conflicts with the fundamental precept of the Information Age, and with technological and cultural change proceeding at an ever-feverish pace, decisions made in the past, even the recent past, seem increasingly intolerable obstacles to progress.

Courts and scholars have considered the proper timing of particular kinds of decisions at great length.¹⁰ They have done relatively little work, however, on a theory of the most desirable timing for legal choices generally. Moreover, what scholarship has moved in this direction has tended to confound the questions of *when* a decision should be made with *who* should make it.¹¹ Although one choice occasionally dictates the other, far more often the law can delegate or withhold authority to particular decision makers without stipulating when that decision maker can exercise her authority. Thus, preferring that trusted actors—such as the police, prosecutors, administrative agencies, judges, or the private sector—make a decision does not require that these trusted actors dither upon receiving that delegation. Analyses of the timing of legal decisions also typically focus on public officials substantively regulating the private sector.¹² This Article addresses a considerably wider array of legal decisions, including fiscal and managerial decisions within public law as well as those in procedural law and decisions of legal significance made by private parties. It draws its in-depth illustrations from public law but includes fiscal as much as regulatory law in its analysis.

¹⁰ See, e.g., *West v. Conrail*, 481 U.S. 35, 36–39 (1987) (determining which acts must occur before expiration of the statute of limitations); *Goldberg v. Kelly*, 397 U.S. 254, 260–72 (1970) (requiring that hearings be held prior to termination of welfare benefits); *Vélez v. Awning Windows, Inc.*, 375 F.3d 35, 43–44 (1st Cir. 2004) (enforcing scheduling order of the district court); TODD D. RAKOFF, *A TIME FOR EVERY PURPOSE: LAW AND THE BALANCE OF LIFE* viii (2002) (exploring “how our society shapes its use of time, and [how] the particular laws . . . participate in that shaping”).

¹¹ Professor Louis Kaplow asks many of the same questions this Article does. See Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992). He fails, however, to differentiate between changes in the timing of decisions and the delegation of those decisions from legislative to enforcement authorities. *Id.* at 561–62 (“One can think of the choice between rules and standards as involving the extent to which a given aspect of a legal command should be resolved in advance or left to an enforcement authority to consider.”). As a result, Professor Kaplow provides little guidance on the purely *temporal* aspects of decision making, such as whether to postpone the exercise of retained authority and whether to require prompt action when delegating power. See *id.* at 608–21.

¹² See, e.g., *id.* at 562–64; see also HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 145–58 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); H.L.A. HART, *THE CONCEPT OF LAW* 125–29 (2d ed. 1994).

This Article seeks to develop a theory of the best timing of legal decisions that is shorn of institutional associations. In doing so, it analyzes law as a productive enterprise. Like any productive enterprise, law seeks to obtain necessary inputs at the lowest cost while producing output of the greatest feasible value. When conditions for production are suboptimal, the law can proceed despite the scarcity of important inputs (either paying the required premium or producing a lower-quality decision with inferior inputs), it can cancel production altogether, or it can postpone production until a scarce input becomes more plentiful. If it puts off production, it risks having the availability of other inputs, or the value of its potential output, decline in the interim. This Article contends that because of a variety of analytical errors and psychological predispositions the law often postpones decision making counterproductively. In particular, while information typically becomes more plentiful over time, other inputs to legal decisions, particularly decisional resources, often become scarcer. Moreover, postponed legal decisions often have considerably less value than a decision made earlier.

This Article recognizes that different actors may have different interests about when particular decisions ought to be made and implemented. For example, those that oppose any action at all may first try to stall, while those that see the political winds turning against them may try to hurry. These timing preferences are sometimes strong enough to affect bargaining on the substance of policies.¹³ This Article, however, focuses primarily on which timing arrangements would best serve social needs across the range of policy areas. Accordingly, this Article does not address the political legitimacy of decision making as such. To be sure, however, making more valuable and clearer decisions can play an indirect role in winning acceptance for the decision maker. Precommitment, moreover, will often immunize decisions from accusations of bias.

Part I seeks to concretize the gauzy concept of flexibility. It suggests that both the creation and the abrogation of regulatory, budgetary, and adjudicatory policy typically occur in four stages. Characteristic patterns of legal conflict occur at the transitions from one to another of these stages. Flexibility, then, is postponing movement to the next stages in the formulation of a decision or retaining the authority to retreat to one of the earlier stages. This typology pro-

¹³ See Jacob E. Gersen & Eric A. Posner, *Timing Rules and Legal Institutions*, 121 HARV. L. REV. 543, 545 (2007) (explaining that “because a panoply of constitutional, statutory, and internal congressional rules constrain the timing of legislative action, . . . ‘mere’ timing . . . can mean nearly everything” (quoting Aaron-Andrew P. Bruhl, *Using Statutes to Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of Proceedings Clause*, 19 J.L. & POL. 345, 398 (2003))).

vides the means of separating decisions that can and should be made in advance from those for which flexibility truly is needed.

Part II lays out an economic theory of the optimal timing of legal decisions. Part III proceeds to examine the current affinity for sweeping flexibility. It identifies logical errors; the conflation of procedural, institutional, and temporal concerns; and a psychological tendency to focus on one kind of flawed decision to the exclusion of others.

Part IV then illustrates these points with examples from disaster preparedness, mitigation, and relief. It uses Hurricane Katrina as an example in part because it represented one of the most egregious governmental failures in recent times and in part because disasters seem to offer an environment well-suited to showcase flexibility's strengths. Among other things, the substance of optimal policy decisions generally is uncontroversial and disasters' episodic nature lowers the stakes on both institutional and procedural questions. In addition, arguments for making early decisions seem weak: vital information—the time, place, and severity of the disaster—is unavailable much in advance, and the rapid, well-targeted response that flexibility supposedly promises is especially important in an emergency. The ironic result in a crisis like Hurricane Katrina, however, is that too much flexibility leads to paralysis.

Part IV first traces deficiencies in funding disaster preparedness not to isolated errors in judgment but to systemic problems with the contemporary budget process and its reliance on highly discretionary modes of budgeting. Specifically, the decisional resources needed for careful annual spending reviews that our current system requires are unavailable at least in part because they are diverted to another use: partisan warfare. The annual appropriations cycle is a classic case of overvaluing information and undervaluing the decisional resources needed to process that information.

Part IV then examines the failure to evacuate one hundred thousand vulnerable people from New Orleans. It finds that federal, state, and local planning processes so valorized discretion that they made many too few useful investments of decisional resources. Finally, this Part compares three agencies' disaster relief efforts. It finds that the rule-bound agency acted much more quickly and effectively than the two with far greater flexibility. With a detailed set of policies already well-known to staff in the field, the rule-bound agency needed only to abrogate a handful of policies that did not make sense in the postdisaster environment. The surfeit of flexibility the other two agencies had preserved for themselves required decisional resources far beyond their capacity in the postdisaster environment. Even when they eventually did act, their hurried exercises of discretion proved substantively defective.

This disaster-response example follows a broader pattern. On the one hand, the policymaking community undervalues the utility of information available in advance of a crisis, such as the general vulnerability of people with very low incomes. On the other hand, it overvalues information that arises in a crisis, such as the projections of a particular storm's track. It also underestimates the cost of government officials' producing timely decisions once they finally receive the late-breaking information.

This Article concludes that policymakers and scholars should move beyond their reflexive embrace of flexibility. Instead, they should analyze delegation and timing issues separately and only postpone decisions when the benefits of new information or other important resources exceed the costs of decreases in the availability of other inputs required for a decision and in the value of the decision rendered.

I

THE DYNAMICS OF LEGAL PROCRASTINATION

Decisions that legal institutions must make typically involve several stages. Some stages may require the various decisional inputs in quite different proportions than others. As a result, the optimal timing of the different components of an aggregate decision may be quite different from one another. A component that depends heavily on information might usefully be postponed until that information becomes more available, while a component that depends far more on decisional resources or a clear set of norms may best be made early, when those resources are more readily available. Unfortunately, contemporary proflexibility literature fails to disaggregate decisions in this manner.¹⁴ Instead, it seeks to postpone all of a complex set of decisions by identifying a single component for which late-arriving information would be helpful. Failure to disaggregate decisions has given a sense of fuzziness to the line between rules and standards.¹⁵ Many legal materials whose relative "rule-ness" scholars debate actu-

¹⁴ See, e.g., Alfred C. Aman, Jr., *Administrative Law in a Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency*, 73 CORNELL L. REV. 1101, 1244 (1988) (discussing the "enormous need to coordinate and control the[] vast policy making powers" of agencies by limiting policy decisions to "an elected branch of government—the President"); Hannah Wiseman, *Public Communities, Private Rules*, 98 GEO. L.J. 697, 763–66 (2010) (finding delegation of rule-making power to sublocal entities appealing because it enhances flexibility).

¹⁵ See Kaplow, *supra* note 11, at 561 n.6 ("[A] particular law will have qualities of rules and of standards, with competing formulations differing in the degree to which they are rule- or standard-like."); Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 244 (1993) (suggesting that rules and standards lie on a "specificity continuum" where "[t]he extremes of the spectrum are easy to identify, while the middle ranges blur at the margins").

ally contain some decisions made and others postponed. Systematically separating the one set from the other, rather than treating them as gray continuum, is essential to evaluating each timing decision.

To that end, subpart A provides a typology of discretion intended to provide more texture than do more common references to “broad” or “narrow” discretion. This typology can support trans-substantive comparisons of the extent of flexibility retained (or delegated without an expectation of immediate action). The typology also allows limiting flexibility to only the aspects of a larger decision for which delay really is cost-effective. Subpart B then provides an abbreviated survey of the kinds of substantive and procedural debates that arise about exercises of discretion made by different tiers of public authority. Much of this conflict comes at the points where early decisions must be reconciled with those that were delayed in the name of greater flexibility. Thus, a less dogmatic pursuit of flexibility could avoid many resource-consuming battles.

A. A Typology of Discretion

Although both the popular media and scholarly literature champion discretionary governance in general, they often are quite vague about just what kind of discretion they mean.¹⁶ Maurice Rosenberg distinguishes between “primary discretion,” the ultimate decision maker’s ability to choose among a wide range of options, and “secondary discretion,” the scope of immunity that a subordinate decision maker (such as a trial court) has from reversal.¹⁷ Ronald Dworkin distinguishes between “strong” and “weak” forms of discretion in quite similar terms.¹⁸ Yet on closer examination, these seeming dichotomies turn out to be more of a continuum: as a subordinate entity enjoys increasing immunity from reversal even on decisions a higher body dislikes, the initial decision maker ceases to be subordinate in any meaningful sense.¹⁹ These distinctions have value in assessing transfers of power among institutions—which may or may not involve temporal displacement of decision making—but they have limited value in directly assessing our propensity to postpone decisions. In particular, because they are only matters of degree, they offer little help in disaggregating decisions into discrete components whose assignment and delay can be debated.

¹⁶ See, e.g., sources cited *supra* note 14 and *infra* note 148.

¹⁷ Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 637 (1971).

¹⁸ See RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 31–33 (1977).

¹⁹ Cf. George C. Christie, *An Essay on Discretion*, 1986 DUKE L.J. 747, 749–50 (acknowledging that secondary discretion may be thought to merge, in practice, with primary discretion when a subordinate “is given the authority to make wrong choices that cannot be overturned”).

Forms of reserved discretion may be distinguished along two important dimensions. First, a choice can be categorized based on its stage in the decision-making process: whether it affects the initiation of policymaking, the completion of a policy that is ready to implement, or some intermediate stage. Second, a choice can be either affirmative or negative: it can either add to the formation of policy or can void and reopen decisions already made. Each of these distinctions has practical consequences. The typology set out below permits considerable specificity in arguments for reserving “more” or “less” discretion. To date, arguments that are valid for postponing decisions at the final one or two stages in a process have been invoked to postpone more formative decisions for which no compelling reason to delay exists. More broadly, this typology also permits the establishment of consistent trans-substantive policies on the timing of decisions, thereby helping to expose covert efforts to manipulate timing to serve undisclosed institutional or substantive ends. This typology also provides a means of understanding the constitutional doctrines that regulate delegations of authority.

1. *Stages in Policymaking*

Formulating legal directives typically involves several stages.²⁰ An organ of the law may perform one or several steps and then leave others for later consideration, by that organ or another. The implications of interrupting the policy formation process to preserve discretion depend on the stage at which the process is interrupted. Four discretionary decisional stages exist in the formulation of most policies: initiative discretion, normative discretion, structural discretion, and quantitative discretion. Notwithstanding the custom of distinguishing exercises of legislative and administrative authority from the courts’ decision of cases, these same patterns exist in legislation, in administrative law, and in judicial decision making. Indeed, although commitment and enforcement systems may look quite different, the same general pattern exists in private lawmaking as well.

First, someone must exercise *initiative discretion* to decide that action will be taken in a particular area. Administratively, for example, the Occupational Safety and Health Administration (OSHA) must decide which of many workplace toxins it will regulate. Legislatively, Congress must decide if it wishes to subsidize the child care expenses of low-income families. Judicially, a state legislature (or a common law court) must decide to act against public drunkenness or unconscionable contracts.

²⁰ The Administrative Procedure Act, 5 U.S.C. § 553(b)–(c) (2006), for example, outlines the three stages of the notice-and-comment rule-making process.

Second, someone must exercise *normative discretion*, deciding what values will be pursued through that action. Thus, the Occupational Safety and Health Act of 1970 declares that OSHA must pursue the elimination of workplace hazards if feasible²¹ and, as interpreted by the Supreme Court, may not consider the costs to industry unless the regulation would destroy its economic viability.²² Congress has vacillated about whether child development or poverty amelioration are goals of its child care programs on a par with workforce mobilization; it primarily has left those normative choices to the states. For the most part, this country has attacked public drunkenness to prevent injuries to others' persons or property rather than to promote abstinence;²³ it has attacked unconscionable contracts in pursuit of both distributive and procedural justice.²⁴

Third, someone must exercise *structural discretion*, selecting a framework for the policy intervention. Here, OSHA must decide whether to establish exposure limits for a toxin, to mandate particular protective equipment, to require labeling, or to intervene in some other way. Congress has decided to reimburse child care secured in the private market rather than to build a string of public child care centers. State and local legislatures often have chosen to criminalize public drunkenness. Courts have determined that the remedy for unconscionability will be unenforceability; in some specific cases, Congress and state legislatures have established additional penalties.

Finally, someone must exercise *quantitative discretion*, supplying the particular, often arbitrary, quantitative elements that activate the structure chosen. This typically is the final exercise of discretion needed to set a government activity in motion.²⁵ OSHA selects a specific exposure limit for a particular toxin or the minimum specifications for pieces of protective equipment—and determines how many resources to devote to enforcing those rules. Appropriators determine how much money to spend on child care subsidies in a given year while administrators decide the maximum amount they will pay

²¹ See 29 U.S.C. § 655. The Occupational Safety and Health Act requires employers to “furnish to each of [their] employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to [their] employees,” *id.* § 654(a)(1), and requires OSHA to set standards “which most adequately assure[], to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life,” *id.* § 655(b)(5).

²² See *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 536–41 (1981).

²³ See Dan M. Kahan, *Reciprocity, Collective Action, and Community Policing*, 90 CALIF. L. REV. 1513, 1527–30, 1538–39 (2002).

²⁴ See *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 448–49 (D.C. Cir. 1965) (affirming judicial power to refuse to enforce an unconscionable contract).

²⁵ On occasion, quantitative discretion is essentially binary: some official or agency determines that a program should indeed operate.

per child per month. State legislatures decide what blood alcohol content is required to be considered drunk and the amount of the fine or length of the sentence to be imposed on convicted drunkards. Courts evolve doctrines of what degree of problems in the formation and terms of a contract suffices to support a finding of unconscionability.

Quite different mixes of inputs are required to produce each type of decision. The law devotes its costliest decisional resources to exercising initiative and normative discretion: its highest courts, high officials elected by the voters or selected by those that were, and sometimes (in state and local systems) the direct attention of the people themselves. These questions require high-level decisional resources because of a scarcity—and indeterminacy—of normative consensus, for which the heightened legitimacy of top policymakers is a substitute. Our commitment to limiting these matters to our highest-level decision makers, along with the scarcity of decisional resources at that level, limits the number of legal initiatives that may be started or redirected at any given time.²⁶ The amount of informational inputs required to exercise initiative or normative discretion vary, but those inputs usually are “legislative facts”²⁷—facts typically available widely and inexpensively.

Many exercises of structural and quantitative discretion are made in a similar manner. Contemporary legal culture, however, does not insist that exercises of these forms of discretion consume the same expensive *type* of decisional resources. The blossoming of the modern regulatory state and the roughly contemporaneous proliferation of balancing tests and similarly complex vehicles in case law, resulted from our acceptance that bureaucrats and lower court judges could exercise quantitative discretion on important matters without direct oversight from senior officials.²⁸ To be sure, some exercises of quantitative discretion require large amounts of decisional resources even if those involved are relatively junior. On the other hand, exercises of quantitative discretion more commonly require extensive informational resources, often including expensive expertise.

²⁶ Cf. NELSON W. POLSBY, *HOW CONGRESS EVOLVES: SOCIAL BASES OF INSTITUTIONAL CHANGE* 145–47 (2004) (describing this phenomenon in the congressional setting as being consistent with the Framers’ preference for and design of a limited federal government).

²⁷ See Hart & Sacks, *supra* note 12, at 360 (defining legislative facts as those “relevant in deciding what general propositions should be recognized as authoritative”).

²⁸ See, e.g., *Heckler v. Campbell*, 461 U.S. 458, 465–67 (1983) (allowing the Social Security Administration to specify levels of impairment necessary to qualify for Social Security disability benefits); *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976) (establishing a three-part balancing test for lower courts to apply when assessing whether an agency has provided sufficient procedural due process).

The sharp differences among these types of discretion have implications both for the advisability of delegating them to subordinate authorities and for their optimal timing. Scholars have focused primarily on the former question: delegation.²⁹ Contemporary federal constitutional doctrine requires Congress to exercise initiative discretion. If it does not, courts will deem an agency's actions to be *ultra vires*.³⁰ Although it purports to require some scintilla of a contribution to normative discretion, the "intelligible principle" requirement can be extremely slight indeed.³¹ Some states require their legislatures to provide much greater contributions to the exercise of normative discretion.³² Determining the optimal timing of legal decisions, on the other hand, requires a quite different mode of analysis.

2. *Creative and Abrogational Discretion*

The preceding subsection describes each stage of decision making in affirmative terms; that is, as way stations toward policy formulation. Not all discretion, however, operates as such *creative discretion*. Some individuals or entities may be empowered to exercise *abrogational discretion*.

Abrogational discretion may operate globally, voiding all prior decisions. If the Office of Management and Budget (OMB), for example, refuses to clear a proposed OSHA regulation, all of the agency's work formulating its policy is for naught. A presidential veto of an appropriations bill may render irrelevant all prior decisions about how child care money in that bill should be spent. A court decision striking down a statute criminalizing public drunkenness is likely to make the details of that statute irrelevant.

²⁹ See, e.g., David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. REV. 1333, 1371 (2005); Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 270–76 (2006).

³⁰ Under the Supreme Court's interpretation, Congress must provide at least an initial "intelligible principle" to administrative agencies prior to delegating to them any decision-making power. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 156–59 (2000) (finding Congress did not authorize the FDA to regulate tobacco products); see also *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

³¹ See *Hampton*, 276 U.S. at 409 (upholding the Tariff Act of 1922 because the vague instructions it gave to the President and the Tariff Commission on tariff adjustments satisfied the "intelligible principle" requirement); see also *Yakus v. United States*, 321 U.S. 414, 425–26 (1944) ("Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers.").

³² See, e.g., *Boreali v. Axelrod*, 517 N.E.2d 1350, 1351 (N.Y. 1987) (striking down tobacco regulation by the public health department as lacking sufficient normative guidance from the legislature); *Thygesen v. Callahan*, 385 N.E.2d 699, 702 (Ill. 1979) (striking down regulation of check-cashing fees because the legislature failed to specify sufficient norms to guide an agency's exercise of quantitative discretion and instead instructed the agency only to be "reasonable" in exercising its discretion).

Abrogational discretion also, however, may operate more surgically. It may be camouflaged as creative discretion at a lower level. Thus, for example, a nominal exercise of quantitative discretion in setting the permissible blood alcohol content level may transform the regime's norms from public safety to abstinence promotion if it criminalizes any detectable degree of intoxication. Similarly, the structural decision to assign responsibility for OSHA enforcement to a hopelessly overburdened corps of inspectors may have the effect of reversing the decision to initiate policymaking in that area.

Alternatively, abrogational discretion may involve deciding whether to make exceptions to any broad policy decisions in a particular case.³³ This abrogation could take the form of a formal waiver or exception or merely an ad hoc failure to apply the policy according to its terms in a particular situation. For instance, OSHA inspectors may elect not to take action against an employer that is releasing more of a toxin than the agency's rules allow if the employer is engaged in a vital activity or appears to be taking steps to resolve the problem. Likewise, states may transfer other funds to meet excess demand for child care subsidies or to pay above their usual reimbursement rates for care provided at unusual hours. Judges and juries may either engage in active nullification of criminal laws they dislike or temper their punishment of some drunkards. And courts may enforce a contract that meets established criteria for unconscionability if it serves an important economic purpose.³⁴

The exercise of abrogational discretion naturally leads to the question of what policies are substituted for the ones rendered void. In some instances, the answer is obvious: the prior policy regime again controls.³⁵ Someone holding abrogational discretion under these circumstances may be reluctant to use it if she, he, or it likes the prior rule even less than the one subject to abrogation. Indeed, standing rules may actually prevent parties from invoking the courts' abrogational authority where the relief sought would serve them just as badly or worse than the prior rule.³⁶

³³ See generally Frederick Schauer, *Exceptions*, 58 U. CHI. L. REV. 871 (1991) (discussing the extent to which exceptions can deprive rules of much of their value).

³⁴ See *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1151 (7th Cir. 1997) (enforcing an arbitration clause contained with a product in a sealed box).

³⁵ Cf. Kristina Daugirdas, Note, *Evaluating Remand Without Vacatur: A New Judicial Remedy for Defective Agency Rulemakings*, 80 N.Y.U. L. REV. 278, 285–86 (2005) (discussing the factors that courts consider to determine the remedy when striking down an existing administrative regime).

³⁶ See, e.g., *Heimberger v. Sch. Dist. of Saginaw*, 881 F.2d 242, 245–46 (6th Cir. 1989) (finding plaintiff parents lacked standing to challenge concededly unlawful school policies because the relief they sought would “actually exacerbate[] rather than relieve[] the alleged injury” by allowing defendant school district to impose a harsher, yet legal, policy should plaintiffs prevail).

In other cases, however, abrogational authority carries with it the authority to remake the decisions voided. This implied creative discretion, rather than the dismantlement of a particular policy, is often the primary source of disputes over the exercise of abrogational discretion. Letting a particular regulated employer exceed OSHA toxic emissions standards, for example, raises fewer concerns than having inspectors engage in a de facto rebalancing of the factors the agency considered in promulgating the rule and creating an exception that the agency previously rejected. Similarly, an administrator's discretionary withholding of child care funds from states with particular kinds of welfare policies sharply broadens the program's effective normative scope. Immunizing white or middle-class drunkards from prosecution effectively adds a new, pernicious term to the statute. Allowing favored companies or industries to enforce contracts meeting the usual standard for unconscionability may provide a market-distorting subsidy.

Some of the key cases that narrowed judicial abrogational discretion under the fourteenth amendment in the 1970s were indeed based on qualms about abrogation;³⁷ others, however, appear to reflect concern about the courts' competence and legitimacy in exercising creative discretion to replace the policies that they might abrogate.³⁸ One key reason why many state courts undertake more aggressive judicial review on both structural and substantive matters is their perceived greater legitimacy in exercising creative discretion to replace the policies they strike down.³⁹ Similarly, the D.C. Circuit has demonstrated an increasing tendency to leave in place agency actions it has found unlawful—to remand without vacatur⁴⁰—to avoid exercis-

³⁷ See, e.g., *Jefferson v. Hackney*, 406 U.S. 535, 536 (1972) (affirming the validity of Texas's computation procedures that resulted in predominantly white categories of welfare recipients receiving higher benefit payments than those received by categories of welfare recipients composed primarily of racial minorities); *Lindsey v. Normet*, 405 U.S. 56, 69 (1972) (rejecting a muddled attack on Oregon's landlord-tenant law).

³⁸ See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40-44 (1973) (noting the difficulty of determining the degree to which each school district might be disadvantaged by disparate property tax bases); *Dandridge v. Williams*, 397 U.S. 471, 485-87 (1970) (refusing to strike down a cap on the level of welfare benefits a family could receive and noting the absence of a coherent, judicially administrable principle on which an increment for larger families could be determined).

³⁹ See Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1144-53, 1168-83 (1999) (discussing expanded state court enforcement of individual rights); see also, e.g., *In re Extension of Boundaries of Hattiesburg*, 840 So. 2d 69, 81-83, 98 (Miss. 2003) (upholding a broad, subjective judicial role in setting municipal boundaries).

⁴⁰ See *Checkosky v. SEC*, 23 F.3d 452, 465 (D.C. Cir. 1994) (documenting the prevalence of the practice of remanding without vacatur and recognizing the court's "remedial discretion not to vacate"). But see *Daugirdas*, *supra* note 35, at 278 (criticizing the application of the practice of remanding without vacating as "frequently flawed").

ing creative discretion to decide which components of the prior regulatory regime to resuscitate.

In theory, an agency could redesign an entire regulatory regime through exercises of abrogational discretion. Doing so, however, would consume decisional resources most inefficiently⁴¹ and would likely produce inequitable inconsistencies.⁴² On the other hand, reservations of abrogational discretion may prove quite efficient if they encourage an agency to exercise more creative discretion in a timely fashion.⁴³ The value of abrogational discretion depends on the likelihood and importance of new information, or perhaps decisional norms, arising in the future. This naturally varies considerably from issue to issue: the steps required for safety on interstate highways, for example, change far less from year to year than those required for safety on the information highway. The costs of abrogational discretion include transaction costs to process requests for its exercise and the costs of erroneous exercises of that discretion that are likely. Alas, choices about how much abrogational discretion to reserve only intermittently reflect comparisons of these benefits and costs.

B. Patterns of Legal Conflict over Postponed Decisions

Most important policies in our system are the result of discretion exercised at different times and often by different levels of government.⁴⁴ Thus, resolution of legal disputes commonly requires reconciling separate exercises of discretion. To concretize the typology just presented in the context of substantive, institutional, procedural, and temporal struggles over flexibility, this section provides an overview of the ways in which the different levels of discretion interrelate in common legal disputes. It should be noted that reservations of flexibility tend to exacerbate these problems as they create uncertainty about

⁴¹ 1 RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 6.8, at 497–99 (5th ed. 2010).

⁴² See Alfred C. Aman, Jr., *Administrative Equity: An Analysis of Exceptions to Administrative Rules*, 1982 DUKE L.J. 277, 285 (recognizing that such discretionary exercises have been subject to attack for “appear[ing] unreasonable when applied to one or a few”); Peter H. Schuck, *When the Exception Becomes the Rule: Regulatory Equity and the Formulation of Energy Policy Through an Exceptions Process*, 1984 DUKE L.J. 163, 293 (describing the “unpredictable and unprincipled” nature of such a discretionary approach).

⁴³ This sequence is sometimes reversed in practice: having enacted a sweeping statute or regulation, either Congress or an agency may have second thoughts and establish an exceptions procedure. See, e.g., Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 850, 110 Stat. 2105, 2336–37 (expanding the USDA’s authority to abrogate the rules Congress included in the Food Stamp Act of 1977, Pub. L. No. 95-113, 91 Stat. 913–1045). This reclamation of discretion dissipates to some extent the decisional resources that the original statute saved but nonetheless is superior to abrogating the underlying rule completely.

⁴⁴ See, e.g., David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 WM. & MARY L. REV. 1653, 1701 (2010).

the extent of the discretion that has been exercised at each stage, allowing for overlaps of conflicting policies or overlooked gaps in policy formulation. Section 1 below considers challenges to the substance of decisions. Section 2 addresses assertions that inappropriate procedures have infected decision making. Section 3 then focuses on abrogational discretion, a wild card that can upset the seemingly orderly progression toward a decision that the other types of discretion provide.

1. *Substantive Challenges to Exercises of Discretion*

Battles over the role of the courts in reviewing the political branches' substantive policy choices revolve around the proper assignment of actions within these categories. Challengers try to portray a subordinate legal organ's policy choices as involving exercises of types of discretion relatively high on the scale of discretion. They then assert that their opponent's institutional superior—the Constitution, Congress, rule makers, a higher court, or whomever—has exercised discretion at least that far down the scale, thus creating a conflict. The policies' defenders do the opposite. Critics commonly see the challenged policy as a betrayal of a higher authority's choices on initiative, norms, or structure; defenders may assert that the challenged action is the obedient calculation of a minor quantitative element that the preordained structure requires consistent with the preordained scope of initiative and norms. Thus, for example, in *Citizens to Preserve Overton Park, Inc. v. Volpe*, the plaintiffs asserted that Congress had exercised initiative, normative, and structural discretion to protect parks and natural areas against encroaching highways, and that the Department of Transportation had contravened those choices by rejecting the congressional initiative, by substituting illicit economic norms, or by selecting a devolutionary structure.⁴⁵ The government, in contrast, asserted that Congress had only loosely invoked its initiative discretion, leaving normative and structural questions to the agency⁴⁶ or, in the alternative, that it was merely exercising quantitative discretion in determining the ratio of environmental harms to construction costs that required rerouting a highway.⁴⁷

The classic two-step test of the validity of agencies' interpretations of federal statutes, enunciated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,⁴⁸ revolves around how much discretion Congress has already exercised: Step One—"whether Congress has di-

⁴⁵ See 401 U.S. 402, 406, 408–09 (1971).

⁴⁶ See *id.* at 411.

⁴⁷ Cf. *id.* at 409.

⁴⁸ 467 U.S. 837 (1984).

rectly spoken to the precise question at issue⁴⁹—addresses contentions that Congress’s decision making reached farther down the hierarchy of specificity than the agency claims. Step Two, in turn, considers arguments that the agency’s actions unreasonably extend farther up that hierarchy than it admits: that its actions do not “reasonabl[y]” fit with congressional choices.⁵⁰ In other words, a claim prevails at Step One if it demonstrates that Congress has exercised discretion on the same level as the agency but in an inconsistent manner; the agency defends such claims by asserting that Congress left open the questions for it to resolve.⁵¹ To prevail at Step Two, a challenger concedes that congressional decision making ceased at a higher level of generality than that at which the agency is ostensibly acting, but asserts that the latter has effectively nullified congressional decisions to initiate or to determine the norms for policymaking. When federal courts apply weaker deference (based on *Skidmore v. Swift & Co.*),⁵² or state courts decline to follow the *Chevron* model,⁵³ they are empowering judges to interpret more broadly the legislature’s actions to imply exercises of discretion at levels farther down the hierarchy of decisions—and in so doing find conflicts with what the agency has done. The choice among degrees of deference reflects a trade-off between the substantive priority of privileging the decisions of the superior political body and the institutional priority of minimizing the abrogative discretion courts exercise. Where courts are seen as more legitimate (in state systems, particularly elected ones) or where administrative agencies fail to maximize their comparative legitimacy advantage over courts by failing to follow the dictates for participatory rule making or adjudication of the Administrative Procedure Act (APA),⁵⁴ courts are prepared to intrude more in defense of legislative sovereignty.

⁴⁹ *Id.* at 842.

⁵⁰ *Id.* at 844.

⁵¹ *See id.* at 843–44 (“If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.”).

⁵² Under *Skidmore* deference, if congressional ambiguity exists, courts give less deference to agency action than under *Chevron*; rather than applying a lenient “reasonableness” test, *Skidmore* instructs courts to grant agency decisions only persuasive weight in a multi-factor analysis. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (“We consider that the rulings, interpretations and opinions of the [agency], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”).

⁵³ *E.g.*, *Conn. State Med. Soc’y v. Conn. Bd. of Exam’rs in Podiatry*, 546 A.2d 830, 834 (Conn. 1988) (finding that an administrative construction of a statute was not entitled to special deference because the statute in question had never been “subjected to judicial scrutiny or time-tested agency interpretations”).

⁵⁴ *See* 5 U.S.C. §§ 553–554; *United States v. Mead Corp.*, 533 U.S. 218, 229–34 (2001) (holding that customs classification rulings are not entitled to *Chevron* deference because

Prior to *Wickard v. Filburn*,⁵⁵ many constitutional law cases turned on the extent to which the Constitution limited Congress's initiative discretion; similar controversies persist in local government law, under home rule regimes⁵⁶ and particularly under Dillon's Rule.⁵⁷ Where the principle of enumerated powers is inapplicable or has not plausibly been violated, constitutional disputes routinely involve dual contests about the extent to which the Constitution has prescribed or proscribed certain norms or structures on the one hand, and about the extent to which the challenged action implicates those norms or structures on the other. Cases such as *Dandridge v. Williams*⁵⁸ (on finding constitutional norms) and *Humphrey's Executor v. United States*⁵⁹ (on finding constitutional structures) shape the former argument; those such as *Washington v. Davis*⁶⁰ (on inferring the norms underlying challenged actions) and *Commodities Futures Trading Commission v. Schor*⁶¹ (on interpreting structures) guide the second inquiry. Similar twin inquiries occur in testing lower courts' adherence to controlling precedent—Rosenberg's "secondary discretion."⁶²

Where the higher authority's exercise of discretion has clearly left off before the point at which the subordinate body began to exercise discretion, substantive review is rare. The Court has implied a background constitutional norm of rationality that is almost always available but almost never found to have been violated;⁶³ the arbitrary and

they neither result from the APA's notice-and-comment procedure nor carry the force of law).

⁵⁵ 317 U.S. 111, 128–29 (1942) (interpreting Congress's powers under the Commerce Clause expansively).

⁵⁶ See Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 643 (1964) (arguing that home rule provisions should provide broad authority to legislate on a local level, subject to judicial protection of interests).

⁵⁷ Dillon's Rule provides that states' grants of authority to municipalities should be strictly construed both as to the ends localities may pursue and the means by which they may pursue expressly authorized ends. See GERALD E. FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* 45–50 (1999).

⁵⁸ 397 U.S. 471, 485 (1970) (applying the same constitutional standard to a case involving administration of public welfare as was applied in cases involving state regulation of business and industry, finding that despite the drastic factual differences, there existed "no basis for applying . . . different constitutional standard[s]").

⁵⁹ 295 U.S. 602, 613–14 (1935) (upholding statutory limits on the President's authority to dismiss appointees to the Federal Trade Commission).

⁶⁰ 426 U.S. 229, 242 (1976) (finding that an invidious discriminatory purpose in violation of the Fourteenth Amendment can be inferred from the totality of the circumstances).

⁶¹ 478 U.S. 833, 847–58 (1986) (finding that an administrative tribunal deciding a contract-based counterclaim to a claim filed under its rules is not usurping the functions of courts).

⁶² See *supra* note 17 and accompanying text.

⁶³ See *Ferguson v. Skrupa*, 372 U.S. 726, 731–33 (1963) (articulating a general presumption of constitutionality and clearly distinguishing rational basis review from more exacting levels of constitutional scrutiny).

capricious or abuse of discretion standard in administrative law⁶⁴ and the abuse of discretion standard in appellate review of trial courts play similar roles. In administrative law, courts occasionally describe this lack of conflict as having no law to apply;⁶⁵ more commonly, they simply find that the agency acted within its discretion.⁶⁶ Even programs in which the underlying statute and rules require or allow relatively little discretion often are held not to generate individually enforceable rights.⁶⁷

The situation is slightly different within the judicial system. Often, little turns on the distinction between a subordinate authority usurping discretion already exercised by a higher authority, on the one hand, and a subordinate entity exercising discretion on a matter truly open for decision, on the other, because the result is the same in either case: the appellate court reverses the lower court and announces, or re-announces, the rule that it thinks best.⁶⁸

2. *Procedural Challenges*

Procedural challenges to public actions also depend on this hierarchy. Some discretion simply cannot be delegated. In criminal law, for example, the initiative, normative, structural, and some quantitative decisions—at least those necessary to allow an individual to determine the criminality of her or his planned actions—cannot be delegated to the trial judge or jury.⁶⁹ In other areas of law, the government may reserve flexibility by paying a specified procedural cost. If an administrative agency, for instance, chooses to leave a point open in rule making, it must allow regulated individuals to argue that point in adjudicatory actions conforming to due process; by deciding the point in advance, it can foreclose such arguments.⁷⁰ Here again,

⁶⁴ 5 U.S.C. § 706(2)(A) (2006).

⁶⁵ See, e.g., *Webster v. Doe*, 486 U.S. 592, 599 (1988) (finding that 5 U.S.C. § 702(a)(2) applies where statutes are so broadly written that they provide “no law to apply” to a given case (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971))).

⁶⁶ See, e.g., *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283–86 (2002) (denying private enforceability to a statute securing the privacy of students’ records).

⁶⁷ See, e.g., *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 22 (1981) (holding that a statute expressly focused on improving care to the mentally disabled through improved organization of state services did not “requir[e] the States to fund newly declared individual rights”).

⁶⁸ See *Harper v. Va. Dep’t of Taxation*, 509 U.S. 86, 94 (1993) (reaffirming the retrospective effect of the Supreme Court’s constitutional holdings). *But see* Roger J. Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 28 *HASTINGS L.J.* 533, 535 (1977) (suggesting exceptions to this rule).

⁶⁹ See *supra* note 7 and accompanying text.

⁷⁰ See *Heckler v. Campbell*, 461 U.S. 458, 467–68 (1983):

[While] the statutory scheme contemplates that disability hearings will be individualized determinations based on evidence[,] . . . this does not bar the Secretary from relying on rulemaking to resolve certain classes of is-

litigation may revolve around determinations about how much discretion the rule-writing authority actually exercised in its rules. In such a case, however, challengers seeking broader hearing rights will wish to *minimize* the extent to which the rules have resolved important questions.⁷¹

Over time, courts' and commentators' inclination to attribute exercises of discretion to norms—as opposed to expertise—has waxed and waned. If we believe that structural and quantitative discretion are primarily the result of expertise, we may be inclined to give agencies particularly broad substantive and procedural latitude. Treating those questions as more clearly dictated by prior exercises of normative discretion anchors them in choices of politically accountable entities, either Congress or the President. In rare cases, we may even question whether those higher entities have exercised sufficient normative discretion to allow subordinate entities to act.⁷²

3. *The Special Problem of Abrogational Discretion*

Some of the most persistently difficult problems for our legal system have come from abrogational discretion. In particular, once abrogational discretion is granted at all it is difficult to restrain. We may intend, for example, to allow abrogation only of our exercises of quantitative discretion, but we can do little to prevent its exercise in a pattern determined by norms very different than those we intended our system to embody. This is all the more true because our procedu-

sues. . . . [The relevant determination] requires the Secretary to determine a[] [factual] issue that is not unique to each claimant . . . [and] may be resolved as fairly through rulemaking as by introducing . . . testimony . . . at each . . . hearing. . . . To require the Secretary to relitigate . . . at each hearing would hinder needlessly an already overburdened agency.

Cf. Atkins v. Parker, 472 U.S. 115, 126 (1985) (holding that a change to food stamps regulations, because it constituted a “mass change” rather than “individual adverse action,” did not require “individual computations” to satisfy due process requirements).

⁷¹ See, e.g., *SEC v. Chenery Corp.*, 318 U.S. 80, 87–90 (1943) (rejecting the agency's assertion that prior judicial decisions had established a firm equitable standard that bound it and requiring new procedures to consider that question).

⁷² See, e.g., *Hampton v. Mow Sun Wong*, 426 U.S. 88, 105 (1976):

We may assume . . . that if the Congress or the President had expressly imposed the citizenship requirement, it would be justified by the national interest . . . ; but we are not willing to presume that the Chairman of the Civil Service Commission . . . was deliberately fostering an interest so far removed from his normal responsibilities. Consequently, before evaluating the . . . asserted justification for the rule, it is important to know whether we are reviewing a policy decision made by Congress and the President or a question of personnel administration determined by the Civil Service Commission.

See also *Kent v. Dulles*, 357 U.S. 116, 129 (1958) (holding that because the “right of exit” is a liberty protected by the Fifth Amendment, any regulation of that liberty must be pursuant either to congressional action or to congressional delegation, neither of which, in this case, existed to authorize the Secretary of State to withhold passports from U.S. citizens with communist ties).

ral rules typically disallow inquiries into the decision maker's motives.⁷³ These problems are most obvious when such discretion is exercised excessively but can also arise when it goes largely unused.

In extreme cases, abrogational discretion's very existence threatens to render all prior exercises of discretion irrelevant. That apparently was the rationale of *Clinton v. City of New York*, which denied the President the power to render portions of legislation ineffective with a "line-item veto."⁷⁴ Critics of the residual exception to the hearsay prohibition⁷⁵ make a similar point, leading to various (largely unsuccessful) efforts to cabin it.⁷⁶ With the dissolution of prior decisions, reliance interests resting on those decisions are undermined. We typically rely on norms of fidelity to the prior decisions to constrain the exercise of abrogational discretion; when those norms break down, a seemingly insignificant grant of abrogational authority can collapse an entire regulatory structure with waivers granted willy-nilly or with a pervasive failure of enforcement.

On the other hand, policymaking can become confused by misplaced reliance on relatively dormant abrogational discretion. We may excuse subordinate authorities' exercises of creative discretion in contravention of superior authorities' decisions because we assume that available abrogational discretion can "clean up" any resulting problems. For example, courts have relied on the availability of abrogational discretion to uphold land use, immigration, and procedural rules that might otherwise be deemed exercises of normative, structural, or quantitative discretion inconsistent with higher law.⁷⁷ Our political process similarly relies on exceptions for hardship or fairness⁷⁸ and places broad faith in mercy and discretion to render palatable decisions that otherwise might seem too harsh. Criticism of the highly discretionary style of constitutional adjudication of some jus-

⁷³ See *United States v. Morgan*, 313 U.S. 409, 422 (1941) ("[I]t was not the function of the court to probe the mental processes of the Secretary.").

⁷⁴ 524 U.S. 417, 444 (1998) ("[W]henver the President cancels an item of new direct spending or a limited tax benefit [by employing the line-item veto] he is rejecting the policy judgment made by Congress and relying on his own policy judgment.").

⁷⁵ FED. R. EVID. 807.

⁷⁶ See *United States v. Tome*, 61 F.3d 1446, 1452 (10th Cir. 1995) ("[A]n expansive interpretation of the residual exception . . . threaten[s] to swallow the entirety of the hearsay rule."). See generally Randolph N. Jonakait, *The Subversion of the Hearsay Rule: The Residual Hearsay Exceptions, Circumstantial Guarantees of Trustworthiness, and Grand Jury Testimony*, 36 CASE W. RES. L. REV. 431 (1986) (criticizing expansions of the residual exception).

⁷⁷ See, e.g., *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 31 (1981) (declining to require appointive counsel for all defendants in actions to terminate parental rights on the condition that counsel be provided in exceptional cases); *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (upholding zoning in general so long as exceptions are available to remedy extreme hardships).

⁷⁸ See PETER H. SCHUCK, *THE LIMITS OF LAW: ESSAYS ON DEMOCRATIC GOVERNANCE* 158-59 (2000).

tics has focused on this flaw: that the vast majority of cases in which an exception could plausibly be sought do not come before the Court and lower courts are unlikely to grant relief without clear guidance.⁷⁹

Assumptions about the efficacy of abrogational discretion can also induce sloth in superior authorities' exercise of discretion. We may rely on abrogational discretion to weaken rules we dislike but lack consensus on how to replace those rules. For example, in the years before a political consensus formed to repeal the Aid to Families with Dependent Children (AFDC) program in 1996, the first Bush and Clinton administrations allowed states to waive AFDC's major requirements.⁸⁰

Abrogational discretion exercised too much, too little, or according to illicit criteria can raise serious equity concerns. Within the criminal justice system, for example, consistent police or prosecutorial practices not to enforce particular laws or to decline enforcement in particular cases can make an unexpected arrest or prosecution seem abusive.⁸¹ Conversely, many will suspect favoritism if someone is given a free ride for an offense that typically yields severe punishment.⁸² Neither the human mind nor modern bureaucracy can readily produce truly random decisions; those interested in a particular type of exercise of discretion are likely to seek patterns in the exercise of that discretion. Thus, for example, juries' waiver of the death penalty in cases where the victim is African American suggests usurpation.⁸³ There, abrogational authority nominally limited to quantitative discretion—that is, determining whether the defendant's conduct was sufficiently severe to warrant death—has been expanded perniciously to rewrite the system's norms.

⁷⁹ See Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 28–30, 57–59 (1976).

⁸⁰ See Michael B. Katz, *The Price of Citizenship: Redefining the American Welfare State* 90–92, 328–40 (2001) (“With encouragement from the federal government, in the late 1980s state governments began to use waivers as vehicles for welfare reform.”).

⁸¹ See, e.g., *People v. Kail*, 501 N.E.2d 979, 981 (Ill. App. Ct. 1986) (“Claims of selective enforcement of the laws are appropriately judged according ‘to ordinary equal protection standards.’” (quoting *Wayte v. United States*, 470 U.S. 598, 608 (1985))).

⁸² Cf. Geoffrey C. Hazard, Jr., *Criminal Justice System: Overview*, in 2 ENCYCL. OF CRIME AND JUSTICE 450, 455, 460 (Sanford H. Kadish ed., 1983) (discussing the discretion and relative autonomy with which police officers and prosecutors operate, as well as the factors that often go into the decision to prosecute or not).

⁸³ See generally U.S. GEN. ACCOUNTING OFFICE, REPORT TO SENATE AND HOUSE COMMS. ON THE JUDICIARY, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5 (1990) (“In 82 percent of the studies, race of victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e., those who murdered whites were found to be more likely to be sentenced to death than those who murdered blacks.”).

II

AN ECONOMIC ANALYSIS OF THE PRODUCTION OF
LEGAL DECISIONS

Contemporary legal theory rarely addresses the timing of legal decisions directly. Instead, it merges those concerns with one of three other discussions.⁸⁴ First, it fuses temporal and institutional concerns. It assumes senior officials—the legislature, senior executive officials, or high courts—will make early decisions and lower-level enforcement officials—front-line agency staff, police, and trial courts—will make postponed decisions.⁸⁵ Although this is often true in practice, it need not be so. This conflation precludes consideration of the merits of retaining authority but postponing its exercise or of delegating power with a short deadline for decision.

Second, some discussions merge temporal concerns with procedural ones. This assumes that delay will foster plenary procedures and that speed requires sacrificing some safeguards of fairness or accuracy. Emblematic of this “ticking bomb” viewpoint are due process cases allowing⁸⁶ or rejecting⁸⁷ prehearing seizures. Similarly, most states regard the eviction of tenants to be sufficiently urgent to require “summary proceedings” shorn of many of the familiar features of civil litigation.⁸⁸ Yet time itself only occasionally imposes an absolute barrier to more plenary procedures: more commonly, a greater commitment of decisional resources would allow equally expeditious action with more meticulous procedures. Conversely, of course, delayed decisions can be terribly slipshod.

The most useful approximation of a direct discussion of the timing of legal decisions is the debate between rules and standards.⁸⁹ At

⁸⁴ For a nuanced and valuable exception to this pattern, see generally RAKOFF, *supra* note 10.

⁸⁵ See Kaplow, *supra* note 11, at 559–63 (defining rules and standards as based on the choice between *ex ante* creation of law by legislative bodies and *ex post* law by adjudicators).

⁸⁶ See *N. Am. Cold Storage Co. v. City of Chicago*, 211 U.S. 306, 320 (1908) (upholding seizure and destruction of putrid poultry without a prior hearing to protect the public health).

⁸⁷ See *Fuentes v. Shevin*, 407 U.S. 67, 96 (1972) (“[P]rejudgment replevin provisions work a deprivation of property without due process of law insofar as they deny the right to a prior opportunity to be heard before chattels are taken from their possessor.”).

⁸⁸ See, e.g., MICH. COMP. LAWS § 600.5714 (2009, supp. 2010) (providing for summary proceedings to recover possession from tenants under certain circumstances).

⁸⁹ See, e.g., LARRY ALEXANDER & EMILY SHERWIN, *THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW* 30 (2001) (contending that the “quality of determinateness” distinguishes rules from standards); FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 104 (1991) (arguing that it is a mistake to distinguish rules from standards solely on the basis of “the dimension of specificity”); Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 66 (1983) (aiming to develop a “standard for standards”); Kaplow, *supra* note 11, at 586–96 (attempting “to clarify understanding of the view that rules tend to be over-

its best, this debate does indeed focus exclusively on the timing of legal decisions. Unfortunately, these debates tend to artificially and unrealistically frame a continuum of options as a dichotomy: every rule requires some interpretation and every standard with practical relevance forecloses some options.⁹⁰ Moreover, discussions of rules and standards all too often take primarily the perspective of the consumers of law—those subject to the law, and perhaps those charged with enforcing it—to the exclusion of the problems attending law's production.⁹¹

When administrative law scholars address economics, they typically focus on outcomes; that is, whether a particular approach to regulation (or deregulation) will enhance or reduce the efficiency of a particular industry, whether a particular public benefit rule will encourage or reduce particular kinds of behavior, and so forth.⁹² When scholars turn to agencies' decision-making processes, they tend to consider economic factors only to the extent that the costs of adjudication serve as a drag on agencies' ability to undertake as fair or as accurate a process as might otherwise be desirable.⁹³

Administrative decision making itself, however, is a form of economic activity. Legal institutions convert information, a set of norms, decisional capacity, and enforcement capacity into decisions that they expect to have more value than that of the inputs required to produce those decisions. These inputs may come from public or private sources, and the decisions that law produces may include those of courts, legislatures, administrative agencies, and private parties responding to legal rules. The agencies that produce administrative decisions must find ways of reconciling the demand (or need) for that service with the available supply of it. Because we generally are unwilling to allow those with business before an agency to bid for the privi-

and underinclusive relative to standards, and more generally, the notion that differences between rules and standards typically involve differences of substance as well as of form").

⁹⁰ See, e.g., Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 573–78, 653–72 (1997) (assuming that judicial intervention and political mechanisms are the only options for limiting discretion in community- and problem-oriented policing).

⁹¹ See, e.g., Kaplow, *supra* note 11, at 563–64 (describing the time of rules through its relationship with the individual behavior of those subject to the rules).

⁹² See, e.g., Lisa A. Gennetian et al., *Regional Differences in the Effects of Welfare Reform: Evidence from an Experimental Program in Rural and Urban Minnesota*, 13 GEO. J. ON POVERTY L. & POL'Y 119, 120–21, 149–50 (2006); David A. Super, *Offering an Invisible Hand: The Rise of the Personal Choice Model for Rationing Public Benefits*, 113 YALE L.J. 815, 825–36 (2004) (describing how public benefit programs seek to influence eligible low-income people's behavior); W. Kip Viscusi, *Toward a Diminished Role for Tort Liability: Social Insurance, Government Regulation, and Contemporary Risks to Health and Safety*, 6 YALE J. ON REG. 65, 65–67 (1989).

⁹³ See, e.g., Edward L. Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044, 1143 (1984) (“[C]ost operates as a pragmatic constraint; it only comes into play after we have decided what we want or need.”).

lege of having their matters decided, agencies do not reconcile supply and demand through a market. Instead, the agency mediates both demand and supply by scheduling decision making. Nonetheless, imbalances between these forces can cause the same kinds of disruptions as a market that is prevented from clearing. When the demand for administrative decisions increases, or when the resources required to make those decisions become more expensive, the effective cost of decisions rises. Just as inefficient queuing may be expected in a market that cannot produce sufficient supply to meet demand due to price controls or limits on market entry, so too are inefficient delays likely when the government cannot arrange for enough decision making to meet demand. Similarly, just as the government may try to relieve queuing in a constrained market with rationing or priority schemes, so too may administrative agencies try to expedite some kinds of decisions at the cost of even more severe delays for others.⁹⁴ In both cases, the infrastructure required to gather the information needed to administer the priority system injects its own additional inefficiencies that sometimes rival those of the queuing it seeks to avoid.

Developing a framework for analyzing when legal decisions ought to be made requires understanding law as a productive activity. This Part analyzes the inputs and output of legal decision making in economic terms. Subpart A examines the ways in which these inputs may be scarce, noting that scarcity often varies with time. Subpart B considers the social value of legal decisions, also in temporal terms. Subpart C then explores the law's options for addressing a perceived shortage of one or another input, finding that delay is often counterproductive.

A. Scarcity of Inputs to Legal Decisions

Every input to a legal decision has a cost, and that cost typically rises with the amount of the input consumed to produce the decision. In that sense, familiar to the economist, the inputs always are scarce. Legal culture, however, tends to view scarcity in a different way. Where an input is unusually rare or costly, or where a decision maker can readily identify missing inputs that seem desirable, legal culture sees a problem to be solved. Commencing an inquiry on this rather impressionistic basis does little harm, however, if the resulting choices about how to structure legal decision making are sound. Because these inputs' scarcity often is at least partially a function of time, efforts to ameliorate scarcity often involve changing the timing of legal decisions.

⁹⁴ Cf. Daugirdas, *supra* note 35, at 301–02 (describing how agencies strategically delay certain cases in order to devote resources to other priorities).

Of the four main inputs to legal decisions—information, applicable norms, decisional capacity, and implementation capacity—the one whose scarcity legal culture most freely discusses as a problem is information.⁹⁵ We avoid discussing deficiencies in decisional or enforcement capacity as they embarrass the law; lawyers often regard normative ambiguity as an intriguing challenge or as an opportunity to advance their clients' cause. When commentators see a decision that, *ex post*, appears ill-informed, they tend to see that lack of information as an error that should be corrected in the future. Although the Due Process Clause can invalidate decisions made despite shortages of any of the four inputs, its basic requirement “to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections”⁹⁶ seeks to remedy informational deficits far more than decisional, normative, or enforcement ones.⁹⁷

The law's myopic focus on information costs parallels that in standard economic discourse. Economics long has recognized inadequate information as a form of market failure.⁹⁸ Although Ronald Coase and others long ago identified agency costs within firms as a particular type of shortage of decisional resources,⁹⁹ only the relatively recent rise of behavioral economics has generalized concerns about the sufficiency of market actors' decisional resources—and the potential for those decisional resources to erode in inverse proportion to increases in information.¹⁰⁰ Classical economics still tends to treat consumers' preferences—in effect, their expressed norms—as exogenous and inviolable.¹⁰¹ Most economic discourse similarly tends to assume perfect enforcement of contracts, that is to say, the infinite, costless

⁹⁵ See, e.g., LeRoy Paddock, *An Integrated Approach to Nanotechnology Governance*, 28 UCLA J. ENVTL. L. & POL'Y 251, 252–53, 270–73 (2010) (discussing the information requirements necessary for environmental and public health governance systems and noting that “[t]he information needed to make adaptive regulatory decisions for most nanotechnologies is not readily available”).

⁹⁶ *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

⁹⁷ Compare *Goldberg v. Kelly*, 397 U.S. 254, 262–64 (1970) (assuring recipients the right to present information before the state terminates welfare benefits), with *Atkins v. Parker*, 472 U.S. 115, 128–30 (1985) (denying the right to a hearing when no new information is likely to be in dispute).

⁹⁸ Cf. RICHARD G. LIPSEY & K. ALEC CHRYSTAL, *ECONOMICS* 158 (10th ed. 2004) (explaining that efficient market models are built on a number of assumptions, one of them being that buyers of the product are well informed about the product's characteristics).

⁹⁹ See R.H. COASE, *THE FIRM, THE MARKET, AND THE LAW* 33–55 (1988).

¹⁰⁰ BARRY SCHWARTZ, *THE PARADOX OF CHOICE: WHY MORE IS LESS* 23 (2004) (noting that individuals must “filter[] out extraneous information” because otherwise, “[i]f everything available to our senses demanded our attention at all times, we wouldn't be able to get through the day”).

¹⁰¹ See LIPSEY & CHRYSTAL, *supra* note 98, at 109–14 (demonstrating consumer preferences on an indifference curves). But see SCHWARTZ, *supra* note 100, at 33 (discussing demand-creating advertising).

availability of enforcement resources.¹⁰² In the same way, the law's focus on information costs, to the exclusion of other inputs, distorts our judgment of the optimal timing of legal decisions because information costs, alone among the four, commonly decline over time.

Scarcity of information can result from conditions in the world at large. At times, information may simply be absent. Nobody knows, for example, which of the workers exposed to a toxin will actually become sick; nobody knows what the decedent might have accomplished but for her untimely demise. In other situations, information may theoretically be available but at an unrealistic, exorbitant price: no doubt modern forensics laboratories, for instance, could work wonders resolving the many uncertainties stemming from minor slip-and-falls or speeding infractions.

Scarcity of information may also result from the law's own procedural rules. These rules can increase the costs of obtaining and using some kinds of information or bar access to some information altogether. Delays can change those procedural rules, either as a direct result of the change in timing¹⁰³ or because the delay is incidental to a reassignment of decisional authority. For example, the desirability of administrative rule making, as opposed to developing policy through adjudication, is widely regarded as depending in large part on whether broad public participation in a rule-making process will produce better policy than an adversarial or semi-adversarial adjudicative process, and in part on whether the policy in question addresses sufficiently recurrent issues that adjudications would be duplicative.¹⁰⁴ Interested parties routinely seek to arbitrage these procedural rules by seeking or opposing delay and, in so doing, may contribute to or ameliorate information costs. Someone who believes that the decision-making procedures likely to be employed at a later stage would be disadvantageous,¹⁰⁵ or who expects higher litigation costs,¹⁰⁶ might oppose delay on that basis. Similarly, parties seeking earlier resolution of a dispute may believe that the procedures that would result in

¹⁰² See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 203 (Am. Bar Assoc. ed. 2009) (1881) (acknowledging the human tendency of contemplating the performance, rather than the breach, of a contract upon entering it). *But see id.* at 203–04 (discussing enforcement and failure as both being plausible, though frequently overlooked, outcomes of a contract).

¹⁰³ For example, different rules may apply in a preliminary hearing and in a later trial.

¹⁰⁴ See *Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 678 (D.C. Cir. 1973) (finding rule making so sufficiently desirable that courts may infer from ambiguous statutes that agencies have rule-making power).

¹⁰⁵ Cf. KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 216 (1969) (noting that formal hearings and judicial review do not cure discretionary injustices).

¹⁰⁶ See Christie, *supra* note 19, at 777 (noting the “staggering” expense of certain delayed judicial decision making).

an immediate decision will increase their chances for prevailing or may worry that the costs they will incur waiting for a later decision will reduce its value to them.¹⁰⁷

Finally, information may be scarce because what we have is too chaotic to analyze efficiently.¹⁰⁸ This form of scarcity may abate over time not from the production of more information but because we invest decisional resources in making sense out of it. Without that investment, the scarcity may remain or even increase over time as the informational cacophony grows.

The unavailability of directly applicable norms prolong deliberations to allow a contest over establishing new norms, perhaps by adapting less pertinent ones. This, too, increases transaction costs, such as the parties' costs of becoming informed about the law,¹⁰⁹ the costs parties and courts incur litigating the applicable legal rule,¹¹⁰ the costs risk-averse regulated entities expend ensuring compliance with the law,¹¹¹ and the costs to the political system of having to negotiate a resolution or add the issue to the list of those over which the next election is to be fought. Occasionally, delaying a decision can be expected to clarify the applicable norms, as when a case on the same question is pending before a higher court.¹¹² In other cases, delay may either permit a consensus to develop or see views fragment further.

Shortages of decisional capacity, too, may be a function of time.¹¹³ Legislators, agency staff, judges, or those in the private sector

¹⁰⁷ See, e.g., *FTC v. Standard Oil Co.*, 449 U.S. 232, 246–47 & n.14 (1980) (acknowledging that defending a price-fixing investigation would come at great expense to respondent, but declining to permit judicial intervention before a final order).

¹⁰⁸ Cf. SCHWARTZ, *supra* note 100 (observing that rather than filter out superfluous information, we are increasingly moving back toward a “time-consuming foraging behavior”).

¹⁰⁹ See generally Kaplow, *supra* note 11 (acknowledging the potential economic inefficiencies of policy transitions).

¹¹⁰ See Ruth Gavison, Comment, *Legal Theory and the Role of Rules*, 14 HARV. J.L. & PUB. POL'Y 727, 750 (1991) (arguing that rules that require determinations of reasons can be time-consuming and wasteful); cf. SCHAUER, *supra* note 89, at 147 (“When . . . courts . . . are channeled by relatively precise rules into deciding cases on the basis of a comparatively small number of easily identified factors . . . , the entire proceeding is streamlined, requiring less time and evidence [and resulting in the court] process[ing] more cases [and] operat[ing] with less expenditure of human resources.”).

¹¹¹ See HENRY J. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS* 24 (1962) (“[Clearer standards] should reduce the volume of cases; absence of standards encourages the filing of applications which their presence would render hopeless.”).

¹¹² See, e.g., *McKithen v. Brown*, 626 F.3d 143, 150 n.3 (2d Cir. 2010) (noting that it stayed an appeal following the Supreme Court’s grant of certiorari in a similar case).

¹¹³ Here again, the issue is typically cost rather than absolute unavailability. Just as we do not think endlessly about which cabbage to buy in the supermarket, both public and private legal decision makers tailor their expenditures of decisional resources to the value they hope to produce.

empowered to make legally significant decisions may be preoccupied with other matters. More subtly, they may lack the analytic capacity to appreciate fully the information and normative commands pertinent to a problem.¹¹⁴ Moreover, they may be biased,¹¹⁵ incompetent,¹¹⁶ or overwhelmed.¹¹⁷ When facing a shortage of decisional resources, the law can delegate the decision to others with more ample decisional resources, ask the available decision maker to “wing it” as best she or he can, or even postpone the decision until the law’s own resources are less dear.

Law coerces compliance with its decisions and deters parties’ resort to some extralegal means in order to motivate parties to commit their resources to gathering necessary information, clarifying normative principles, and funding decisional capacity.¹¹⁸ A shortage of enforcement capacity, however, does not prevent decisions from being made. Even so, it can eliminate most of any decision’s value. The ability to enforce a decision can fluctuate over time. A public official coming to the end of her or his term, for example, may need to make decisions long enough before leaving office to have time to enforce them; in a collapsing business or legal system, speed of decision may be pivotal. Conversely, new leadership taking over a discredited agency, legislature, court, or business may need to build goodwill before making controversial decisions.

B. The Changing Value of Legal Decisions

The value of legal decisions also can change with time. Where a decision’s value would decline sharply with time, the law may be willing to bear higher input costs just as a factory might pay above-market rates for prompt delivery of a machine needed to meet a surge in demand. For example, when a plaintiff risks suffering irreparable injury, courts hold expedited preliminary injunction proceedings¹¹⁹

¹¹⁴ See, e.g., Danielle Keats Citron, *Technological Due Process*, 85 WASH. U. L. REV. 1249, 1271–72 (2008) (warning of “automation bias,” which causes decision makers to assume the veracity of information received from computers).

¹¹⁵ See, e.g., *Gibson v. Berryhill*, 411 U.S. 564, 578–79 (1973) (rejecting a decision maker for financial bias and “unprofessional conduct” because the decision maker had a financial stake in the outcome of the decision).

¹¹⁶ See *Tanner v. United States*, 483 U.S. 107, 115–26 (1987) (explaining that despite potential juror incompetence stemming from intoxication, jurors could not be forced to testify as to the intoxication or its effect on jury deliberations).

¹¹⁷ See *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965) (acknowledging the court’s power to void a contract for unconscionability when the terms of the contract were so complex and grossly in favor of one party as to raise questions about whether that party could understand and respond to them).

¹¹⁸ Although the state supplies legislatures, administrative agencies, judges, and juries, private parties pay for arbitrators and devote their resources to arranging their decisions in the manner the law specifies.

¹¹⁹ FED. R. CIV. P. 65(a).

even though the parties' information production costs and the value of the court's time may be higher than if the matter came to trial in the usual course. More generally, earlier decisions reduce parties' need to include hedges against multiple contingencies in their plans.¹²⁰ They also may reduce the parties' costs of learning the law, increasing compliance and the social benefits the law is designed to yield.¹²¹ Furthermore, postponing the main decision may require addressing subsidiary or interim matters first, duplicating transaction costs and multiplying the costs of errors. For example, the longer a criminal trial is delayed, the greater the importance of the decision on bail because of the correspondingly increasing amount of time that an innocent defendant might be wrongfully detained.¹²² Postponing decisions also may force rushed decisions of secondary matters that can only be addressed once the initial decision has been rendered.

Decisions rarely become more valuable to society as a whole when rendered later, although particular parties may benefit substantially from delay. The few situations in which a later decision may have greater social benefit than an earlier one often involve processes of producing the decision with positive side effects that cease once the decision has been made.¹²³ The very act of participating in demo-

¹²⁰ See PIERCE, *supra* note 41. Arguments for rule-based decision making have traditionally focused on the ability of rules to foster the interrelated virtues of reliance, predictability, and certainty. According to such arguments, decision makers who follow rules—even when other results appear preferable—enable those affected to predict in advance what the decisions are likely to be. Consequently, those affected by the decisions of others can plan their activities more successfully under a regime of rules than under more particularistic decision making. See SCHAUER, *supra* note 89, at 77–78.

¹²¹ See Kaplow, *supra* note 11, at 564 (discussing the effect that the cost of learning the law has on people's willingness to inform themselves). *But see* Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 270 (1983) (suggesting that creating a system with more developed standards and rules may actually result in a greater need for *ex ante* legal advice, thereby requiring greater expense early on in a dispute).

¹²² See Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335, 335–40 (1990) (discussing a case in which a man was held, arguably erroneously, for years before the judge reached a determination on the issue of bail, only to have the defendant subsequently acquitted).

¹²³ In old movies, books, and plays, for example, prospective heirs often renounce their vices and become uncharacteristically generous to compete for an elderly relative's affections. Once the testator renders a decision, however, the loser's incentives for prosocial behavior ceases. *See, e.g.*, ROALD DAHL, CHARLIE AND THE CHOCOLATE FACTORY 156–62 (rev. ed. 1973) (testing of the children's moral fiber ends when the chocolate factory is awarded to Charlie Bucket); WILLIAM SHAKESPEARE, KING LEAR act I (describing how upon deciding on the division of his kingdom, Lear suffers humiliation at the hands of deceitful heirs).

cratic decision making¹²⁴ or participatory adjudication¹²⁵ may foster civic virtues. Thus, even when the outcome is clear, wise committee chairs and hearing officers postpone calling votes or rendering decisions until the prospective losers have had the opportunity to speak their minds.¹²⁶ And of course, postponing a decision also may be beneficial if no decision may ultimately be needed.¹²⁷

For the most part, however, maximizing the value of law's output will be a factor counseling the early production of a decision. This is particularly likely where the later decision reverses an earlier one: not only does the late decision allow the public less opportunity to adapt on its own terms but it wastes the adaptations made in response to the now-voided judgment.¹²⁸ Delayed or reversed decisions will rarely be preferable unless the increased availability of inputs will improve the decisions' quality significantly.¹²⁹

¹²⁴ BRUCE ACKERMAN & JAMES S. FISHKIN, *DELIBERATION DAY* 52–59 (2004) (finding that the anticipation of participating in elections made people more informed on public issues and increased their level of public spiritedness).

¹²⁵ See JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 158–67, 177–80 (1985); Edmund L. Pincoffs, *Due Process, Fraternity, and a Kantian Injunction*, in *NOMOS XVIII: DUE PROCESS* 172, 180 (J. Roland Pennock & John W. Chapman eds., 1977).

¹²⁶ See, e.g., Ronald M. Levin, *Nonlegislative Rules and the Administrative Open Mind*, 41 *DUKE L.J.* 1497, 1505 (1992) (arguing that an agency's notice-and-comment period ends up bolstering the legitimacy of the rules it adopts).

¹²⁷ Professor Kaplow suggests that when a problem's frequency is low, it should be left for *ex post* resolution. See Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 *HARV. L. REV.* 509, 593 (1986) (“[W]hen the probability . . . is low, the expected risk-bearing cost also is far less.”). If law must postpone some decisions, this is good advice: fewer parties will have to bear the costs of uncertainty in these cases. Nonetheless, unless the inputs to those decisions will become significantly less dear in the interim, if the decision must be made in any event it likely will produce less net value if postponed. Professor Kaplow is right only if a significant possibility exists that no decision will ever be needed (e.g., that no one will need to set permissible exposure levels for a particular toxin because that toxin never finds a practical use).

¹²⁸ See Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 *MINN. L. REV.* 1173, 1177–80 (2006) (suggesting that because parties adapt their behavior and their arguments according to the guidance that precedent provides, a judicial system that regularly ignored precedent would prove unworkable); Anthony T. Kronman, *Precedent and Tradition*, 99 *YALE L.J.* 1029, 1038–39 (1990) (summarizing Professor Schauer's arguments in support of precedent, see Schauer, *infra*, as being premised on two grounds: that the predictability that accompanies precedent makes it easier for people to live their lives and that the fairness of the legal system is contingent on treating like cases alike); Frederick Schauer, *Precedent*, 39 *STAN. L. REV.* 571, 595–602 (1987) (suggesting that all the arguments in favor of judicial precedent all focus on one issue—stability, or “stability for stability's sake”); see also *United States v. Bensimon*, 172 F.3d 1121, 1127 (9th Cir. 1999) (having once ruled, a court “must consider any prejudice that will accrue to the defendant as a result of the court's reversal of an earlier in limine ruling”). But see Earl Maltz, *The Nature of Precedent*, 66 *N.C. L. REV.* 367, 368 (1988) (arguing that while there is truth to the argument that precedent is necessary for certainty and reliance reasons, the damage caused to reliant parties by decisions that ignore precedent is mitigated if the decisions are only prospective in nature).

¹²⁹ Some improvement in the quality of a decision may well result from delay: There is no reason to believe, and much reason to disbelieve, that rule-based decision-making is intrinsically more just than decision-making in

C. Responding to Input Scarcity

When the inputs of a decision appear unusually costly, law has four basic responses available. At one extreme, it can simply devote the additional resources necessary to bear those costs, perhaps leaving it unable to decide other matters or perhaps commandeering resources from other public or private pursuits. The legal system's general willingness to allow litigation costs to exceed the amount at stake in many civil cases is an example of this.¹³⁰ At the other extreme, it can refuse to render a decision at all. To this end, the law maintains an elaborate set of rules designed to husband public resources for cases in which their investment is likely to produce a decision of greater value. Thus, for example, courts will not hear disputes in which the plaintiff lacks a sufficient interest.¹³¹ They will revisit decisions already made only in narrow circumstances under which the new decision is likely to be particularly valuable. And the law abstains altogether from intervening in wide areas of human affairs.¹³² For the most part, however, the law chooses between two intermediate options: rendering a lower-quality decision based on what inputs it can secure or shifting the decision to a time when inputs may be more plentiful.

The law often relies on default rules to respond to shortages of information,¹³³ normative guidance,¹³⁴ or decisional capacity.¹³⁵

which rules do not block a decision-maker, especially a just decision-maker, from considering every factor that would assist her in reaching the best decision. Insofar as factors screened from consideration by a rule might in a particular case turn out to be those necessary to reach a just result, rules stand in the way of justice in those cases and impede optimal justice in the long term.

SCHAUER, *supra* note 89, at 137. The question, however, is whether the improvement in quality is sufficient to justify the diminished value of the later decision and any increased costs of inputs.

¹³⁰ See David M. Trubeck et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 114 (1983) (proposing that a net recovery-to-stakes ratio be used to determine plaintiff "success" in litigation, rather than a recovery-to-fee ratio where "recovery" refers to the gains from a favorable outcome and "fee" refers to the costs associated with pursuing litigation).

¹³¹ See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577-78 (1992) (holding that Congress cannot statutorily grant standing to sue to persons who lack a "concrete" injury in fact).

¹³² HOLMES, *supra* note 102, at 65 ("[T]he prevailing view is that [the state's] cumbrous and expensive machinery ought not to be set in motion unless some clear benefit is to be derived from disturbing the status quo." (emphasis omitted)).

¹³³ See, e.g., U.C.C. § 3-307(1)(b) (1999) (presuming the validity of most signatures on checks).

¹³⁴ See EINER ELHAUGE, *STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION* 41-69 (2008).

¹³⁵ See, e.g., *United States v. United Mine Workers*, 330 U.S. 258, 293 (1947) (requiring compliance with even questionably lawful injunctions until lifted).

These and other decisional work-arounds¹³⁶ effectively serve as lower-quality substitutes for the desired inputs.¹³⁷ As such, they presumably produce a lower-quality product—a decision more likely to be “wrong” when compared with the result more copious inputs would have yielded.¹³⁸ Like a business, the law must be cautious of the effect on its reputation of issuing an inferior product. Utilitarian mass consumers of law, such as banks and large retailers, may be satisfied with the results of fairly crude default rules, just as lower-quality fruit suffices to make juice. On the other hand, the law’s one-time individual users—tort plaintiffs, criminal defendants, and the like—are more likely to judge the law’s legitimacy by whether it considered all relevant circumstances;¹³⁹ they may respond to decisions based on subpar inputs the way supermarket shoppers do to aesthetically marred fruit. Because decisions are arguably law’s most visible and best recorded result, its human agents tend to recoil from conspicuous downgrades of the legal product.

Law’s other major response to shortages of inputs is to change its timing. Again like a profit-making business, law seeks to optimize its social returns by conducting its productive efforts at the time when its inputs are least costly and its decision will be most valuable. When useful information is missing, the applicable norms are murky, decisional resources are scarce, or enforcement of any decision is uncertain, law may postpone producing a decision until the input in question becomes more affordable.

Conversely, sometimes law must move expeditiously because delaying would increase the cost of one or another vital input. For example, statutes of limitations recognize that information degrades over time; constitutions lock in decisions based on norms that their framers fear might not endure;¹⁴⁰ wills allow testators to determine

¹³⁶ Most simply, judges, juries, and other decision makers can make their best guess when deciding with inadequate information, murky legal guidance, or limits on their capacity.

¹³⁷ With the passage of years, some of these simplifications can gain great dignity, displacing the rules they helped cabin. 1 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW* 337 (Cambridge Univ. Press, 2d ed. 1968) (1895) (describing “*Quia Emptores Terrarum*,” a statute which simplified English estates in land in 1290).

¹³⁸ See Werner Z. Hirsch, *Reducing Law’s Uncertainty and Complexity*, 21 UCLA L. REV. 1233, 1234–39 (1974) (analyzing the conditions under which such simplifications may be more or less desirable).

¹³⁹ TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 40–56 (2006).

¹⁴⁰ See Tom Ginsburg et al., *Commitment and Diffusion: How and Why National Constitutions Incorporate International Law*, 2008 U. ILL. L. REV. 201, 210 (characterizing constitutions as “mechanisms for making political precommitments,” which “means ‘becoming committed, bound[,] or obligated to some course of action or inaction or to some constraint on future action’”) (quoting THOMAS C. SCHELLING, *STRATEGIES OF COMMITMENT AND OTHER ESSAYS* 1 (2006)).

how to dispose of their property after they have lost the capacity to decide.

III

THE SOURCE OF ENTHUSIASM FOR FLEXIBILITY

The foregoing discussion suggests that the desirability of postponing decisions depends on the cumulative effect of changes in inputs' costs, which can be positive or negative, and changes in the value of the decision, which are likely to be negative.¹⁴¹ That is not, however, the way our legal culture usually approaches these problems. Instead, it leans toward legal procrastination, under the lofty moniker of "flexibility." Popular opinion venerates private business in part because it regards business as more flexible than government.¹⁴² Administrative law allows sweeping, largely standardless delegations of lawmaking authority to agencies because of their superior flexibility.¹⁴³ Politicians across the ideological spectrum pay homage to state and local government for their presumed greater flexibility.¹⁴⁴ Popular history long has blamed inflexible strategic planning—the Schlieffen Plan and its Russian counterpart—for catapulting Europe into the First World War.¹⁴⁵ Similarly, schoolchildren are taught to admire Robert E. Lee for his flexibility and scorn George McClellan for his lack of it.¹⁴⁶ In social life, calling someone "flexible" is generally a compliment; inflexibility is characteristic of bullies, dinosaurs, and control freaks. Some imbibe this lesson with particular zeal: we are told that men seek flexibility in relationships "to wriggle out of commitment, maturity, honor,"¹⁴⁷ and all manner of uncomfortable decisions.

¹⁴¹ See *supra* Part II.

¹⁴² Cf. HAROLD DEMSETZ, *ECONOMIC, LEGAL, AND POLITICAL DIMENSIONS OF COMPETITION* 25 (1982) (imagining a "perfect decentralization model" in which government or firm authority or control would be unnecessary and "there would be no need to give up the flexibility and independence of exchange").

¹⁴³ See DAVIS, *supra* note 105, at 38–39 (outlining the four basic principles underlying the generous amount of law-making authority legislatures give to agencies).

¹⁴⁴ See, e.g., Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 437–38 (1998) (criticizing the "rigid requirements" of a piece of federal legislation that "flies in the face of . . . localism").

¹⁴⁵ See JAMES JOLL, *EUROPE SINCE 1870: AN INTERNATIONAL HISTORY* 184 (1973) ("When, in a moment of clarity and anxiety, the [German] Kaiser asked if it would not be possible to act against Russia alone, he was told by his military advisers that it was out of the question to undo the plans elaborated over many years . . .").

¹⁴⁶ See KEVIN DOUGHERTY WITH J. MICHAEL MOORE, *THE PENINSULA CAMPAIGN OF 1862: A MILITARY ANALYSIS* 46, 83 (describing McClellan's "characteristic inflexibility and tendency to give higher priority to the plan itself than the evolving situation," and citing it as "a key flaw of McClellan's generalship").

¹⁴⁷ HELEN FIELDING, *BRIDGET JONES'S DIARY* 18 (1996).

Enthusiasm for reserved flexibility also pervades legal scholarship.¹⁴⁸ The typical justification for reserving discretion is a critique of rule making. It sets up a trade-off between the clarity and simplicity of a regulation, on the one hand, and its accuracy in achieving its substantive policy goals.¹⁴⁹ A bright-line rule is easy to understand and inexpensive to apply, yet it almost inevitably proves both over- and underinclusive. The antidote, we are told, is the additional information that will become available if we reserve discretion until the policy needs to be applied to particular cases. Although this may mean individual adjudications in some cases, it also may mean acting legislatively on a class of cases only when a decision becomes necessary, e.g., determining spending on a particular activity through annual appropriations rather than multi-year legislation.

One might expect that substantively flawed decisions made with reserved discretion might trigger a movement to rein in flexibility.¹⁵⁰ Although that is one possible response, critics are just as likely to argue that the problem can be corrected by changing the procedure or institutional assignment for rendering the decision.¹⁵¹ Indeed, they may claim that the decision maker put too *low* a value on information.¹⁵² Demanding still more information prior to decision, however, could lead to additional delay.¹⁵³

¹⁴⁸ See, e.g., Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 850 (2007) (promoting immigration reforms' "informational and flexibility advantages"); Lee Anne Fennell, *Revealing Options*, 118 HARV. L. REV. 1399, 1410 (2005) (seeking ways to "better interject flexibility into the interactions between current and future holders of land"); Henry Hansmann et al., *Law and the Rise of the Firm*, 119 HARV. L. REV. 1335, 1395 (2006) ("Flexibility in allocating ownership, control, and income rights is important in small firms . . ."); Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 413 (2007) (invoking H.L.A. Hart to defend "the need for flexibility to respond to unanticipated situations"); Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1672 (2002) (praising flexibility as a value whose pursuit, in some policy areas, merits some sacrifice of stability); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781, 828 (2006) (arguing that "more flexible" constitutional law would be more "political market-friendly"); Jonathan L. Zittrain, *The Generative Internet*, 119 HARV. L. REV. 1975, 1990 (2006) (touting a "flexible, robust platform for innovation from all corners").

¹⁴⁹ See Diver, *supra* note 89, at 70–71.

¹⁵⁰ See Christie, *supra* note 19, at 754 (discussing the inherent unease one feels when others in a decision-making role have the power of discretion).

¹⁵¹ See Brian L. DeLeonardo, *Inadequate Training in the Use of Non-Deadly Force as the Next Frontier in Federal Civil Liability: Analysis of the Baltimore City Baton Program*, 26 U. BALT. L.F. 23, 28–29 (1996) (criticizing police officers' decisions to use certain weapons rather than the availability of those weapons).

¹⁵² *Id.* at 30 (suggesting that weapons carry greater potential for harm than police officers realize, particularly when making split-second decisions).

¹⁵³ Cf. Christie, *supra* note 19, at 764–65 (arguing that despite the assertions of American realists that "if we know more about how society works and more about the concrete problems of the parties engaged in . . . legal disputes, the right answers . . . will somehow jump out at us," in practice "the result . . . has been to increase the area of judicial choice without necessarily leading to . . . 'better' decisions").

This Part seeks to explain the heedless obsession with maximizing flexibility. Subpart A identifies logical errors underlying many arguments for flexibility. Subpart B shows that much of the enthusiasm for flexibility results from merging either procedural or institutional considerations with temporal ones. Finally, subpart C explores the psychological factors that cause us to fear erroneous precommitment far more than other kinds of defective decisions.

A. Logical Errors Underpinning Enthusiasm for Flexibility

Four common analytical errors tend to cause underestimates of the costs of delay. First, commentators assume that more information is an unalloyed good.¹⁵⁴ Therefore, because a later decision maker will have more information, they regard delay as desirable. In fact, information has value, but acquiring it has cost. Decision makers recognize this when not contemplating delay: they do not indiscriminately maximize the informational inputs but rather weigh the likely value of the data against the cost of hiring investigators, holding hearings, or whatever else is required to get it.¹⁵⁵ The same should be true of information expected to become available in the future. It presumably has value, but to obtain it we must bear costs, including those of having one or another decision maker refamiliarize itself with the problem, regulated entities' uncertainty while the decision is held open, and the possibility that decisional resources—another key factor of producing a decision—will have become substantially more costly. Manufacturers, for example, may idle their production lines because they expect a sizeable drop in the cost of one factor of production, but they presumably do so only after considering the costs of shutting down and reopening their factories and the risk that another key input's price may have risen in the interim.

Second, and related, commentators sometimes focus myopically on one of the factors without appreciating the import of others. Most commonly, they overestimate the role of information in producing a legal decision, exaggerating the value of information that they hope to receive if they wait (or overstating the deficiencies in their present store). For example, Louis Kaplow implies that decisions at the en-

¹⁵⁴ See Charles D. Case, *Problems in Judicial Review Arising from the Use of Computer Models and Other Quantitative Methodologies in Environmental Decisionmaking*, 10 B.C. ENVTL. AFF. L. REV. 251, 255, 306 (1982) (arguing for the use of models for environmental decision making based on "sufficient evidence" and "[] correct data").

¹⁵⁵ Perhaps this statement is too sanguine: current debates about antiterrorist wiretapping, for example, at times seem to focus exclusively on the value of additional information without regard to the costs of obtaining it. See, e.g., Bob Egelko, *Mukasey Backs Bush Efforts on Wiretapping*, S.F. CHRON., Mar. 28, 2008, at B1.

forcement stage are cheaper than *ex ante* rule making.¹⁵⁶ For this to be true, the cumulative cost of the required inputs for several *ex post* decisions must be less than that of the inputs needed for a single *ex ante* decision.¹⁵⁷ This, in turn, requires that either information or decisional resources must be radically cheaper at the enforcement stage. This seems unlikely. And if adjudicatory decisions are cheaper, that does not necessarily mean that declining information costs are the reason: the legal system may simply have selected costlier procedures for rule making than for applying standards. If the difference in procedures is unjustified, it hardly belongs in a comparison of the relative benefits of early and late decisions. And if the difference does make sense, it likely is as a reflection of the less-valuable delayed decision not warranting as extensive an investment as more useful *ex ante* rules. Law's fatalistic acceptance that much of the potential benefit of a decision has been lost in delay is no good reason to suffer that loss deliberately by postponing the decision.

While the decision maker awaits more plentiful information, decisional capacity may become increasingly scarce. The longer a testator waits, for example, the more she or he is likely to know about prospective heirs. If she or he waits too long, however, her or his decisional capacity will disappear. Similarly, "[m]otions in limine are designed to avoid the delay and occasional prejudice caused by objections and offers of proof at trial."¹⁵⁸ A hurried judge in the midst of a trial has less capacity to resolve complex evidentiary matters—and postponing decisions sometimes allows improper evidence to degrade the trial's decisional resources by contaminating the jury.¹⁵⁹ (Decisions in limine also are more valuable to parties seeking to plan their strategies than rulings made at trial.¹⁶⁰) And decisions that an actor may make honestly in advance may engender corruption, favoritism, or bigotry if postponed until officials know the partic-

¹⁵⁶ See Kaplow, *supra* note 11, at 562 ("Rules are more costly to promulgate than standards because rules involve advance determinations of the law's content . . ."). But see *id.* at 562-63 ("[S]tandards are more costly for legal advisors to predict or enforcement authorities to apply because they require later determinations of the law's content.")

¹⁵⁷ *Id.* at 563 ("If there will be many enforcement actions, the added cost from having resolved the issue on a wholesale basis at the promulgation stage will be outweighed by the benefit of having avoided additional costs repeatedly incurred in giving content to a standard on a retail basis.")

¹⁵⁸ *Wilson v. Williams*, 182 F.3d 562, 566 (7th Cir. 1999) (en banc) (emphasis omitted).

¹⁵⁹ James W. McElhane, *Don't Be an Evidence Cop: Object When You Should, Not Just to Show That You Can*, A.B.A. J., Feb. 2006, at 24, 24.

¹⁶⁰ See *Pena v. Leombruni*, 200 F.3d 1031, 1034-35 (7th Cir. 1999) ("It is highly desirable that the trial judge rule on motions in limine well before trial so that the parties can shape their trial preparations in light of his rulings without having to make elaborate contingency plans." (citing *Wilson*, 182 F.3d at 566)); see also MANUAL FOR COMPLEX LITIGATION (THIRD) § 32.23 (1995) (endorsing pretrial motions in limine).

ulars of those affected.¹⁶¹ Courts may deem an agency's decision arbitrary and capricious due to insufficient information, but they also may do so due to deficient applications of decisional resources. Frederick Schauer warns that the costs of insufficient decisional resources must be balanced against those resulting from information shortages when decisions are made in advance.¹⁶²

Awaiting more plentiful information also can result in disappearance of the normative consensus that would have guided a prompt decision. For example, varying convicts' sentences based on prison officials' decisions on whether to award "good time" credit brings more information into the decision-making process—but it also brings different norms into the decision.¹⁶³ More recently, California and some other states have developed systems in which long sentences precede parole with numerous conditions, strictly enforced.¹⁶⁴ The result has been a high rate of reincarceration for acts that are not crimes but that violate parole rules; thus, these delayed incarceration decisions depend on norms far-removed from the laws the individual originally violated.¹⁶⁵ Some observers, of course, may prefer the norms that guide later decisions to those that would have applied *ex ante*. The broader point remains, however, that the delay brought changes not only in the informational input but also in the normative input, and the ultimate efficiency of delayed decision making depends on changes in the costs of *all* decisional inputs, not just on information.

A third common analytical error is failing to appreciate the declining value of decisions delayed too long. Even if inputs' cost comes down, legal decision making may produce less net value if the decision accomplishes less. The law favors early decisions on economic matters because much of decisions' value is accommodating private

¹⁶¹ Cf. Rudolf Bahro, *The Alternative in Eastern Europe* 154 (David Fernbach trans., Verso ed. 1981) ("[P]riorities and preferences that go into [decision making] can in no way be determined in an objective scientific manner as long as there are still antagonistic interests in society, such as are given with the unequal distribution of scarce resources . . .").

¹⁶² See SCHAUER, *supra* note 89, at 149–50. He does suggest that decision making improves with practice in some cases. See *id.* n.16. The sort of judgment to which he refers, however, is only one facet of decisional resources, along with the decision maker's time.

¹⁶³ See James B. Jacobs, *Sentencing by Prison Personnel: Good Time*, 30 UCLA L. REV. 217, 234–40 (1982) (explaining prison officials' reasons and procedures for revoking good time).

¹⁶⁴ Michael Vitiello & Clark Kelso, *A Proposal for a Wholesale Reform of California's Sentencing Practice and Policy*, 38 LOY. L.A. L. REV. 903, 943–44 (2004) (discussing how a failed system of parole has led to extremely lengthy prison sentences).

¹⁶⁵ See *id.* (arguing that many offenders in California receive sentences disproportionate to the severity of the of the offender's criminal conduct); LITTLE HOOVER COMM'N, BACK TO THE COMMUNITY: SAFE & SOUND PAROLE POLICIES at i (2003), available at <http://www.lhc.ca.gov/studies/172/report172.pdf> (noting the frequency with which parole revocation is used in lieu of prosecution for parolees suspected of committing new crimes).

parties' risk aversion.¹⁶⁶ The Contracts Clause¹⁶⁷ constitutionalizes a prohibition on some kinds of retroactive legislation, although distinguishing between retroactive rules and prospective ones that change the value of choices made under prior policy has proven problematic.¹⁶⁸ The Supreme Court has read the Contracts Clause broadly to preclude later legislation from abrogating administrative officials' promises on which private actors have relied.¹⁶⁹ Although this is unlikely to prevent Congress from changing tax rules in ways that effectively reduce reliance interests that prior law had established,¹⁷⁰ legislators tend to find the ability to rely on early decisions a crucial component of those decisions' value.¹⁷¹ Initial debates about Social Security, for example, turned precisely on the question of whether to precommit to levels of support for the aged and persons with disabilities or to allow to "each generation . . . the determination of what is just and adequate."¹⁷² Not only did those proposals lose out in the 1930s, but by the 1970s Social Security's precommitment rationale had rendered it inviolable.¹⁷³ Without an early decision, payments might still be social, but they could provide little security.

And fourth, some postponements of decisions accompany delegations to different bodies, typically courts, administrative agencies, or lower tiers of government. The recipients of these delegations may have better access to information, may have superior decisional resources, or may adhere to normative rules that those promoting delegation prefer. An observer's opinion of the relative competence and

¹⁶⁶ See Daniel S. Goldberg, *Government Precommitment to Tax Incentive Subsidies: The Impact of United States v. Winstar Corp. on Retroactive Tax Legislation*, 14 AM. J. TAX POL'Y 1, 6-8 (1997) (explaining how predictable tax subsidies are economically efficient because people who act in reliance on them need not be compensated by a risk premium).

¹⁶⁷ U.S. CONST. art I, § 10, cl. 1.

¹⁶⁸ See Goldberg, *supra* note 166, at 17-21 (discussing the difficulty in interpreting the scope of the mistakability doctrine).

¹⁶⁹ See *United States v. Winstar Corp.*, 518 U.S. 839, 868-71 (1996).

¹⁷⁰ See Michael J. Graetz, *Legal Transitions: The Case of Retroactivity in Income Tax Revision*, 126 U. PA. L. REV. 47, 48 (1977) (stating that subject to a few constitutional constraints, the legislature is relatively free to set whatever effective dates it chooses); Saul Levmore, *The Case for Retroactive Taxation*, 22 J. LEGAL STUD. 265, 270 (1993) (giving an example of how a congressional tax proposal could reasonably be seen as retroactive).

¹⁷¹ See Daniel S. Goldberg, *Tax Subsidies: One-time vs. Periodic: An Economic Analysis of the Tax Policy Alternatives*, 49 TAX L. REV. 305, 305 (1994); Kyle D. Logue, *Tax Transitions, Opportunistic Retroactivity, and the Benefits of Government Precommitment*, 94 MICH. L. REV. 1129, 1134 (1996) (describing how Congress often provides transition relief when it enacts changes in federal tax law). *But see* Kaplow, *supra* note 127, at 509 (arguing that relief from costs that arise from changes in government policy is better found in the market than in government efforts to relieve those costs).

¹⁷² MARTHA DERTHICK, *POLICYMAKING FOR SOCIAL SECURITY* 185 (1979) (quoting JOHN J. CORSON & JOHN W. MCCONNELL, *ECONOMIC NEEDS OF OLDER PEOPLE* 133-34 (1956)).

¹⁷³ *Id.* at 203-04 (considering "[h]ow . . . are you going to terminate a retirement program that people have been paying into for decades with the expectation of receiving money back?" (citation omitted)).

legitimacy of the original and subsequent bodies likely will help determine her or his enthusiasm for reservations of authority. Those who hold Congress and administrative rule-writers in bad odor or who celebrate the expertise of agencies' adjudicators, the wisdom of the courts, or the sensitivity of state and local government, will probably seek to postpone decisions to compel a transfer of decisional authority. They justify this position by decrying planning "expressed in the way that administrative competence at each lower level is more strictly circumscribed than is good for its vital functioning . . ." ¹⁷⁴ Criminal law long has depended on delegating decisions to prosecutors to counterbalance the populist excesses of anticrime legislation. ¹⁷⁵ Yet the law can delegate vast authority to prosecutors without delaying decisions about charging and sentencing. ¹⁷⁶

Compounding these analytical difficulties, distributional concerns may override the desire to achieve the most efficient timing where the costs of delay are born unequally. A delay in resolving civil litigation ordinarily causes the ultimate decision's value to decline more rapidly for plaintiffs than the delay produces value for defendants, ¹⁷⁷ making it socially inefficient, but defendants may have sufficient political influence to prevent the legislature from committing more resources to the courts. ¹⁷⁸ The rights to a speedy trial decision in criminal cases ¹⁷⁹ and to timely decisions in public benefits administrative hearings ¹⁸⁰ depend less on calculations about efficient timing than about distributional concerns. Despite the general timing advantages of motions in limine, some courts limit or reject them from prosecutors out of concern that ruling out defenses improperly shifts leverage away from defendants. ¹⁸¹ Here again, however, as valid as

¹⁷⁴ BAHRO, *supra* note 161, at 155.

¹⁷⁵ See Franklin E. Zimring, *Penal Policy and Penal Legislation in Recent American Experience*, 58 STAN. L. REV. 323, 331–34 (2005) (revealing how throughout the 1990s and early twenty-first century, prosecutors in San Francisco almost never invoked "three-strikes" penalties, which were supposed to be mandatory under California law).

¹⁷⁶ See Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 31–35 (2002) (describing the prosecutorial "screening" process and suggesting that "early assessment" be part of that process).

¹⁷⁷ Although the time value of money may work in roughly opposite directions on the two parties, both likely must absorb risk premiums and pay to keep their cases at the ready.

¹⁷⁸ See Fred C. Zacharias, *The Politics of Torts*, 95 YALE L.J. 698, 720–21 (1986) (describing the ways in which insurance companies exert political power over legislative decision making).

¹⁷⁹ See *Barker v. Wingo*, 407 U.S. 514, 530–33 (1972) (identifying the factors courts must assess to determine whether a defendant has been deprived of his right to a speedy trial).

¹⁸⁰ See, e.g., 7 C.F.R. § 273.15(c)(1) (2011) (requiring that within sixty days of receipt of a request for fair hearing, the agency must conduct a hearing, reach a decision, and notify the affected parties).

¹⁸¹ See *State v. Brechon*, 352 N.W.2d 745, 748 (Minn. 1984) (stating that the use of a motion in limine against a defendant in a criminal case is questionable considering the

the concerns may be, they can be accommodated without dictating the timing of legal decisions. Even if policymakers prefer meeting their distributional goals to efficiently timing legal decisions, they often can achieve both by adjusting parties' financial relationships to shift the incidence of the costs of postponed decisions.¹⁸²

Sometimes the four fallacies compound one another. Postponing normative choices in the hope of enlightenment from additional information can prove counterproductive when decisional resources become scarcer. Several important evidentiary rules postpone complex normative decisions until trial. For example, in most jurisdictions the list of exceptions to the prohibition on hearsay is not only voluminous but nonexclusive.¹⁸³ This forces judges to make snap normative judgments about what are "equivalent circumstantial guarantees of trustworthiness" and whether "the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence" as well as the more information-dependent question of whether the "statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts."¹⁸⁴ Critics have questioned the desirability of rule making authorities postponing these normative decisions and delegating them to trial courts.¹⁸⁵

New scientific and technological developments can complicate these calculations, changing the optimal timing of legal decisions in several ways. They can make information cheaper earlier. For example, advances in genetics are allowing recognition of harm resulting from exposure to toxins long before disease manifests itself.¹⁸⁶ Tech-

defendant's constitutional rights); Douglas L. Colbert, *The Motion in Limine in Politically Sensitive Cases: Silencing the Defendant at Trial*, 39 STAN. L. REV. 1271, 1272-73 (1987) (suggesting that prosecutorial motions in limine violate defendants' Fifth and Sixth Amendment rights). *But see* Christopher B. Mead, *Motions in Limine: The Little Motion That Could*, 24 LITIG. 52, 53 (1998) (finding increased reception in federal courts to prosecutorial motions in limine).

¹⁸² *See, e.g.*, *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1083 n.67 (D.C. Cir. 1970) (requiring that tenant-defendants who invoke the implied warranty of habitability pay their monthly rent into court in order to reduce potential harm to their landlords); David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CALIF. L. REV. 389, 426-34 (2011) (criticizing these requirements).

¹⁸³ *See* FED. R. EVID. 807. Although not all states have a "residual" exception to the hearsay rule, *see, e.g.*, PA. R. EVID. 803, many states' rules of evidence mirror the Federal Rules of Evidence and include some form of the residual exception, *see, e.g.*, W. VA. R. EVID. 803(24).

¹⁸⁴ FED. R. EVID. 807.

¹⁸⁵ *Cf.* Ronald S. Longhofer, *Michigan's New Catch-All Hearsay Exceptions*, 75 MICH. B.J. 950, 951 (1996) (asserting that Michigan's adoption of the catch-all hearsay exception should have a positive impact so long as judges are vigilant to avoid admitting unreliable evidence).

¹⁸⁶ *See* Jamie A. Grodsky, *Genetics and Environmental Law: Redefining Public Health*, 93 CALIF. L. REV. 171, 177, 267-68 (2005) (explaining how information concerning environ-

nology also may enable the identification of persons who suffered harm from toxic exposure before a statute of limitations expires.¹⁸⁷ On the other hand, technology may facilitate destructive uses of information—such as employment discrimination, insurance underwriting, or invasions of privacy based on genetic data¹⁸⁸—and thus increase the social cost of producing that information. This can lead to policies that prohibit the assembly of particular kinds of information that might aid in a decision. Technology may complicate the process of decision making, requiring more costly decisional resources such as longer trials or rule making processes or more analytic capacity than most generalist judges, juries, and lawmakers possess.¹⁸⁹ Science also can help refine default rules so that their invocation degrades the value of a decision less.¹⁹⁰

B. Conflating Procedural, Institutional, and Temporal Concerns

Under close examination, many arguments for flexibility reveal themselves as arguments for improved decision-making procedures or for a different institutional decision maker. Yet additional procedures and delegations of responsibility usually can occur with or without significant postponement of the decision. To the contrary, strong procedural and institutional concerns often argue *against* flexibility.

1. Procedural Arguments

Some commentators assume that delaying decision making is necessary to allow procedures consistent with careful deliberation or broad participation. For the most part, however, decisional resources rather than time are the factor constraining choice of procedures. In fact, concerns about procedural justice often militate against broad reservations of flexibility because of the ultimate decision's reduced value.

Occasionally, the value of a decision declines so rapidly over time that the law requires an authority to exercise a certain amount of discretion before initiating a regulatory program. For example, if a criminal statute, particularly one limiting important rights, is too vague,

mental exposure and effects may support tort claims even in the absence of manifest injury).

¹⁸⁷ Cf. Jamie A. Grodsky, *Genomics and Toxic Torts: Dismantling the Risk-Injury Divide*, 59 STAN. L. REV. 1671, 1687–88 (2007) (noting that scientific developments have allowed the detection of evidence of chemically-induced changes long before the emergence of clinical symptoms).

¹⁸⁸ See Grodsky, *supra* note 186, at 197 (noting the implications of genetic testing for threats to privacy, employment, and insurance discrimination).

¹⁸⁹ See *id.* at 242–43 (discussing the difficulties of validating findings about genetic markers and applying them in litigation and regulation).

¹⁹⁰ *Id.* at 243.

enforcing authorities may not constitutionally supply the missing details. An administrative agency in theory may not constitutionally regulate if Congress has not exercised enough discretion in the authorizing statute to supply an intelligible guiding principle,¹⁹¹ although such authorizing principles can nonetheless leave a great deal open.¹⁹² Some statutes require administrative agencies to act through rules,¹⁹³ although the impossibility of anticipating every possible contingency in rules has left courts reluctant to enforce those requirements aggressively.¹⁹⁴ More commonly, an agency's failure to follow the designated procedures exercising discretion may disqualify its decisions from having the force of rules. Preserving some abrogational discretion addresses any claims for an opportunity to participate.¹⁹⁵

Even absent cognizable legal claims, concerns about fairness to regulated entities often deter legal actors from retaining excessive flexibility. For the most part, *ex ante* exercises of discretion will allow private actors to adapt to the regulatory regime and minimize the disruption of settled expectations.¹⁹⁶ On the other hand, under some circumstances private actors may prefer to act first and have the opportunity to justify their actions to regulators later.

Preservation of large amounts of discretion does make policy formation more incremental. This appeals to several groups. Those preferring more participatory procedures for policymaking—either on general principle or because they expect to be able to dominate the participation—may indeed find more opportunities if large amounts

¹⁹¹ See *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (“If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix [tariff] rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.”).

¹⁹² See *Yakus v. United States*, 321 U.S. 414, 426 (1944) (“Only if we could say that there is an absence of standards for the guidance of the Administrator’s action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means for effecting its declared purpose . . .”).

¹⁹³ *Morton v. Ruiz*, 415 U.S. 199, 231 (1974) (“The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left . . . by Congress.”); see *Food and Nutrition Act of 2008*, 7 U.S.C. § 2013(c) (requiring the USDA to govern the Supplemental Nutrition Assistance Program (SNAP) through properly promulgated administrative rules).

¹⁹⁴ See *Allison v. Block*, 723 F.2d 631, 636–38 (8th Cir. 1983) (allowing agency to “develop . . . criteria through adjudicative processes which give some precedential effect to prior . . . decisions” even where Congress indicated its desire for uniform regulations).

¹⁹⁵ See *Heckler v. Campbell*, 461 U.S. 458, 467 & n.11 (1983) (allowing for the standardization of Social Security disability decisions where the claimant retains the means of challenging the adjudicator’s discretion); *Fed. Power Comm’n v. Texaco, Inc.*, 377 U.S. 33, 41–45 (1964) (same for regulatory permissions).

¹⁹⁶ See *SCHAUER*, *supra* note 89, at 155–58 (describing how one argument against allowing private actors to bear losses from changes in government policy is that they relied on preexisting law).

of discretion are preserved.¹⁹⁷ In addition, those opposing the exercises of initiative or normative discretion in a given area will have greater opportunities to subvert those choices later if flexibility is reserved. Those seeking sweeping policy change may prefer to roll out their initiatives a bit at a time rather than in one, highly recognizable thrust.¹⁹⁸ None of this, however, provides a principled justification for flexibility.

2. *Institutional Arguments*

Institutional arguments are another mainstay of pro-flexibility discourse: comparing the legitimacy, competence, and efficiency of the institutions that would decide if discretion is to be exercised *ex ante* to that of the institutions that would inherit reserved discretion. Although this approach has obvious practical appeal, it offers little guidance on *when* discretion should be exercised. For example, decentralizers commonly advocate relatively loose federal statutes to preserve as much discretion as possible for states or localities; the preference to decentralize does not answer the question of when state or local authorities should exercise their delegated discretion. Similarly, faith in the expertise of administrative agencies may induce one to prefer minimalist authorizing statutes but does not determine whether the agencies should act through rulemaking or adjudication. And a general desire to minimize regulatory activity does not dictate when whatever remaining authority should be exercised.¹⁹⁹

The institutional counterargument is equally unenlightening on the timing of legal decisions. A major institutional critique of discretionary government has been that it tends to transfer power from an elected Congress to less politically accountable bureaucrats.²⁰⁰ Some

¹⁹⁷ See Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 424–25 (1981) (“Many economists . . . see the reality of policymaking as nothing more than competition among influential partisans for selfish objectives. Indeed, participatory procedures are more consistent with the incrementalist’s impulse to accommodate conflicting values than with the policy analyst’s penchant for objectivity.” (footnote omitted)).

¹⁹⁸ See Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 41–42 (1982) (explaining that decision makers must consider the “perceptual thresholds” of those affected by their decisions to determine whether incremental action is preferable to a more “global” approach).

¹⁹⁹ Some confusion can arise because the term “planning” can be juxtaposed either with leaving the free market undisturbed or with having the government intervene but wait to do so. Most critics of government planning have the first meaning in mind, not the second. See FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 48–50 (1944) (arguing that complex activities need more competition, not more planning); Lon L. Fuller, *Freedom—A Suggested Analysis*, 68 HARV. L. REV. 1305, 1325 (1955) (arguing that planners may lack sufficient information).

²⁰⁰ See *Indus. Union Dep’t v. Am. Petroleum Inst.*, 448 U.S. 607, 685–86 (1980) (Rehnquist, J., concurring) (arguing that the nondelegation clause is important because, *inter alia*, it ensures “that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will”); JOHN HART ELY, *DEMOCRACY AND*

also suggest that clear, bright-line rules are essential to democratic legitimacy.²⁰¹ Lately, however, some scholars have argued that the involvement of the President and close presidential advisors in regulatory policymaking is broader than had been understood,²⁰² at least moderating this concern. In addition, Jerry L. Mashaw questions whether any meaningful reduction in bureaucracies' discretion is achievable.²⁰³ His reference appears to be an institutional rather than a temporal one: he doubts senior decision makers' capacity to decide much more than they now do. But knowing that decisions must be delegated does not mean that they must be delayed.

The institutional checks and balances our system relies upon to reconcile these institutional concerns also may be ineffective without more attention to temporal concerns than the current ill-structured, impressionistic approach to discretion permits. One major constitutional doctrine seeking to cabin subordinate actors' exercise of discretion, the nondelegation doctrine,²⁰⁴ long has been criticized as ineffectual,²⁰⁵ at least at the federal level.²⁰⁶ If the Supreme Court finds sufficient constraint on delegated discretion in a statute requiring only that the executive act in a "generally fair and equitable" manner that "will effectuate the purposes of the Act,"²⁰⁷ delegations have

DISTRUST: A THEORY OF JUDICIAL REVIEW 133-34 (1980) (arguing that the nondelegation doctrine exists in part to require legislators to remain accountable for their actions rather than shirk their responsibilities by passing on decision-making power to others); Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1295-96 (1984) (addressing the arguments that support and that question the legitimacy of the bureaucratic system).

²⁰¹ See Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 YALE L.J. 529, 530-31 (1997) (reviewing ANTONIN SCALIA ET AL., *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997)) (attributing this view to Justice Scalia).

²⁰² See Nicholas Bagley & Richard Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1302 (2006) (discussing the considerable influence the President exercises over agency action by appointing loyalists to important agency posts); cf. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2345 (2001) (discussing how Presidents Reagan and Clinton, despite having vastly different policy agendas, both "countered the dominant contemporary forces of bureaucratic and political lethargy through their practices of influencing agency decisions").

²⁰³ Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 97 (1985). Mashaw considers a "Law of Conservation of Administrative Discretion," which holds that attempting to confine discretion at one point in the process merely causes it to "migrate" elsewhere in the process. See *id.* This fatalistic, hydraulic model may fit highly adversarial processes, such as campaign finance regulation or OSHA enforcement. It does not account for the great deal of administrative activity on which either a broad consensus exists or the agency is not prepared to invest the political capital to make a fight.

²⁰⁴ See *supra* note 6 and accompanying text.

²⁰⁵ See DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 44-45 (1993).

²⁰⁶ But see *supra* note 32 and accompanying text (describing somewhat more muscular versions on the state level).

²⁰⁷ *Yakus v. United States*, 321 U.S. 414, 420, 426 (1944).

little meaningful limit.²⁰⁸ The Court essentially abandoned the task of specifying how much discretion is too much. The typology set out in Part II, however, offers concrete options for the restructuring of such a principle. Even current doctrine seems to require that the legislature exercise initiative discretion and make some contribution to normative discretion, although federal cases allow that contribution to be quite slight.²⁰⁹ Yet the rationale for many delegations—greater decisional capacity and cheaper access to information at the agency level—typically carries the greatest weight with regard to exercises of quantitative discretion and, occasionally, structural discretion. Thus, a requirement that delegations of creative discretion be limited to the latter two forms, and one that legislatively specified norms constrain any abrogational discretion, would meet the needs of the administrative state while proving far easier for courts and legislatures to apply. It would also compel the earlier rendering of decisions. If, on the other hand, we decided that we no longer desire to restrain delegations of broad initiative and normative discretion to administrative agencies, the Court could allow agencies to supply the constraining exercises of initiative, normative, and structural discretion in advance where the legislature has failed to do so,²¹⁰ thus capturing the benefits of agencies' expertise while minimizing the costs of politicized swings in policy.²¹¹

The emblematic constraint on judicial discretion in the common law system—*stare decisis* and the measured evolution of the law²¹²—suffers from similar vagueness. Although we may have impressionistic senses of whether a new decision departs from prior law in large or small ways, the courts lack a clear system for sorting departures from prior law. The typology set out above offers such a system. Thus, for example, a case exercising quantitative discretion about what level of contacts with a forum state justifies its exercise of personal jurisdiction over a defendant²¹³ is less significant than the initial one exercising normative discretion to make “fair play and substantial justice” the object of jurisdiction inquiries and structural discretion to make “minimum contacts” with the forum state the nature of the inquiry²¹⁴—and less significant than a subsequent decision adding “tradition” to

²⁰⁸ *But see* *Clinton v. New York*, 524 U.S. 417, 443–44 (1998) (invalidating a statute that set no standards for exercise of presidential authority to invalidate spending items and tax expenditures).

²⁰⁹ *See supra* note 31 and accompanying text.

²¹⁰ *But see* *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472–73 (2001) (denying agencies any role in remedying insufficient legislative delegations).

²¹¹ *Cf. Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (suggesting that sudden change in policy is problematic).

²¹² *See* HART & SACKS, *supra* note 12, at 341–44.

²¹³ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474–76 (1985).

²¹⁴ *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 320 (1945).

the inquiry's guiding norms.²¹⁵ Most of the costs that stare decisis seeks to avoid—such as undermining reliance interests and willful or biased judging—attach far more to reversals of exercises of initiative or normative discretion than to structural discretion, and more to structural discretion than to quantitative discretion. This allows a high court to delegate to trial courts, and to postpone exercise of, quantitative discretion while exercising higher-level discretion itself. It also provides a means of reconciling the core values of stare decisis with the need for the law to keep up with constantly changing social and economic circumstances²¹⁶—which likely demand changes in quantitative standards or perhaps the structure of legal analysis, but not the question of whether law should intervene at all or the norms under which it should do so. To be sure, courts often achieve something similar on an ad hoc basis today.²¹⁷ Without qualitative means of describing discretion exercised and that retained or delegated, however, courts and observers are left only with vague and contestable notions of whether the discretion exercised is “a lot” or “a little”; judges desiring to delegate sufficient authority for lower courts to meet unforeseen problems may inadvertently provide more power than those courts require.

The potential for appellate review and legislative overrides of administrative and judicial actions also provides a crucial part of the justification for delegations of discretion.²¹⁸ If recipients of delegated power reserve large amounts of discretion, higher bodies will have less time to assess and respond to those decisions ultimately made. Acquiescence for lack of time for consideration, or because a reversal would be too disruptive, replaces genuine accountability—and undermines legitimacy in the process.

Finally, we accept institutional arrangements under which unelected judges and bureaucrats exercise vast authority in part on the basis that they must exercise that authority transparently,²¹⁹ making them subject to political correction. Choices that judges might

²¹⁵ *Burnham v. Superior Court*, 495 U.S. 604, 622–23 (1990).

²¹⁶ *Cf.* WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 10–11 (1994) (describing the dynamic nature of statutory interpretation in the United States “as a matter of practice and positive theory”).

²¹⁷ *See Kylo v. United States*, 533 U.S. 27, 33 (2001) (noting that technological changes, such as aerial surveillance, have compelled courts to weigh the degrees of intrusiveness of different kinds of searches).

²¹⁸ *Cf.* HART & SACKS, *supra* note 12, at 286–87 (describing the availability of a judicial appellate system but also the relative infrequency of its use compared to the number of disputes that exist).

²¹⁹ *See, e.g., Cummock v. Gore*, 180 F.3d 282, 285 (D.C. Cir. 1999) (describing the Federal Advisory Committee Act as requiring that the “creation, operation, and duration [of advisory committees] be subject to uniform standards and procedures” and “that Congress and the public remain apprised of their existence, activities, and cost” (quoting *Public Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 446 (1989))).

otherwise doubt are deemed ratified by the lack of political resistance.²²⁰ For extremely high-salience matters, this political oversight is inevitable, with journalists and advocates sufficiently motivated to pierce any opacity. For more prosaic decisions, however, legitimating political accountability depends on transparency. Dividing authority between multiple actors—appellate and trial courts, the legislature and an executive agency, senior agency policymakers and line enforcement staff—already complicates the electorate’s task in determining whom to hold accountable and for what specific decision. To the extent those actors play their respective roles at widely separated times because of a choice to reserve discretion, the electorate will be further confused.

C. Psychological Attachment to Discretionary Policymaking

Society’s willingness to invest decisional resources in rulemaking fluctuates considerably over time. At the moment, for a mixture of political, technological, and psychological reasons, the pendulum has swung very far against policymaking through rules and in favor of broad reservations of discretion,²²¹ leaving many normative, structural, and quantitative issues open until closer to the time a policy needs to be implemented in particular cases. As noted, this sometimes results from a desire to avoid hard political choices. It also results from the widespread ignorance of, and skepticism about, statistical and other means of anticipating changes. More broadly, we focus on one particular form of decisional failure—officials bound by policies that they know are mismatched to their situation—to the exclusion of several other kinds. John Thibaut and Laurens Walker offer empirical evidence that people expect judges to have the flexibility to respond to their individual circumstances.²²²

This myopic attention to policy obsolescence results from our increasing tendency to treat a very narrowly-defined conception of effi-

²²⁰ See *Johnson v. Transp. Agency*, 480 U.S. 616, 629 n.7 (1987) (“[I]f the Court has misperceived the political will, it has the assurance that because the question is statutory Congress may set a different course if it so chooses.” (quoting *United Steelworkers v. Weber*, 443 U.S. 193, 216 (1979) (Blackmun, J., concurring))).

²²¹ Cf. *In re Int’l Chemical Workers Union*, 958 F.2d 1144, 1149–50 (D.C. Cir. 1992) (criticizing OSHA’s six-year delay in promulgating a rule); Thomas O. McGarity, *The Expanded Debate over the Future of the Regulatory State*, 63 U. CHI. L. REV. 1463, 1523 (1996) (describing agencies’ difficulties in promulgating rules).

²²² JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* 77–80 (1975). This evidence suggests that Professor Christie is mistaken in assuming that we naturally distrust decision makers we cannot closely supervise. See Christie, *supra* note 19, at 754–55.

ciency as the government's primary goal.²²³ This triumph of *gesellschaft* over *gemeinschaft* has driven both parties to recast their rhetoric in terms of economic efficiency and to restructure public institutions with that goal. Federally, the economic view of government has produced the Government Performance and Results Act,²²⁴ President Bill Clinton's "reinventing government,"²²⁵ and President George W. Bush's even more quantitative performance evaluation systems.²²⁶ The efficiency-driven economic model of state and local government manifests itself in increasing reliance on special districts, public au-

²²³ See, e.g., Paula A. Monopoli, *Gender and Constitutional Design*, 115 YALE L.J. 2643, 2647–49 (2006) (describing a strong voter preference for a decisive, agentic male executive).

²²⁴ Government Performance and Results Act of 1993, Pub. L. No. 103-62, 107 Stat. 285 (codified in scattered sections of 5 U.S.C. and 31 U.S.C.).

²²⁵ See John Kamesky, *A Brief History* (Jan. 1999), <http://govinfo.library.unt.edu/npr/howeare/history2.html> (providing an overview of the Clinton Administration's National Partnership for Reinventing Government to "reform the way the federal government works").

²²⁶ See Sidney A. Shapiro & Ronald F. Wright, *The Future of the Administrative Presidency: Turning Administrative Law Inside-Out*, 65 U. MIAMI L. REV. 577, 611 (2011) (briefly describing the Program Assessment Rating Tool (PART)). The tendency to view government as a business has shaped the selection of leaders arguably to the benefit of candidates with executive experience. Over the past three decades, for example, governors and former governors have run against current or former members of Congress in seven presidential elections and have won six (former Georgia Governor Jimmy Carter versus former Congressman Gerald Ford in 1976; former California Governor Ronald Reagan versus former Senator Walter Mondale in 1984; former Massachusetts Governor Michael Dukakis (the sole loser of the of the group) versus former Congressman George H.W. Bush in 1988; former Arkansas Governor Bill Clinton versus former Congressman George H.W. Bush in 1992 and versus former Senator Bob Dole in 1996; and former Texas Governor George W. Bush versus former Senator Al Gore in 2000 and versus Senator John Kerry in 2004). Prior to the election of then-Senator Barack Obama in 2008, the U.S. Senate, once the cradle of presidents, had become an orphanage: senators had failed to win an election since 1960, the longest such span in the nation's history. Cf. Richard S. Dunham, *'Change Has Come to America': Obama Turned Red States Blue, Broke Barriers*, HOUSTON CHRONICLE, Nov. 5, 2008, <http://www.chron.com/disp/story.mpl/nation/6095707.html> (reporting that President-elect Obama would become the first senator elected President since John F. Kennedy in 1960). Private-sector executives with no political experience have won governors' mansions in numerous states—Arizona, Kentucky, Massachusetts, Texas, and Virginia, among others—as well as the mayoralties of several large cities, including New York. See, e.g., Nick Allen, *Michael Bloomberg Elected Mayor of New York for a Third Time*, THE TELEGRAPH, Nov. 4, 2009, <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/6498609/Michael-Bloomberg-elected-mayor-of-New-York-for-a-third-time.html> (reporting the mayoral victory of former Salomon Brothers executive Michael Bloomberg). These executives come to office promising to clean up the mess, attacking the legislature as much as their predecessors or opponents. See Daniel Howes, *Snyder Taps into Engler People to Rebuild State*, DETROIT NEWS, Dec. 14, 2010, at A10. Although the complexity of state government has flummoxed some businessmen—governors, cf., e.g., Tyler Bridges, *Election Is Up in the Air for Now*, TIMES-PICAYUNE (New Orleans), May 22, 1995, at A1 (describing a governor with a business background as being perceived as a failure), many arrive in office equipped to exercise power more quickly and effectively than converted legislators. They also often arrive, for better or worse, without an intuitive appreciation for the role of the legislature. See KATZ, *supra* note 80, at 272–73 (describing how former Governor Bill Clinton's miscalculations of Congress doomed his health care reform proposal).

thorities, and other unelected special purpose governments.²²⁷ This economic orientation reflects both academic arguments and a culture that demands immediate gratification. It prefers policies with specific objectives, the executive's forte, over the inchoate values of process, deliberation, and "civic virtue" that relatively inefficient legislatures can offer.²²⁸

This efficiency-oriented political discourse relies heavily on a business model of management, featuring sweeping executive discretion, with few obvious analogues to administrative rules.²²⁹ Indeed, putting off decisions until they are required, rather than investing resources in a rulemaking process only to have the policies developed wait months or years to be needed, may seem consistent with increasingly popular "just-in-time" inventory management strategies.

The presumption that the hierarchical executive is the most efficient branch of government²³⁰ has, along with the demise of the antidelegation doctrine,²³¹ resulted in broader delegations through vague legislation resolving fewer important issues. Although this could have meant that agencies' rules replaced statutes, the result often has been a change in the nature, as well as the author, of governmental action. Courts have been reluctant to require the executive to exercise its powers through rules²³² or to attach negative

²²⁷ Laurie Reynolds, *Intergovernmental Cooperation, Metropolitan Equity, and the New Regionalism*, 78 WASH. L. REV. 93, 137–49 (2003).

²²⁸ Scholars, too, have increasingly accepted efficiency as a central normative foundation of government. Some of this emphasis is seen in conservative law and economics scholarship that sees cost-benefit analysis as a tool for reducing the scope of government regulation. *See, e.g.*, Richard A. Posner, *The Social Costs of Monopoly and Regulation*, 83 J. POL. ECON. 807, 818–19 (1975). More recently, however, liberals too have begun singing the praises of governing methods whose chief virtue is their efficiency. *Cf.* Dorf & Sabel, *supra* note 144, at 370, 405–07 (urging decentralized decisions as adapting to local circumstances because decentralization promotes "efficiency and creativity").

²²⁹ *See, e.g.*, Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L.Q. 1001, 1076–83 (2004) (illustrating how broad executive control over outsourcing American military activities evades the need for congressional and popular approval of executive action).

²³⁰ *See* Kagan, *supra* note 202, at 2251–52, 2331–46 (arguing that the presidential model best promotes accountability and effectiveness in government).

²³¹ *See* *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474–76 (2001) (discussing the breadth of the nondelegation doctrine and asserting that "we have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'" (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting))).

²³² *See, e.g.*, *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) ("[An agency] is not precluded from announcing new principles in an adjudicative proceeding[,] and . . . the choice between rulemaking and adjudication lies in the first instance within the [agency's] discretion."); *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) ("[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency." (emphasis omitted)).

consequences to the failure to do so.²³³ Many agencies' rulemaking processes have become so ossified that their requirements of time and resources exceed many policymakers' tolerance.²³⁴

Difficulty in predicting changes in economic conditions and technology, and the sense that these changes come faster than agencies can amend their rules, may someday lead to new ways of writing rules to be more robust to such changes. It also may lead to changes in the rule making process and perhaps to a reduction in the number of clearances an agency must obtain to publish proposed and final rules.²³⁵ For now, however, it has produced an impulse to leave important issues unresolved and in the hands of the faster-moving executive.²³⁶ Some have argued that we are strongly predisposed to expect decisiveness, even despotism, from our leaders.²³⁷ We depend on leaders, and it is through their decisions that we are empowered.²³⁸

In addition, the set of actors with whom one identifies often dictates one's policy views.²³⁹ The same phenomenon that is "flexibility" from the perspective of decision makers can be "instability"²⁴⁰ or

²³³ See, e.g., *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1055–57 (D.C. Cir. 1987) (declining to find that a lack of formal rules constrains an agency's exercise of its discretion through informal policy guidance). But see *United States v. Mead Corp.*, 533 U.S. 218, 231–34 (2001) (affording less deference to agency interpretations of statutes through policy guidance). Indeed, *Perry v. Sindermann*, 408 U.S. 593, 601–03 (1972), gives the executive an incentive *not* to constrain its discretion: those constraints may create property rights enforceable through the Due Process Clause.

²³⁴ See David A. Super, *The Quiet "Welfare" Revolution: Resurrecting the Food Stamp Program in the Wake of the 1996 Welfare Law*, 79 N.Y.U. L. REV. 1271, 1305–07 (2004).

²³⁵ See *id.* at 1306–07 n.121 (giving examples of those clearances and why they tend to interact to clog the regulatory process); see also Peter L. Strauss, Speech, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 WAKE FOREST L. REV. 745, 760 (1996) (commenting on Jimmy Carter's presidential campaign against "big government" and its increasingly ossified rule-making process).

²³⁶ This may be seen perhaps as a special case of skepticism of the idea that rules can ever be effectual in resolving important disputes. For an analysis of why the argument for formal rules may be undermined in actual legal settings, see Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1699–1701 (1976).

²³⁷ See George R. Goethals, *Presidential Leadership*, 56 ANN. REV. PSYCHOL. 545, 548–49, 563 (2005) (discussing Sigmund Freud's theories of leadership in the context of the American presidents and arguing that there is a positive correlation between power motivation and presidential success).

²³⁸ See Ronit Kark et al., *The Two Faces of Transformational Leadership: Empowerment and Dependency*, 88 J. APPLIED PSYCHOL. 246, 254 (2003) (finding support for "the hypothesized relationships between transformational leadership, followers' identification with the leader and the organizational unit, dependence on the leader, and certain indicators of followers' empowerment").

²³⁹ See, e.g., MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 31–62 (1977) (attributing shifts in private law rules in the early nineteenth century in part to judges coming to identify with industrialists rather than with landowners).

²⁴⁰ See SCHAUER, *supra* note 89, at 155–58 (discussing instability as a "reaction to systemic stability" but noting the importance of questioning whether or not stability is desirable beyond its abstract appeal).

“equivocation”²⁴¹ when seen through the eyes of those subject to those decisions, who may find planning difficult or feel the need to curry favor with the decision makers.²⁴² Recent experience with corruption can build empathy with those being regulated and support rules seeking to cabin administrative discretion.²⁴³ Periodic corruption scandals apparently have failed to make enough of an impression to temper the preference for discretionary administration.²⁴⁴ And concerns that discretion may be exercised in a discriminatory manner have made little headway against this country’s strong presumption that racism is aberrational.²⁴⁵

Thus, most people tend to identify with the decision maker. An individual gains leadership positions in part by persuading voters that they have much in common with her or him.²⁴⁶ Leaders are the prototypical members of the group that selects them; other members of the group naturally identify with the leader.²⁴⁷ Perhaps this also is the product of pluralistic democratic ideology, which encourages many people, at least opinion leaders, to imagine themselves making crucial decisions. They attribute to the leader their own qualities and values.²⁴⁸ As a result, empathy with decision makers dominates current

²⁴¹ ALEXANDER & SHERWIN, *supra* note 89, at 56 (defining equivocation as a form of coordination error that “occurs when individual actors can proceed in several incompatible ways and there is no reason to prefer one course of action over the other”).

²⁴² Cf. SCHAUER, *supra* note 89, at 137–45 (weighing the benefit of rules that can adapt to changing circumstances with the importance of fostering predictable rules that people can rely on).

²⁴³ See *id.* at 151–52 (discussing the consequences of limiting the range of factors decision makers may consider to prevent decision-maker abuses).

²⁴⁴ See, e.g., *Firms with Bush-Cheney Ties Clinching Katrina Deals*, USA TODAY, Sept. 10, 2005, http://www.usatoday.com/news/washington/2005-09-10-katrina-contracts_x.htm (reporting on close connections between government officials and private companies awarded reconstruction contracts following Hurricane Katrina).

²⁴⁵ See generally Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 321–23 (1987) (arguing that the equal protection doctrine should incorporate the unconscious racism entrenched within American culture).

²⁴⁶ See Michael J. Platow et al., *A Special Gift We Bestow on You for Being Representative of Us: Considering Leader Charisma from a Self-Categorization Perspective*, 45 BRIT. J. SOC. PSYCHOL. 303, 305 (2006) (discussing “in-group prototypicality” as a “key feature of leadership”); see also Kenneth J. Levine, *Voter Decision Making: The Tensions of Personal Identity, Personal Ethics, and Personal Benefit*, 49 AM. BEHAV. SCIENTIST 63, 64 (2005) (recognizing the “personal identity variable”—the voter’s identification with the candidate—as one of the factors involved in researching voting behavior).

²⁴⁷ See Michael A. Hogg, *A Social Identity Theory of Leadership*, 5 PERSONALITY & SOC. PSYCHOL. REV. 184, 187–90 (2001) (discussing group dynamics and the influence of group leaders via prototypicality, social attraction and attribution, and information processing).

²⁴⁸ See *id.* at 190 (contending that attribution processes yield a “tendency to construct a charismatic leadership personality for [the highly prototypical group member] that, to some extent, separates that person from the rest of the group and reinforces the perception of status-based structural differentiation within the group into leader(s) and followers”).

thinking. We imagine we would act virtuously in that position and we can imagine that person's frustration at having her or his "hands tied" so that she or he is unable to pursue the evidently wise course.²⁴⁹

Unconstrained discretion also may appeal to policymakers, particularly those who arguably previously held such discretion in the business world. Ordinarily, one would expect regulated entities to champion rulemaking to give them definite rules against which to plan. At present, however, many business interests' collective efforts are concentrated on reducing the substantive scope of regulatory authority.²⁵⁰ This leaves debates about *how* that authority is exercised largely up to the executive and its allies. Identification with policymakers also may distort our calculation of the economics of deferred decision making. All information-processing activities have a cost to the government.²⁵¹ The process of sorting among alternatives—the exercise of power—is a particularly pleasing form of work for policymakers, who may discount its cost.

Alternatively, we may imagine ourselves as being able to persuade the decision maker of the justice of our own cause; our fear, then, is that the decision maker will be persuaded but unable to act in our favor. Perhaps this sense results from negative experiences with large public or private organizations in which we were told—truthfully or otherwise—that the person on the phone or at the counter would like to help us but lacks the discretion to do so. People with weak social identification, accordingly, prefer discretionary administration.²⁵²

IV

DISCRETIONARY POLICYMAKING AND DISASTERS

Because of their high visibility and accelerated time lines, disasters provide an excellent means of examining otherwise obscure aspects of government behavior, such as the benefits and risks of reserved discretion.²⁵³ On its face, disaster preparation and response

²⁴⁹ One place where this generally is not true is the courts. Even while we promote broader discretion for the executive and legislative branches, we simultaneously seek to rein in so-called activist judges and runaway juries. Perhaps we have greater difficulty imagining ourselves in those positions, or perhaps those decision makers' relative isolation from the news media prevents us from having a sense of the frustrations they feel when their discretion is constrained. Or perhaps, the political insulation of federal, and some state, judges may make flexibility seem costlier.

²⁵⁰ See *supra* note 235 and accompanying text.

²⁵¹ See generally SCHWARTZ, *supra* note 100 (introducing the basic premise that sifting through extensive informational options is time-consuming).

²⁵² See generally Michael Wenzel & Prita Jobling, *Legitimacy of Regulatory Authorities as a Function of Inclusive Identification and Power over Ingroups and Outgroups*, 36 EUR. J. SOC. PSYCHOL. 239 (2006) (examining the tripartite power relationship between authority, ingroup, and outgroup in the context of self-identification and legitimacy).

²⁵³ The failure to address global climate change is likely to make disaster response an ever more important governmental task in the years to come. See David A. Super, *From the*

would seem to present the perfect case for postponing decisions: information about the time, location, and nature of the disaster are extremely valuable decisional inputs and utterly unobtainable in advance. As the preceding Parts explained, the superior information available to later decision makers is a crucial component of arguments for delaying decisions.²⁵⁴ Information about unforeseen problems is an obvious and seemingly compelling example of this. By that standard, disasters would seem to present a particularly strong case for delaying government decisions: disasters demand urgent responses to sudden crises whose particulars are all but impossible to anticipate. Rule-bound public administration, this narrative suggests, is too slow to adapt to rapid changes and would make crucial errors due to its deciding on rules with insufficient information. Therefore, evidence that maximizing reserved discretion is counterproductive even in coping with disasters would strongly undercut the case for legal procrastination generally.

Hurricane Katrina exposed severe deficiencies in all four major aspects of emergency management: mitigation, preparedness, response, and recovery.²⁵⁵ Maintenance of the levees protecting New Orleans and preparation of coordinated responses were badly underfunded.²⁵⁶ Evacuation planning was grossly insufficient²⁵⁷ and left tens of thousands of people stranded in the city as the hurricane approached.²⁵⁸ These stranded people then became vulnerable to criminal victimization and to acute shortages of food and drinkable water

Greenhouse to the Poorhouse: Carbon-Emissions Regulation and the Rules of Legislative Joinder, 158 U. PA. L. REV. 1093, 1143–57 (2010) (describing the difficulties of determining what the components of viable climate-change legislation should be).

²⁵⁴ See *supra* Part I.

²⁵⁵ See William L. Waugh, Jr., & Ronald John Hy, *Introduction to Emergency Management*, in *HANDBOOK OF EMERGENCY MANAGEMENT: PROGRAMS AND POLICIES DEALING WITH MAJOR HAZARDS AND DISASTERS* 1, 2 (William L. Waugh, Jr., & Ronald John Hy eds., 1990).

²⁵⁶ See SELECT BIPARTISAN COMM'N TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA, A FAILURE OF INITIATIVE, H.R. REP. NO. 109-377, at 87–92 (2006) [hereinafter A FAILURE OF INITIATIVE], available at <http://www.gpoaccess.gov/katrinareport/mainreport.pdf>.

[I]mprovements to levee strength which may have mitigated or prevented . . . critical breaches . . . were rejected by the competing local organizations. There also appear to have been lapses in both maintenance and inspections of selected levees, including those that breached. Also, prior to Hurricane Katrina, residents along those same levees reported they were leaking, another potential lapse in maintenance.

See also *id.* at 152 (“The diminished readiness of the national emergency response teams has been attributed to a lack of funding for training exercises and equipment.”).

²⁵⁷ See *id.* at 121 (recounting the disjointed evacuation planning during Hurricane Katrina).

²⁵⁸ See *id.* at 220 (“Many pre-planned distribution points were inaccessible and many hundreds of people were stranded by flood waters, blocked roadways or lack of fuel for transportation.”).

in the Superdome and the Convention Center.²⁵⁹ Outside assistance was tragically late in arriving²⁶⁰ and vast numbers of people whose homes were destroyed remain homeless, displaced, and cut off from jobs and community.²⁶¹ Each of these failures was arguably the consequence of an insufficiency of resources of one kind or another. Some resulted from insufficient funds allocated through the discretionary portions of the federal budget.²⁶² Others sprung from low-income people lacking cars, money for gas, or the means of sustaining themselves if they left town. Still others sprung from agencies' lack of capacity to respond timely to the sudden demands a disaster places on them. This Part contends that each of these shortfalls, in one way or another, also reflects an over-reliance on ad hoc exercises of discretion.

Subpart A examines the discretionary federal budgetary process. Here, the delegational dimension of discretion is relatively slight: power is shifted within the same institution from one set of committees (authorizers) to another (appropriators). The requirement of annual readjustments of spending priorities requires considerable additional decisional resources. If those resources are not forthcoming, the quality of the resulting decisions is likely to erode.

Subpart B conceptualizes exercises of discretion as investments of decisional resources. Although not all investments are wise, when we lose our ability to earn our accustomed level of income or face unanticipated expenses we will be most thankful for any sound investments we may have made in better times. Disasters shrink our decisional resources while generating a host of new decisions that we must make. Programs whose pursuit of flexibility caused them to postpone exercises of discretion—in effect, decisional spendthrifts—are likely to find themselves paralyzed at the crucial moment. Not only does this result in critical delays, causing immediate harm, but the agencies'

²⁵⁹ See *id.* at 244 (alteration in original) (citation omitted):

The conditions at the Superdome, as described in a National Guard report, illustrate the desperation felt by the crowd inside: "The water pressure declined steadily over the first several days and failed to provide toilet function on or about Wednesday the 31st of August. Unfortunately, many of the toilets had overflowed by then and foot traffic distributed fecal material and urine throughout the facility The warm temperature, combined with the floodwaters on the lower level, rotting food and other refuse, human and animal (pets) waste material, and the aroma of unwashed humans, produced an increasingly noxious smell in the place."

But see id. at 242 ("Many . . . reports . . . of unchecked violence in the Superdome[] appear to have been unsubstantiated.")

²⁶⁰ See *id.* at ix (listing "[w]hy supplies and equipment and support were so slow in arriving" as one of the questions the post-Katrina bipartisan investigation aimed to answer).

²⁶¹ See *id.* at 311 ("Louisiana and Mississippi immediately were faced with thousands and thousands of the suddenly homeless, without the ability to provide emergency shelter or longer-term housing for all of them.")

²⁶² See *supra* note 256.

frantic efforts to catch up are likely to yield underdeveloped decisions, causing further damage later as those failures become known.

A. Discretionary Budgeting and Preparation for Disasters

Limiting the harm that disasters will wreak depends heavily on preparation. Preparation is needed on both the collective and the individual levels. Government can play an important role in developing evacuation and response plans, training its personnel, and educating the public.²⁶³ In some areas, it also can mitigate disasters with investments in infrastructure: levees around New Orleans and on flood-prone rivers, vibration-resistant highways in California, and so forth. Individuals, in turn, need to have viable plans for evacuating where appropriate and sustaining themselves during any postdisaster chaos.

Maximizing flexibility, on the other hand, is the antithesis of preparation. A plan that countenances too broad an array of options becomes too complex for authorities to master and implement in an emergency. Beginning a major infrastructure improvement project requires sacrificing budgetary flexibility for several years to come. And failing to decide on a means of evacuation or sheltering may mean that none occurs in the chaos and confusion surrounding disasters.

This subpart examines how our current affinity for discretionary budgeting systematically disadvantages the very kinds of spending crucial to the government's preparation for disasters. In essence, we have come to rely on highly discretionary budgeting that postpones exercises of quantitative discretion, and often much more, to annual appropriations processes and executive agencies' implementation of those bills. This requires a steady stream of decision resources to sustain important projects. In fact, however, we have elected to devote many of those resources to a different purpose: ideological warfare.

1. *The Consequences of Discretionary Budgeting*

Modern government funds a vast array of activities. In addition, when it refrains from imposing taxes or tapping credit markets, government allows a far wider array of private activities to proceed. No one individual or group of individuals small enough to coordinate their judgments closely can possibly understand each of the functions of government well enough to compare their value accurately—much

²⁶³ Establishing sound plans to mitigate the physical and financial harm from potential disasters also can protect the government from *ex post* demands for excessive and ill-targeted disaster relief spending. See Howard Kunreuther & Mark Pauly, *Rules Rather Than Discretion: Lessons from Hurricane Katrina*, 33 J. RISK & UNCERTAINTY 101, 103 (2006).

less to compare them with the private activities they might be displacing.²⁶⁴

Two interrelated but quite separate kinds of decisions are needed to operate a governmental program. First, the content of that program must be determined. This involves exercises of initiative, normative, and structural discretion. Second, the program's funding level must be set, an exercise of quantitative discretion. The program's organization is likely to differ substantially depending on the sequencing of, and allocation of responsibility for, these decisions.

Legislators, as well as popular journalists and the electorate as a whole, are far better able to comprehend and form opinions about initiative, normative, and, to a lesser extent, structural decisions about programs' content. Everett Dirksen is rumored to have captured the difficulty most people have in assessing programs' budgets with his famous quip that "a billion here, a billion there, and pretty soon you're talking real money."²⁶⁵ Thus, a process that controls programs first through qualitative decisions by the legislature is likely to be the most transparent. On the other hand, processes in which the legislature's input is largely through setting a funding level is likely to be difficult for the public to critique and provides the maximum amount of discretion to administrators. It does this both because the legislature will likely be dependent on administrators for advice in setting that number and because it will leave the most discretion to the administrators in determining how to balance the program's competing priorities in spending whatever money the legislature allocates.

At the federal level, the various policymaking and funding mechanisms for public programs can be arrayed in a continuum from those made earliest, with the most transparency, to those delayed longest, with the most obscurity. The easiest programs for the electorate and their agents in Congress and the news media to evaluate are those for which Congress makes the important decisions about the existence, norms, and structure of the program *and* supplies eligibility and benefit formulas that determine automatically the program's funding level. These include budgetary entitlements or direct spending programs such as Social Security, Medicare, farm price supports, and food

²⁶⁴ See RICHARD A. POSNER, *CATASTROPHE: RISK AND RESPONSE* 9 (2004) (comparing this problem to that of early hominids "had they been prone to let their attention wander from situations fraught with a high probability of immediate death . . . to low-probability menaces").

²⁶⁵ Although this famous quote is often attributed to Senator Dirksen, historians have been unable to conclusively attribute this utterance to him. See "A Billion Here, A Billion There . . .", DIRKSEN CONGRESSIONAL CENTER, http://www.dirksencenter.org/print_emd_billionhere.htm (last updated Jan. 15, 2009).

stamps.²⁶⁶ Whatever changes Congress makes in program rules translate automatically, without further action, into expanded greater or decreased spending without further policymaking. Congress controls spending by reviewing cost estimates for proposed changes. In sum, the qualitative decisions dominate and drive the quantitative ones.

A somewhat less transparent, and more discretionary, approach is to have Congress write detailed programmatic rules into permanent authorizing legislation but to postpone funding decisions until annual appropriations. Here Congress, under the leadership of its substantive authorizing committees, has made specific qualitative decisions about the program's structure, but those decisions may not be carried out fully if it does not subsequently, under the leadership of its appropriators, exercise quantitative discretion to activate the structure it has established.²⁶⁷ Administrators commonly have some flexibility about how a shortfall of funding is allocated; this can amount to a mandate to exercise abrogational discretion and hence render apparent normative and structural decisions illusory. In addition, this funding method gives appropriators the discretion to "earmark" funds—again, either revising or temporarily abrogating previous normative and structural decisions—in response to the most recent information about need (or political pleading). In this model, the qualitative and quantitative decisions about program design are separated, with neither necessarily subordinate to the other.

Most discretionary of all are programs ill-defined in substantive law in which Congress's involvement is largely limited to providing funds. Some of these are block grants to states.²⁶⁸ Others are, in effect, block grants to particular federal administrators to spend as they see fit within broadly defined sets of goals.²⁶⁹ For example, most funding for law enforcement leaves administrators broad discretion

²⁶⁶ Although Congress renamed the Food Stamp Program the Supplemental Nutrition Assistance Program (SNAP) in 2008, 7 U.S.C.A. § 2013(a) (West 2010), this Article follows the still-common convention of referring to "food stamps," in particular because the immediate aftermath of Hurricane Katrina, *see infra* Part IV, occurred before the name change.

²⁶⁷ *See* STANDING RULES OF THE SENATE R. XVI, S. DOC. NO. 110-9 (2007) (prohibiting new or general legislation, including that to create or modify a program, on appropriations bills). This process can become even more opaque to the public if the legislation establishing the program authorizes—but does not appropriate—a specific sum for the program. *See, e.g., Affordable Care Act: Prevention and Public Health*, NAT'L ASS'N OF CNTYS., <http://www.naco.org/programs/csd/Documents/Health%20Reform%20Implementation/Prevention%20and%20Wellness.pdf> (last visited Apr. 11, 2011) (listing various programs in the Affordable Care Act that are authorized but not appropriated). These authorization ceilings typically have little practical effect, but they give the appearance of being exercises of quantitative discretion.

²⁶⁸ *See, e.g.,* 42 U.S.C. §§ 601–619 (2006) (establishing block grants to states for the temporary assistance for needy families (TANF)).

²⁶⁹ *See, e.g.,* DAVID M. BEARDEN & ROBERT ESORTHY, CONG. RESEARCH SERV., RS22386, ENVIRONMENTAL PROTECTION AGENCY: FY2007 APPROPRIATIONS HIGHLIGHTS 1 (2007).

about *which* laws will receive how much enforcement and in *which* contexts. Here, Congress partially reverses the usual sequence of policy development, exercising initiative discretion and quantitative discretion while leaving much or all of the normative and structural discretion to the recipients of its largess. If Congress becomes involved in policymaking at all, it is likely to be as an adjunct to its funding role in the form of earmarks and other special provisions fine-tuning the program. This model subordinates qualitative to quantitative decisions and delegates the former to highly discretionary choices in annual appropriations and agency decision making.

Among these three models, the current tendency is strongly in favor of greater discretion.²⁷⁰ Politicians of both parties routinely rail against entitlements, which they claim are wrecking the federal budget.²⁷¹ Even among nonentitlement (formally known as “discretionary”) programs, the trend is toward maximizing discretion and minimizing the number of decisions made in permanent legislation.²⁷² The main procedural impediment to this model—House and Senate rules forbidding most new substantive legislation on appropriations bills²⁷³—have fallen into almost complete disuse. Major new spending programs increasingly take the form of block grants or their equivalents, existing programs are merged into new block grants, and broad authority for administrative waivers is added to override many of the conditions that remain. Even where statutes still contain discretion-limiting substantive choices, the courts have reduced their importance by restricting private rights of action.²⁷⁴ Thus, if administrators or recipients disregard Congress’s qualitative choices about program design, no real consequence ensues. In sum, the value of avoiding long-term qualitative policy decisions that would limit flexibility to adjust government spending programs to respond to current needs is highly privileged relative to the democratic values of open and politically accountable decision making.

²⁷⁰ See generally Cynthia R. Farina, *Deconstructing Nondelegation*, 33 HARV. J.L. & PUB. POL’Y 87 (2010) (discussing the federal courts’ reluctance to enforce nondelegation principles); Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 454 (2003) (“The affirmative side of administrative law in structuring discretionary lawmaking will increasingly rely on structures that are not centered on courts and thus will conserve scarce judicial resources.”).

²⁷¹ See Ross Douthat, *The Dilemmas of Entitlement Reform*, N.Y. TIMES (Mar. 17, 2011, 3:03 PM), <http://douthat.blogs.nytimes.com/2011/03/17/the-dilemmas-of-entitlement-reform/>; Michael Sherer, *Can Obama Actually Achieve Entitlement Reform?*, TIME (Feb. 23, 2009), <http://www.time.com/time/politics/article/0,8599,1881223,00.html>.

²⁷² See sources cited *supra* note 270.

²⁷³ See RULES OF THE HOUSE OF REPRESENTATIVES R. XXI, H.R. Res. 5, 112th Cong. (2011) (enacted); STANDING RULES OF THE SENATE R. XVI, S. DOC. NO. 110-9 (2007).

²⁷⁴ See, e.g., *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 61–62, 64–65 (2004) (disallowing judicial review under the APA of an agency’s failure to act where challengers were not seeking a sufficiently specific act).

To be sure, earmarks are widely condemned in principle, and particularly appalling examples, such as “bridges to nowhere,”²⁷⁵ are held up to ridicule. In practice, however, earmarks are so ubiquitous and diverse, and the collective action problems with attacking them are so severe, that they are difficult or impossible to eradicate. And, in fact, many see them as a necessary if undesirable cost of maintaining a highly discretionary approach to government spending.²⁷⁶

The claimed advantages of discretionary budgeting are several, all celebrating flexibility in one form or another. Discretionary programs automatically come up for review every year²⁷⁷ and thus are far easier procedurally to adjust for new circumstances or preferences. Therefore, so the argument goes, they are immune to the risk of “running out of control”—consuming more resources than anticipated—that is commonly ascribed to entitlement programs.²⁷⁸ Moreover, these annual reviews allow the programs’ resources to be redirected to the most urgent areas or types of need: the programs are less likely to waste resources solving “yesterday’s problem.” As we see the pace of social, economic, and technological changes accelerating, we feel this need with greater intensity. More generally, we tend to identify with decision makers, either appropriators or administrators, and empathize with the frustration that they must feel having “their hands tied” when they believe different policies would work well.²⁷⁹

All of this reasoning, however, assumes that we are consistently able to make sound decisions. If our decision-making competence fluctuates over time, we may be better off adhering to an older deci-

²⁷⁵ The “Bridge to Nowhere” was a bridge that would link Ketchikan, Alaska, on one island in southeastern Alaska, to its airport on another island and replace the ferry service previously used to connect the two islands. At a cost of \$398 million, the proposed bridge was widely condemned as a prime example of federal “pork-barrel spending,” as earmarks are popularly coined. See *Alaska: End Sought for “Bridge to Nowhere,”* N.Y. TIMES, Sept. 22, 2007, at A12.

²⁷⁶ Michael Coleman, *N.M. Senator’s Earmark Comes Under Fire*, ALBUQUERQUE J., Dec. 18, 2010, at A1 (“‘I believe that sometimes it is necessary to earmark funding for our state, rather than leaving all funding decisions up to federal agencies,’ [Senator] Bingaman said, adding that he does not believe eliminating earmarks would necessarily lead to budget cuts.”); Greg Allen, *Morning Edition: To Defenders, Some Earmarks Are Sound Politics*, NPR (Dec. 22, 2010), <http://www.npr.org/2010/12/22/132205569/to-defenders-some-earmarks-are-sound-politics> (“The problem with eliminating earmarks is that you’re essentially ceding those decisions, for the most part, to bureaucrats within agencies that may or may not have done their homework.” (quoting Kirk Fordham, CEO of the Everglades Foundation)).

²⁷⁷ Patrick Fisher, *Entitlements and the Congressional Budget Process*, in 1 ENCYCLOPEDIA OF PUBLIC ADMINISTRATION AND PUBLIC POLICY 437, 437 (Jack Rabin ed., 2003).

²⁷⁸ See George K. Yin, *Temporary-Effect Legislation, Political Accountability, and Fiscal Restraint*, 84 N.Y.U. L. REV. 174, 178–80 (2009) (arguing that “temporary-effect legislation,” or discretionary spending programs, “increases political accountability and may enhance fiscal restraint”).

²⁷⁹ See *supra* notes 246–49 and accompanying text.

sion, based on less-current information, than a recent, better-informed one. An older will made when the testator was of sound mind, for example, prevails over a more recent one made in the fog of incompetence even if the newer will has the benefit of greater information and experience about the behavior of the testator's family and friends.²⁸⁰ Indeed, the very process of seeking more recent information may corrupt the decision-making process (yielding "undue influence" in the language of wills). Some problems with discretionary decision making are well-analyzed in the literature: capture and the influence of rent-seeking interest groups.²⁸¹

These discussions, however, generally fail to appreciate the decision-making process as a scarce resource in itself, separate and apart from the resources it allocates. This Part corrects that omission. It argues that our appropriations and administrative systems cannot fulfill the expectations implicit in the discretionary budgeting model if our political system is using them for other purposes. Specifically, it argues that a budgetary process that has been pressed into service in ideological warfare is ill-suited to the kind of frequent fine-tuning that the discretionary budgeting model assumes. And although this deficiency infects all programs subject to discretionary budgeting, this section shows that it strikes particularly hard at the kinds of programs that are crucial to ameliorating and preparing responses to disasters.

The preference for flexibility in allocating public resources also assumes that new information will have significant added value. Allocating budgetary resources among them thus requires considerable estimation and approximation. Sincere disagreements about estimation methodologies, as well as opportunistic exploitation of this uncertainty to serve particular ends, can open the door to considerable contention even where fundamental values are widely shared. Thus, the imprecision of these estimates as well as disagreements about fundamental values render the comparison of competing claims on the public fisc an inevitably political process. Here again, if that political process is consumed with intense, essentially continuous, trench warfare over strongly held ideological points, it is less likely to be able to assimilate the necessary data to perform the kinds of adjustments that would make sense under any coherent set of normative assumptions.

²⁸⁰ A will made by a person of unsound mind is presumptively invalid, because [in order to make a donative transfer], the testator . . . must be capable of knowing and understanding in a general way the nature and extent of his or her property, the natural objects of his or her bounty, and the disposition that he or she is making of that property, and must also be capable of relating these elements to one another and forming an orderly desire regarding the disposition of the property.

RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.1(b) (2003).

²⁸¹ See, e.g., Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHL.-KENT L. REV. 1039 (1997).

Finally, the preference for discretionary budgeting tends to ignore the costs of continually revising these decisions. In a polarized political environment, these decisions are likely to be hard-fought and to consume substantial political capital. Funding programs backed by cohesive interest groups may well proceed in this environment because those interest groups can provide the necessary capital. Other programs with diffuse and difficult to identify beneficiaries, such as disaster funding, may not be able to command decision makers' full attention each year under a discretionary budgeting system.

The tenor of political debates about the budget varies considerably over time. To some extent, this variation reflects the broader political climate: harmonious times may result in thoughtful budgeting while deep divides over other issues may easily spill over into budgetary politics. Some of this variation, however, springs from changes in attitudes toward what can be accomplished through the budget process. Actors that care most about the shape of specific policies, whether for noble or ignoble reasons, are likely to work cooperatively to ensure that their pet programs or tax preferences survive periods when they are out of power. On the other hand, actors whose priority is major change in the size of government—to cut spending or to grow the revenue base—are unlikely to achieve success in coalition. At least until they determine the extent to which they can remold the political system in their favor, they may remain belligerent and opportunistic, even if from time to time this allows their opponents to frustrate their particular policy priorities.

As the following subsections show, this country has been locked in a virtually continuous war over the scope of the federal government for the past quarter century.²⁸² As a result, fewer programs have enjoyed bipartisan protection absent clear evidence of immediate benefits.

2. *The Chronic Fiscal War*

The promise of immediate tax cuts and of new spending for pet projects long has been a staple of political campaigns.²⁸³ President Ronald Reagan's 1981 tax and spending cuts,²⁸⁴ however, truly did initiate a revolution by defining the Republican Party as prioritizing a large, permanent reduction in the scope of government over any pref-

²⁸² See MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* 15–16 (2003) (contending that politics in the United States are unusually polarized at present).

²⁸³ See, e.g., CONRAD BLACK, *RICHARD M. NIXON: A LIFE IN FULL* 365–67 (2007) (describing Richard Nixon's campaign to cut taxes during the 1960 presidential campaign).

²⁸⁴ See Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357; Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172.

erences about the content of the government's program.²⁸⁵ President Reagan and congressional Republicans retreated from that program the following year in the face of towering deficits.²⁸⁶ Eight years after President Reagan relented, however, Congressman (and later Speaker of the House) Newt Gingrich revived a single-minded commitment to shrinking government and rode it first to control of the Republican Party and then to retake Congress.²⁸⁷ Bush made huge tax cuts the centerpiece of his campaign and, upon taking office, his domestic policy.²⁸⁸ Even after one of the largest and fastest fiscal turnarounds in the nation's history—from multitrillion dollar surpluses to multitrillion dollar deficits—the Bush administration and congressional Republicans continued to enact further deep tax cuts.²⁸⁹ After taking a thumping in the 2008 elections, Republicans regained control of the House and picked away at the Democratic majority in the Senate in 2010 by championing tax and spending cuts.²⁹⁰

A political party cannot easily compromise on its signature proposals without disappointing its zealots and blurring partisan lines for the next election.²⁹¹ Thus, with reducing public spending so central

²⁸⁵ Former OMB Director David Stockman christened this strategy as “starving the beast.” Paul Krugman, *The Tax-Cut Con*, N.Y. TIMES, Sept. 14, 2003, § 6 (Magazine), at 54, 56 (also noting that in an interview on National Public Radio, Grover Norquist, President of Americans for Tax Reform, expressed the desire to “reduce [government] to the size where I can drag it into the bathroom and drown it in the bathtub”).

²⁸⁶ See Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324.

²⁸⁷ See Karen Hosler, *House Passes Democratic Budget Plan—GOP Alternative Falls Short of Goal by \$100 Billion*, BALT. SUN, Oct. 17, 1990, at 1A (describing then-Minority Whip Newt Gingrich's steadfast refusal to agree to tax increases, signaling a Republican rebuke of the budget proposed by President George H.W. Bush, a fellow Republican, and a deep divide on the issue among Republicans). In 1994, the “Republican Revolution” resulted in the Republican Party taking control of the House of Representatives for the first time in forty years, with Gingrich at the helm. See Andrea Stone, *Parts of Republican Revolution Fade with Age: Party Adopts Practices That It Once Criticized*, USA TODAY, Jan. 19, 2003, at 5A.

²⁸⁸ See Dana Milbank, *From His “Great Goals” of 2000, President's Achievements Mixed*, WASH. POST, Sept. 2, 2004, at A01 (reporting that while President Bush had mixed success in accomplishing his objectives during his first term, he had made “enormous progress” toward the goal of cutting taxes).

²⁸⁹ See, e.g., Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, 117 Stat. 752 (increasing the exemption amount for the individual Alternative Minimum Tax and lowering income taxes from dividends and capital gains).

²⁹⁰ See Richard Cowan, *House Republicans Seek \$32 Billion in Spending Cuts*, REUTERS, Feb. 3, 2011, available at <http://www.reuters.com/article/2011/02/03/us-usa-congress-spending-idUSTRE7125Z420110203?pageNumber=2> (“In their 2010 congressional campaigns, Republicans pledged to cut \$100 billion from Obama's [fiscal year 2011 budget] request and to set domestic discretionary spending back to 2008 levels—before massive government bailouts and spending measures were instituted to help rescue an economy plunging into a deep recession.”).

²⁹¹ For example, although congressional Republicans introduced several bills in 1993 and 1994 that would have expanded health insurance coverage vastly, President Clinton and congressional Democrats felt they could not politically afford to pass legislation that was not clearly theirs. Jay Carney, *Is This the Last Best Hope?*, TIME, July 4, 1994, at 28.

to the ongoing electoral program of one of the two major parties, the prospect for sustained bipartisan accord becomes remote: Republicans must drive an impossibly hard bargain. Accordingly, some Democrats' efforts to compete by attacking the government's competence to solve problems²⁹² produced not consensus but rather additional cuts.²⁹³ Neither party, however, typically wishes to campaign on proposals for large cuts in funding to specific, popular programs. The result, then, is a bifurcation between a highly salient process of setting overall spending levels for broad classes of programs and a largely obscure process of actually allocating those cuts. The congressional budget process rationalizes this approach by leaving the funding of the vast majority of programs to annual appropriations bills that, in theory, can respond to the most severe needs each year. Thus, if the cuts in one program prove too severe the appropriators (at least in theory) can restore its funding the next year by slashing something else.

3. *The Special Vulnerability of Funding for Disaster Preparation*

Different types of budgetary items draw political support in different ways. Some involve ongoing, readily apparent needs. If we stop funding our embassy in France, for example, we will have more difficulty communicating with the French. Others have ongoing support from interest groups. Any proposal to defund the National Labor Relations Board (NLRB), for example, would bring howls of protest from unions and industry groups that value labor peace. Still others' functional and political value is relatively difficult to discern on an ongoing basis; these items enter the budget in response to a crisis and remain as long as memory of that crisis persists. For more than a generation, for example, Pearl Harbor increased this country's willingness to fund its armed forces in peacetime. Mining disasters similarly stimulate support for funding mine safety inspectors; the mine safety program coasts politically between crises.

Pressure to reduce real public spending changes both the analytical and the political sides of budget making. The simple-minded ac-

²⁹² For example, Vice President Al Gore's National Performance Review, and his celebrated appearance on late night television to demonstrate the waste he had found, had little partisan content: he made little attempt to suggest that the waste was the fault of his Republican predecessors rather than being an intrinsic feature of the federal government. This message badly undercut the Clinton administration's proposals for expanding the federal role in organizing health care and other services. See Joe Klein, *The Vice President's Ashtray*, NEWSWEEK, Aug. 16, 1993, at 27.

²⁹³ Split control of national government forced a series of short-term truces between 1995 and 2001, but the divide remained. See Allen Schick, *A Surplus, If We Can Keep It: How the Federal Budget Surplus Happened*, BROOKINGS (2000), http://www.brookings.edu/articles/2000/winter_governance_schick.aspx ("Divided government has blocked Republican ambitions for large tax cuts and deterred Democrats from big increases in social spending.")

count of public budgeting would hold that we should reduce spending when the marginal value produced by the least useful dollar spent is less than the value that dollar would produce if diverted to a tax cut or to increasing the government's net worth (e.g., by reducing a deficit or building up a reserve). The slogan "cut the fat out of government" implicitly reflects this assumption. In fact, both the inability to identify reliably the least-valuable government expenditures and many low-value programs' political defenses ensure that spending reductions will be a "market basket" composed of low-, medium-, and even a few high-value items. Thus, the correct question is whether the marginal value of the first dollar that is *likely* to be cut exceeds that of the same dollar allocated to a tax cut or an increase in net public reserves. Of course, the same kinds of imperfections govern alternative applications of money cut from spending: just because deficit reduction or highly-productive tax cuts might be superior uses of funds does not mean that any spending reductions will go there. Thus, a clever politician can sell ever-greater requirements for spending cuts by pointing to the difference between the value of the worst (but politically untouchable) spending programs and the best (but politically unattainable) tax cut or deficit reduction goal, knowing that each is likely still to be around the next year.²⁹⁴

Spending reductions are sold, however, on the assumption that the items to be cut are dispensable. Because no one is eager to admit that she or he is cutting vitally needed expenditures, decision makers in this environment tend to downgrade their estimates of the value of programs. This process has the greatest impact on programs whose impact is most difficult to measure or intuit. At the same time, the political process becomes more focused on the present: lessons learned in past crises are more quickly forgotten—and risks in the indefinite future more easily dismissed—in the face of intense pressure to achieve immediate savings. This gives budget analysts a compelling reason to acquiesce in, or even to exaggerate, the limits on their ability to project future risks and needs.²⁹⁵

²⁹⁴ Big spenders could, in theory, do the reverse and justify a larger budget by pointing to the most sympathetic unmet need and then comparing it to the most egregious special interest tax loophole. In practice, however, this would be difficult: legislators might substitute other, less politically buttressed, tax increases for the criticized loophole, but they would have difficulty the following year explaining why they have nothing to meet the need that they identified the year before. Tax policy and deficit projections are sufficiently opaque to the public, however, to make this "bait and switch" strategy quite feasible.

²⁹⁵ Judge Posner notes that "[a] compelling reason for not giving a great deal of thought to the remote future is the difficulty, often the impossibility, of making accurate predictions beyond a few years." POSNER, *supra* note 264, at 17. More broadly, he notes that the law's failure to respond to new knowledge about causation is symptomatic of its general "faltering struggle to cope with the onrush of science." *Id.* at 8. "Modern science,"

Applying severe, virtually across-the-board, pressure to reduce spending to pay for tax cuts or to reduce a deficit is a blunt instrument. Its advocates cannot predict precisely which programs will be cut by how much. And because the level of cuts demanded is not tied to estimates of how much is spent on programs conservatives specifically oppose, those responsible for making the cuts will have no palatable alternatives. Indeed, those programs' inability to show tangible results in non-disaster times invites assertions that they are overfunded and unproductive.²⁹⁶ For similar reasons, a wide range of programs to promote pro-social behavior become vulnerable because their effects are difficult to measure.²⁹⁷ In sum, the time horizon of decision makers telescopes, and shortsighted, risky cuts become more appealing: cutting spending on levees, for example, will have no political costs in the likely event that no big storm strikes near New Orleans; other possible cuts are assured of yielding obvious problems.

When intermittent hazards arise often enough, on the other hand, analysts and politicians can convert the probability that it will occur at any given time into an estimate of the frequency of the hazard, a computation far easier to comprehend.²⁹⁸ City councils, for example, routinely fund fire departments even when nothing is burning at the time of the vote because they have a sense of the frequency of fires. Although the recurrence of some kinds of disasters—certainly hurricanes and earthquakes—is well-known, uncertainties about the place, and the distinctive characteristics of each individual occurrence, prevent many from treating them as predictable phenomena with known frequencies; even if we intellectually “know” more hurricanes and earthquakes are inevitable, that conviction does not readily rise to the level that can motivate action.²⁹⁹

Furthermore, chronic fiscal warfare leaves the party in power with little reason to continue to devote resources to projects whose support lies primarily within the opposing party. Conversely, those opposing

Posner notes, “enables remote causes to be identified and diffuse effects traced to them.” *Id.* at 9.

²⁹⁶ See Patrick S. Roberts, *Shifting Priorities: Congressional Incentives and the Homeland Security Granting Process*, 22 REV. POL'Y RES. 437, 438–39 (2005).

²⁹⁷ See David A. Super, *The Political Economy of Entitlement*, 104 COLUM. L. REV. 633, 696–703 (2004) (“[The] difficulty in describing nontitlement programs systematically skews political debates about them. In particular, it greatly complicates advocacy for expanding or preserving such programs and provides opportunities for dedicated opponents to maneuver program reductions going far beyond what policymakers and voters think they are approving.”).

²⁹⁸ See POSNER, *supra* note 264, at 10 (“The mental exertion required to think about things that one has not experienced is a form of imagination cost and a clue to why people do better in dealing with probabilities when they are restated as frequencies . . .”).

²⁹⁹ See *id.* Using the September 11, 2001, terrorist attacks as an example, Posner argues the risk of such a terrorist attack was not taken seriously “until it actually happened, though the risk was well known.” *Id.*

budget cuts have little chance of appealing successfully to members of the dominant coalition. The terms of the current polarization are particularly dangerous to those dependent on government services because one of the two parties is running on an explicit program of dismantling much of government.³⁰⁰

4. *Underfunding Preparedness Before Hurricane Katrina*

Scarce federal budgetary resources continually stymied efforts to plan for known hurricane risks in the New Orleans area. Although the then-director of the Federal Emergency Management Agency (FEMA), Joe Allbaugh, promised in August 2001 to fund the development of a hurricane federal response plan for the region, after an initial kickoff meeting in December 2001, the project “moved in ‘starts and stops’ for a year because of budget problems” and other issues.³⁰¹ In 2002, FEMA’s regional director noted that New Orleans had limited evacuation routes and no provision for evacuating one hundred thousand people without transportation.³⁰² The following year, slides prepared for a meeting a FEMA meeting recognized that a hurricane hitting New Orleans would be “cataclysmic” and that “250,000 to 350,000 people would be stranded.”³⁰³

FEMA finally produced some of the promised funding in 2004.³⁰⁴ Even then, however, it remained strikingly parsimonious about planning for the severe risks it had recognized: to save money, for example, it insisted that six topics, including pre-landfall evacuation, be omitted from the planning project.³⁰⁵ Perhaps fearing that the funding would disappear again, state officials rushed the scheduling of the simulation, giving the contractor only fifty-three days to prepare for the kind of exercise many contractors would take two or three years to plan.³⁰⁶ FEMA’s failure to pay \$15,000 to transport participants postponed a follow-up workshop that fall.³⁰⁷ Budgetary problems also killed a larger exercise in summer 2005 intended to identify additional problems and refine disaster planning.³⁰⁸

³⁰⁰ See *supra* notes 283–90 and accompanying text.

³⁰¹ S. COMM. ON HOMELAND SEC. AND GOV’T AFFAIRS, HURRICANE KATRINA: A NATION STILL UNPREPARED, S. Rep. No. 109-322, at 110–12 (2006) [hereinafter A NATION STILL UNPREPARED], available at <http://www.gpoaccess.gov/serialset/creports/katrinanation.html>.

³⁰² *Id.* at 112.

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ See A FAILURE OF INITIATIVE, *supra* note 256, at 81.

³⁰⁷ A NATION STILL UNPREPARED, *supra* note 301, at 113.

³⁰⁸ See A FAILURE OF INITIATIVE, *supra* note 256, at 82.

State disaster preparedness was similarly chronically underfunded.³⁰⁹ Louisiana's state emergency preparedness office's staff was forty percent smaller than the national average and also largely inexperienced: "Depressed pay scales both prevented the agency from hiring experienced candidates and led to high turnover. Planning in particular suffered."³¹⁰ The lack of state follow-through prevented New Orleans from finalizing agreements with Amtrak and other carriers to help with pre-landfall evacuations in the 2005 hurricane season.³¹¹

B. Discretion and Disaster Response

Disasters obviously cause a rapid increase in demand for administrative decisions. A great many of these are retrospective adjudications of claims for relief benefits or people accused of claiming benefits inappropriately. Another class is requests for prospective guidance: what to do in an unfamiliar situation, which regulations may be disregarded, and the like. Most people in the way of disasters tend to honor clear, directive statements from authorities.³¹² Unfortunately, maintaining broad discretion on how to respond to a disaster commonly results in conflicting official viewpoints.³¹³ Although democratic societies value a diversity of opinion in normal times, during a disaster it can cause costly indecision.³¹⁴ Finally, agencies face a host of intramural managerial decisions about how to compensate for lost administrative infrastructure. Disasters temporarily expand the administrative state's substantive agenda, thus incapacitating some institutions to which agencies commonly defer and suspending some of the rationales for limiting agencies' interventions.

At the same time, disasters sharply reduce agencies' capacity to make and implement decisions. One signal feature of a disaster is a sudden scarcity of resources; this scarcity commonly affects a wide range of vital commodities including shelter, food, safe water, health care, transportation, communications, energy, and sometimes even air.³¹⁵ The suddenness of a disaster, and resulting shortages of infor-

³⁰⁹ See A NATION STILL UNPREPARED, *supra* note 301, at 81.

³¹⁰ *Id.* (footnote omitted).

³¹¹ *Id.*

³¹² See HARRY ESTILL MOORE ET AL., BEFORE THE WIND: A STUDY OF THE RESPONSE TO HURRICANE CARLA 124 (1963).

³¹³ See *id.* at 142 (describing the inconsistencies among local responses to disaster and calling for better coordination between local, state, and national actors).

³¹⁴ See *id.* at 139.

³¹⁵ See, e.g., Erik Auf Der Heide, *Principles of Hospital Disaster Planning*, in DISASTER MEDICINE, 95, 99 (David E. Hogan & Jonathan L. Burnstein eds., 2d ed. 2007) (instructing disaster-relief planners to assume that "a shortage of supplies and medical personnel will exist").

mation,³¹⁶ hamper efforts to prepare or tap reserves. These sudden shortages profoundly affect the administrative state. It faces an acute deficit of decision making resources. With the time and personnel scarce in the affected area, it typically is ill-equipped to adjudicate. And with shortages in information, time, and communications, officials outside of the disaster area are ill-equipped to fill the gap.³¹⁷ Thus, disasters create sudden, severe imbalances between the demand for administrative decisions and the resources for supplying those decisions.

An organization anticipating sudden imbalances between demand and supply can respond in several ways. First, and most basic, it can ensure that it does not carry backlogs of work from prior periods that would distract it when a crisis hits. Second, it can go a step further and complete part of the process in advance. A restaurant, for example, may prepare dishes to order, but its chefs always chop vegetables well in advance of the lunch rush. Third, it can ensure that its most expert employees fill the most pivotal roles. Fourth, it can extract more work from its staff through schedule changes and overtime. Finally, it can reduce marginal production costs by streamlining its production process or temporarily eliminating less important steps. The five subsections below examine each of these approaches, both in the immediate context of a disaster and in terms of what they may portend for administrative law after the emergency has passed.

1. *Avoiding Chronic Decision-Making Backlogs*

Backlogs of adjudications can undermine the government's effectiveness in the same manner that clogged judicial dockets or fiscal deficits do. As such, they should be identified and addressed just as those other forms of public disinvestment. Most of the time, however, they go relatively unnoticed except by those directly subject to them.³¹⁸

Disasters can expose the harm adjudicative backlogs cause. For example, the inspection of the bus that crashed during the evacuation from Hurricane Rita was delinquent even prior to when the emer-

³¹⁶ See Philip J. Weiser, *Communicating During Emergencies: Toward Interoperability and Effective Information Management*, 59 FED. COMM. L.J. 547, 549–53 (2007).

³¹⁷ Regardless of their expertise, officials outside of the disaster area may be unable to make many decisions because “when conditions are changing rapidly, predictions based on simple extrapolation from past experience are likely to be completely unreliable.” POSNER, *supra* note 264, at 12.

³¹⁸ See *Heckler v. Day*, 467 U.S. 104, 119 (1984) (overturning the lower court's order limiting the Social Security Administration's delays in adjudicating its reconsideration of disability applications). *But see* *Harley v. Lyng*, 653 F. Supp. 266, 276 (E.D. Pa. 1986) (declaring that “hunger takes no holidays” in ordering the state to expedite action on food stamp applications).

gency arose.³¹⁹ At that point, Texas lacked the administrative resources to make up the shortfall and elected to waive its inspection regime, with tragic results.³²⁰ Similarly, Texas for many months had failed to resolve serious operational problems with its primary public benefits computer system.³²¹ Having let those problems linger as it devoted its energies to planning a major privatization scheme, it was forced to try to process assistance to disaster victims on the antiquated system it had been working to replace.³²²

2. *Front-Loading Administrative Decision Making*

An agency cannot adjudicate an individual's case before that case arises. An agency can, however, take action now that reduces its future adjudicatory burden. Setting clear policies can prevent some disputes from ever arising. And for those determinations that cannot be avoided—either because prospective measures fail to control behavior or because they do not involve behavioral matters—an agency can simplify the issues by promulgating rules. Thus, rules can be seen as a form of decisional capital.

Unfortunately, in the current climate, agencies show little interest in “saving” in this manner. A key reason is the contemporary fascination with administrative discretion, leading to a preference for leaving decisions open as long as possible. This is yet another chronic structural flaw in the administrative state that Hurricane Katrina laid bare. Subsection a below shows that an unwillingness to invest decisional resources proved just as ruinous as the lack of budgetary resources in federal, state, and local planning for the disaster. Subsection b compares three agencies' responses to Hurricane Katrina to demonstrate the dangers of relying on “just-in-time” policy-making. Subsection c then discusses another means of “banking” decisional resources that current practice also shuns: judicial decisions as a means of pre-positioning decisional resources.

³¹⁹ *Hurricane Rita Bus Owner Found Guilty*, USA TODAY, Oct. 3, 2006, http://www.usa.today.com/news/nation/2006-10-03-rita-bus_x.htm (reporting that the owner of the bus that exploded and killed twenty-three people during the Hurricane Rita evacuation was convicted for poorly maintaining his fleet of buses and for not requiring his drivers to fill out vehicle inspection reports).

³²⁰ See Michael Grabell & Vanesa Salinas, *Schools Relied on Troubled Bus Firm; Educators Complained, But District Had Few Alternatives*, DALLAS MORNING NEWS, Nov. 12, 2005, at 1A (describing the failure of a bus operator to comply with a self-inspection system).

³²¹ See Carlos Guerra, *Hurricanes Hit Social Services Amid Cloud Over Welfare Reform*, SAN ANTONIO EXPRESS-NEWS, Oct. 23, 2005, at 1B (describing administrative difficulties).

³²² See CENTER FOR PUBLIC POLICY PRIORITIES, *UPDATING AND OUTSOURCING ENROLLMENT IN PUBLIC BENEFITS: THE TEXAS EXPERIENCE 44* (2006) (describing an ad hoc system and the necessity to input incorrect information into that system for it to function), available at [http://www.cppp.org/files/3/CPPP_PrivReport_\(FS\).pdf](http://www.cppp.org/files/3/CPPP_PrivReport_(FS).pdf); David A. Super, *Privatization, Policy Paralysis, and the Poor*, 96 CALIF. L. REV. 393, 395 (2008) (describing the sweeping ambitions of Texas's privatization plan).

a. *Deferred Decision Making and Disaster Planning*

This rapturous embrace of administrative discretion is dubious in theory and calamitous in practice. Since the Hurricane Katrina catastrophe, officials and their defenders at times insist that they could not possibly have anticipated its scope and severity.³²³ But in fact, thirteen months earlier over three hundred people from thirteen parishes, twenty state agencies, and fifteen federal agencies participated in a simulated response to a hypothetical Hurricane Pam whose characteristics were eerily similar to Katrina's.³²⁴ A review of federal, state and local planning efforts before Hurricane Katrina shows both a broad awareness of the specific problems that would arise and a maddening refusal to invest decisional resources in pro-active planning. The need to plan was widely accepted.³²⁵ Not accepted, however, was that meaningful planning required the exercise, rather than the reservation, of discretion.

The National Response Plan (NRP) that the Department of Homeland Security (DHS) completed in December 2004 and unveiled in January 2005³²⁶ is more of an invitation to plan than a plan proper: "The Federal Government encourages processes that support informed cooperative decisionmaking";³²⁷ "State and local governments are encouraged to conduct collaborative planning with the Federal Government as part of a 'steady-state' preparedness for catastrophic incidents."³²⁸ At times, it assigns tasks to particular officials in the case of a disaster,³²⁹ but it largely fails to make specific provision for how readily anticipated needs, such as transportation, emergency shelter, food, and medical aid, will be provided. It thus

³²³ *But see* A FAILURE OF INITIATIVE, *supra* note 256, at 80 (quoting Report Chairman Tom Davis as saying "[t]hat's probably the most painful thing about Katrina, and the tragic loss of life: the foreseeability of it all"); A NATION STILL UNPREPARED, *supra* note 301, at 149 ("Based on its own models and experience, [the Louisiana government] could have foreseen the inadequacy of many of its plans and resources . . .").

³²⁴ A NATION STILL UNPREPARED, *supra* note 301, at 113; *id.* at 89:

The hypothetical Hurricane Pam was posited to be a strong, slow-moving Category 3 storm preceded by 20 inches of rain. The exercise projected results including over 60,000 deaths, more than 1 million people evacuated, and 10 to 20 feet of water in New Orleans. Except for the deaths figure, the Hurricane Pam projections were generally close to the real-life experience of Katrina.

³²⁵ *See, e.g.*, 42 U.S.C. § 5131 (2006) (providing funds for the creation and updating of federal and state disaster preparedness plans); LA. REV. STAT. ANN. § 29:72 (2007) ("[T]o preserve the lives and property of the people of the state of Louisiana, it is hereby found and declared to be necessary: . . . [t]hat statewide and local plans for homeland security and emergency preparedness be prepared and approved without further delay and be maintained current to the maximum extent possible.").

³²⁶ A NATION STILL UNPREPARED, *supra* note 301, at 557.

³²⁷ U.S. DEP'T OF HOMELAND SEC., NATIONAL RESPONSE PLAN PRV-2 (2004).

³²⁸ *Id.* at 44.

³²⁹ *Id.* at 11.

remains heavily dependent on ad hoc information gathering and exercises of discretion at the time of a disaster.³³⁰

Had the NRP been intended as the beginning of a planning process, one might ask why it took so long, but at least DHS could claim that Katrina's timing was part of the problem. The NRP, however, was not intended as such a beginning. Homeland Security Secretary Tom Ridge declared that "America is better prepared today, thanks to the National Response Plan."³³¹ He contrasted the NRP with other plans and reports routinely issued in Washington: "Instead of promising results in the future, it is a deliverable that we believe will bring definite results now."³³² The NRP abrogated and made sweeping changes to a prior, Clinton-era plan, yet a Senate investigating committee declared that "DHS's implementation effort appears to have been entirely inadequate."³³³

New Orleans's purported disaster plan³³⁴ was similar; throughout, its authors determinedly refused to surrender meaningful discretion. The plan insisted on the importance of "[p]roper and coordinated planning"³³⁵ but failed to provide it. Instead, it repeatedly extolled the virtues of training, enjoined all to work well and harmoniously, and insisted that it desired a positive outcome. "The Office of Emergency Preparedness and Office of Communications," the plan boasted, "shall also devise a mechanism whereby the largest possible segment of the population can be sufficiently educated in disaster events to minimize panic and misunderstanding, including elderly and special needs population."³³⁶ It continued: "Emergency management has to be prepared to address the long-term operations needed to return the community to normalcy."³³⁷ Planners clearly

³³⁰ For example, the word "assess" or "assessment" appears more than three hundred times in the document. These "assessments" commonly lead to "evaluations" by or recommendations to other agencies. In short, the document's tone implies that neither time nor decisional resources will be in any scarcity at the time of a disaster. *See id. passim*.

³³¹ A NATION STILL UNPREPARED, *supra* note 301, at 551.

³³² *Id.*

³³³ *Id.* at 552.

³³⁴ CITY OF NEW ORLEANS COMPREHENSIVE EMERGENCY MANAGEMENT PLAN (2000) [hereinafter CEMP], available at <http://msnbcmedia.msn.com/i/msnbc/Components/Interactives/News/US/Katrina/docs/City%20Of%20New%20Orleans%20Emergency%20Preparedness%20-%20Hurricanes.pdf>; *see also* DOUGLAS BRINKLEY, THE GREAT DELUGE: HURRICANE KATRINA, NEW ORLEANS, AND THE MISSISSIPPI GULF COAST 19 (2006) ("[T]he [CEMP] didn't have any novel answers or fresh approaches. . . . New Orleans did not possess a *realistic* hurricane plan . . .").

³³⁵ CEMP, *supra* note 334, at 13. Indeed, the plan seems to admit that only a catastrophic storm will induce the city to improve its future preparedness: "In response to a major destructive storm, future plans call for the preparation of a post disaster plan that will identify programs and actions that will reduce or eliminate the exposure of human life and property to natural hazards." *Id.*

³³⁶ *Id.* at 3.

³³⁷ *Id.* at 11.

understood that their agencies might cease to function once a disaster hit³³⁸ yet for the most part they declined even to formulate default rules to govern important issues in that event.

New Orleans Mayor Ray Nagin recognized shortly after taking office that one hundred thousand people had no means of leaving the city in a disaster but his response was to try to leverage this fact to secure funding for a light rail public transit system within the city.³³⁹ Similarly, the city's disaster plan acknowledged that "[a]pproximately 100,000 Citizens of New Orleans do not have means of personal transportation" but responded only with the vague assertion that "[s]helter assessment is an ongoing project."³⁴⁰ Similarly, it noted that "[t]hroughout the Parish persons with special needs[] require special consideration regarding notification, transportation, and sheltering."³⁴¹ It vaguely promised that "[t]ransportation will be provided to those persons requiring public transportation from the area"³⁴² without another word of how that transportation would be arranged.

At the Hurricane Pam simulation thirteen months earlier, New Orleans Emergency Preparedness Chief Joseph Matthews reported that New Orleans could not execute a massive post-landfall evacuation because it lacked sufficient qualified drivers and had not completed negotiations with transportation companies.³⁴³ Participants in the Hurricane Pam exercise responded by proposing that federal, state, and local governments pool their resources to provide some six hundred buses and twelve hundred drivers in the fifty hours before expected landfall.³⁴⁴ Even this effort would only have accounted for about a quarter of the people in New Orleans known to lack personal transportation,³⁴⁵ but officials again refrained from making the specific advance decisions required to make this idea reality. The Southeast Louisiana Catastrophic Hurricane Functional Plan (SLCHFP) that resulted from the Hurricane Pam exercise stated only that "school and municipal buses . . . will be used to transport those hurricane evacuees who do not have transportation."³⁴⁶ The regional plan

³³⁸ *Id.* at 6 (outlining basic procedures to follow if the Emergency Operations Center (EOC) were rendered unusable).

³³⁹ A NATION STILL UNPREPARED, *supra* note 301, at 154 (2006).

³⁴⁰ CEMP, *supra* note 334, at 11.

³⁴¹ *Id.* at 5.

³⁴² *Id.* at 8.

³⁴³ See A NATION STILL UNPREPARED, *supra* note 301, at 113.

³⁴⁴ *Id.* at 114.

³⁴⁵ *Cf. id.* at 118 n.60 (noting that a FEMA official who participated in the Hurricane Pam exercise suggested that 5000 buses per day would be necessary to account for 75,000 evacuees a day for ten days).

³⁴⁶ INNOVATIVE EMERGENCY MGMT., SOUTHEAST LOUISIANA CATASTROPHIC HURRICANE FUNCTIONAL PLAN (DRAFT) 78 (2004), available at http://msnbcmedia.msn.com/i/msnbc/Components/Interactives/News/US/Katrina/docs/Southeast_Louisiana_Catastrophic_Hurricane_Functional_Plan.pdf.

was similarly mum about how to move displaced persons from emergency shelters to temporary housing: it left “tasks,” “coordinating instructions,” “personnel,” and “communications requirements” on that issue “TBD.”³⁴⁷ And it recognized, but had nothing substantive to offer, persons with special needs. The SLCHFP says simply that “special needs evacuees will be directed to regional special needs shelters as per the LA Shelter Plan.”³⁴⁸ This failure to develop plans for sheltering individuals with special needs outside the New Orleans area resulted in local officials sheltering them in the Superdome, with often negative results.³⁴⁹

Recognizing but then skirting another issue that would prove vital, the City’s plan blithely declares that “[s]ecurity measures will be employed to protect the evacuated area(s) in accordance with established procedures and situations,” saying nothing about what those “procedures and situations” are.³⁵⁰

The plan does note that the public’s need to pack and prepare for an evacuation, and the limited capacity of the roads leading out of town, require considerable advance notice. For a Category 3 hurricane—two levels less than what Hurricane Katrina was expected to be—the plan calls for a preliminary evacuation notice seventy-two hours in advance, evacuation of special needs populations between sixty and sixty-four hours in advance, and a mandatory evacuation order for the general public forty-eight hours before expected land-fall.³⁵¹ Anything less risked stranding residents as roadways became clogged with traffic and ultimately flooded.³⁵² Yet even here, the plan’s authors were so protective of their delayed discretion that they effectively instruct people not to take the plan seriously: “In determining the proper time to issue evacuation orders, there is no substitute for human judgment based upon all known circumstances surrounding local conditions and storm characteristics.”³⁵³

This refusal to exercise discretion in advance—deciding which objective conditions would trigger an evacuation order and agreeing on the terms of such an order—proved disastrous. New Orleans officials began considering an evacuation order late, spent almost a day haggling over legal and logistical issues, not issuing an evacuation order until less than twenty hours before Katrina made its Louisiana

³⁴⁷ *Id.* at 30–31.

³⁴⁸ *Id.* at 82.

³⁴⁹ A FAILURE OF INITIATIVE, *supra* note 256, at 103.

³⁵⁰ CEMP, *supra* note 334, at 8.

³⁵¹ *Id.* at 8.

³⁵² *See id.* at 9–10 (“The clearance times . . . for a severe hurricane will necessitate proper traffic control Flooding of roadways due to rainfall before a hurricane arrives could close off critical evacuation routes rendering evacuation impossible.”).

³⁵³ *Id.* at 7.

landfall.³⁵⁴ Although Amtrak and northern Louisiana public transit systems were willing to help move people out of the city, New Orleans officials never developed plans to address basic issues, such as where Amtrak should take people and how to move them from train stations to state shelters.³⁵⁵

Not only did this profligacy with decisional resources greatly increase the number of people stranded in the city, but this faith in ad hoc decision making prevented the state from timely responding to the consequences of the predictably delayed evacuation order. With many thousands of people in the Superdome and Convention Center enduring increasingly desperate conditions, for example, some officials were shooing away offers of buses at the same time others were seeking to round them up.³⁵⁶ FEMA officials, in turn, spent a day squabbling with the National Guard over whether buses or helicopters were the best means of moving people from the Superdome and Convention Center, further delaying postdisaster evacuations.³⁵⁷

This tragic experience yields several general lessons. First, the assumption that the exercise of executive discretion is the most efficient decision-making method is a gross oversimplification. It considers the (highly visible) costs of suboptimal result when a rule is applied to unanticipated circumstances but not to the (far more obscure) costs of conducting de novo review of every problem presented.³⁵⁸ Budgetary processes offer few opportunities to compare costs of these two types. In ordinary times, suboptimal decisions can stimulate adverse media coverage or political fights; demands for deci-

³⁵⁴ See A NATION STILL UNPREPARED, *supra* note 301, at 248 (concluding that “[l]ong-term planning and preparation by the city before Katrina approached the Gulf Coast could have obviated this nearly 24-hour effort to resolve these issues”).

³⁵⁵ See *id.* at 249, 373 n.98.

³⁵⁶ See Laura Maggi, *Roundup of Buses for Storm Bungled; Blanco Documents Show Staff Confusion*, TIMES-PICAYUNE (New Orleans), Dec. 6, 2005, at 1.

³⁵⁷ See Bill Walsh, *FEMA's Dome Airlift Plan Never Got Off the Ground; Concept Not Viable, National Guard Says*, TIMES-PICAYUNE (New Orleans), Dec. 9, 2005, at 4.

³⁵⁸ See SCHAUER, *supra* note 89, at 145–49:

[W]hen there are simply no rules to consult, the conscientious decision-maker looks at each decision-prompting event in as much relevant detail as the event offers. But when a decision-maker decides according to rules and therefore relies on decisions made by others, she is partially freed from the responsibility of scrutinizing every substantively relevant feature of the event.

See also Kaplow, *supra* note 11, at 570 (“[T]he cost [is] greater if a standard [of discretion] governs because the adjudication will also require giving content to the standard.”). Recognition that Congress could not formulate and enact timely responses to each disaster was a major impetus for enacting permanent federal disaster-relief legislation. See SUBCOMM. ON NATURAL DISASTER RELIEF, COMM’N ON INTERGOVERNMENTAL RELATIONS, NATURAL DISASTER RELIEF 1 (1955) (recognizing that previously, “by the time Congress had acted . . . , much hardship and suffering had occurred”).

sional resources exceeding supply will be addressed through one or another form of inefficient but largely invisible rationing.³⁵⁹

Second, even if one focuses single-mindedly on the risk of suboptimal decisions, those resulting from overgeneralizations or lack of foresightedness in rules are only one kind.³⁶⁰ The more questions left for ad hoc decision making, the greater the chances that the decision maker will make an improvident choice.³⁶¹ Our identification with decision makers³⁶² causes us to assume that they all share the diligence and good judgment we see in ourselves. Yet leaving many issues to be resolved only when a resolution becomes necessary compels agencies to employ a large number of decision makers, who inevitably have divergent capabilities and personalities.³⁶³ The Supreme Court has held, therefore, that both transaction costs and the risk of inconsistent results justify foreclosing issues that claimants might otherwise raise in adjudication proceedings.³⁶⁴

Third, quite ironically, leaving too many issues open can actually reduce flexibility. Boggling administrators down in myriad relatively minor issues prevents them from turning their full attention to the major ones: excessive discretion overwhelms available decisional capacity and reduces executives' ability to control agencies, particularly in a crisis.³⁶⁵

Fourth, these inefficiencies likely are not distributed evenly. Information costs for influencing subtle discretionary decisions are likely to be greater than for influencing legislation or rulemakings. Inequities between the affluent and low-income people in access to information are probably greater than in access to votes. As a result, if access and information are required to stimulate action, affluent people will be able to get their needs met in a discretionary regime far better than low-income people. This, even without malice, is likely to profoundly skew decisions by race and wealth.³⁶⁶

³⁵⁹ See, e.g., Super, *supra* note 297, at 672–77 (explaining that even when lawmakers purport to disallow rationing, administrators faced with more demand for resources than they have resources available will covertly restrict access in a form of rationing).

³⁶⁰ See Diver, *supra* note 197, at 431–34 (arguing that the danger of substantive errors varies with the age of a policy initiative).

³⁶¹ See SCHAUER, *supra* note 89, at 149–55.

³⁶² See *supra* notes 239–45 and accompanying text.

³⁶³ See SCHAUER, *supra* note 89, at 153.

³⁶⁴ See *Heckler v. Campbell*, 461 U.S. 458, 467–68 (1983) (noting that it wants to avoid forcing a government agency “continually to relitigate issues that may be established fairly and efficiently in a single rulemaking proceeding”).

³⁶⁵ See SCHAUER, *supra* note 89, at 149–50 (“Freed to look at everything, decision-makers often use that freedom unwisely, employing factors that *could* produce the best result to produce instead something inferior to it.”).

³⁶⁶ See John O. Calmore, *Close Encounters of the Racial Kind: Pedagogical Reflections and Seminar Conversations*, 31 U.S.F. L. REV. 903, 910 (1997) (noting the danger of racial subordination in judging).

Fifth, this approach ignores the inefficiencies of leaving the public uncertain about what rules to follow³⁶⁷ and other transaction costs as policy continually changes.³⁶⁸ Norms clearly defined in advance can prove particularly vital to effective disaster responses, such as timely evacuations.³⁶⁹ Where plans are ambiguous, however, chaos is likely, and the only hedge against that chaos is likely to be the unilateral exercise of arbitrary power.³⁷⁰ Similarly, disaster relief programs working from designs developed in advance can be implemented much more quickly than those that must be designed on the fly.

Finally, whatever its merits as a means of achieving agreed-upon objectives, discretionary decision making is an unreliable means of resolving disagreements about important matters of values. Champions of discretionary administration assert that it increases political accountability.³⁷¹ FEMA Administrator Michael Brown may have been fired,³⁷² but unless the electorate becomes convinced that his party is systematically more likely than its opponent to appoint people like him to responsible positions—a dubious proposition given how large and diffuse each party is—it can do little about him in the coming elections.³⁷³ In the current, highly polarized political environment, accountability is even less likely because partisan loyalties in Congress are likely to outweigh institutional ones and journalists have become comfortable simply writing about cross-charges rather than sorting out facts.

b. *Deferred Decision Making and Disaster Response*

The urgency of responding to Hurricane Katrina brought into sharp relief other latent defects in agencies' deferred exercises of discretion—and demonstrated that the weaknesses of postponed decision making are not confined to the executive branch. Because each policy question that must be identified, understood, and resolved requires time, leaving more questions open increases the total amount of time required to formulate a policy. Each open policy question

³⁶⁷ See SCHAUER, *supra* note 89 at 137–45; Diver, *supra* note 89, at 73–74.

³⁶⁸ See Kaplow, *supra* note 127, at 611–20; Michael P. Van Alstine, *The Costs of Legal Change*, 49 UCLA L. REV. 789, 854–58 (2002).

³⁶⁹ See MOORE, *supra* note 312, at 142–44.

³⁷⁰ See *id.*

³⁷¹ See Kagan, *supra* note 202, at 2331–39; Mashaw, *supra* note 203, at 95–99 (1985).

³⁷² *Seeking a Cure for the Hurricane Hangover*, ECONOMIST, Sept. 16, 2005, http://www.economist.com/node/4418260?story_id=4418260 (noting that while Michael Brown technically resigned from his position with FEMA, he was “perhaps pushed by his bosses, after a storm of criticism about the old-boy connections that got him the job and the lack of experience he brought to it”).

³⁷³ Cf. Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 493–94 (2003) (challenging “the idea of majoritarianism as the linchpin of legitimacy”).

that must be resolved under severe time pressure also presents another opportunity for errors, shortsightedness, and neglect. Because this is the inevitable result of postponing too many decisions, little purpose is served by focusing on particular officials or particular defective decisions. Although critics portrayed Michael Brown as a frivolous and callous official, even the most attentive and compassionate policymaker would arguably have been inundated by the number of decisions that needed to be made quickly and well. Some of those decisions required knowledge of the particulars of the disaster and hence could not be made in advance. Many others, however, were sufficiently predictable that they could have been made, or at least the options narrowed, well in advance.³⁷⁴

The value of narrowing discretion can be seen by comparing the responses to Hurricane Katrina of three federal agencies, one successful and two not. The one federal agency that mounted a major Katrina relief effort without significant public criticism was the U.S. Department of Agriculture's (USDA) Food and Nutrition Service (FNS), which operates the Food Stamp Program and other nutrition assistance. FNS succeeded because it had made most of the crucial decisions well in advance of the disaster.³⁷⁵ First, FNS has a detailed set of federal eligibility rules and procedures promulgated as rules.³⁷⁶ Second, FNS has taken advantage of its prior experience with disasters to develop a standard template of deviations from those rules to apply in relief operations.³⁷⁷ Thus, when Hurricane Katrina hit, a handful of FNS staff met for a couple of hours to choose from the short list of options within that template and to consider a few additional departures from standard policy that might be appropriate in light of the unusual extent of destruction and displacement.³⁷⁸ FNS's disaster and evacuee food stamp policies were drafted by two civil servants in a single afternoon and then approved and communicated to states the

³⁷⁴ See, e.g., A NATION STILL UNPREPARED, *supra* note 301, at 366 (2006) (discussing a DHS document drafted on August 30, 2005, titled "Decisions needed," that included decisions that presumably could have been made prior to the storm making landfall, such as "identif[ing] location[s] of alternate shelter" (second alteration in original)).

³⁷⁵ See, e.g., THE WHITE HOUSE, THE FEDERAL RESPONSE TO HURRICANE KATRINA: LESSONS LEARNED, app. B at 136 (2006) (noting, for example, that "[p]rior to Katrina making landfall, the [FNS] had proactively pre-positioned food in warehouses in Louisiana and Texas, making food readily available for disaster meal service programs").

³⁷⁶ See 7 C.F.R. pts. 271-280 (2011).

³⁷⁷ See 7 C.F.R. § 280.1 (authorizing procedures for the emergency food assistance of victims of disasters); FOOD AND NUTRITION SERVICE, U.S. DEP'T OF AGRIC., DISASTER SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM: WAIVER-RELATED PUBLICATIONS 4-6 (2009), www.fns.usda.gov/disasters/response/D-SNAP_Handbook/waivers.doc (describing waivers available to states wishing to deviate from the standard food stamp program regulations).

³⁷⁸ Interview with Carolyn Foley, Asst. to the Deputy Adm'r of FNS for Family Nutrition Programs, in Alexandria, Virginia (Nov. 4, 2005).

following day.³⁷⁹ This policy could be simple and easily implemented since it relied for the vast majority of details on pre-existing, well-known food stamp rules. This relatively nondiscretionary policy infrastructure allowed FNS to provide emergency food assistance to over two million people within a few weeks.

FEMA's confusion about which human and physical resources to deploy—exemplified by its uncertainty about whether to bring in the military forces to bring order³⁸⁰ and its failure to access a hospital ship sitting just off of the Louisiana shore through much of the critical early recovery period³⁸¹—demonstrates the impact of leaving too many decisions to be made, and having too little structure established to guide those decisions, in a time of crisis. Some, however, may insist on laying FEMA's failures at the door of individual officials, particularly Michael Brown and New Orleans Mayor Nagin.³⁸² It thus may be helpful to examine a more prosaic failure of disaster relief.

The Temporary Assistance to Needy Families (TANF) block grant is the very embodiment of governmental flexibility. The 1996 welfare law³⁸³ created TANF to replace the already-quite-flexible Aid to Families with Dependent Children (AFDC) program and several child care programs. TANF eliminated AFDC's loose national benefit structure³⁸⁴ and gave each state a fixed amount of money that it could spend as it pleased.³⁸⁵ If flexibility is the key to the effective operation of governmental programs, TANF should have offered the proudest story of success in responding to Hurricane Katrina. In fact, quite the opposite is the case.

³⁷⁹ *Id.*

³⁸⁰ *Cf.* A FAILURE OF INITIATIVE, *supra* note 256, at 201 (concluding that the military played an "invaluable role" but that "coordination was lacking").

³⁸¹ The hospital ship, the *Comfort*, "originally destined for New Orleans to provide medical care to storm victims," was redirected to Pascagoula, Mississippi "due to the lack of a medical mission in [New Orleans]." *Id.* at 301.

³⁸² *See, e.g.,* Gordon Russell, *Nagin Gets Mixed Reviews; Evacuation Plans, Superdome Use Criticized*, TIMES-PICAYUNE (New Orleans), Oct. 23, 2005, at 1; *see also* Kevin Hechtkopf, *Congress Grills Michael Brown*, CBS NEWS (Sept. 28, 2005), <http://www.cbsnews.com/stories/2005/09/27/katrina/main886469.shtml> (discussing the exchange of blame between Brown, Nagin, and members of Congress over the failures of the government's response to Hurricane Katrina).

³⁸³ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified in scattered sections of 7, 8, and 42 U.S.C.).

³⁸⁴ Under AFDC, states determined the income eligibility limit and the maximum grant level. 42 U.S.C. § 602(a)(7) (1994) (repealed 1996). They also had de facto control over the rate at which benefits were phased down for families with income: about ten states chose to disregard a substantial amount of that income to allow it to "fill the gap" between their payment levels and the amount they determined that families needed. The Department of Health and Human Services (HHS) gave states even more flexibility to dispense with provisions of federal law with which they disagreed through loosely defined waivers under section 1115 of the Social Security Act. *See* 42 U.S.C. § 1315 (2006).

³⁸⁵ *Id.* § 604.

It turns out that although TANF offers states considerable *regulatory* flexibility, they lack corresponding *budgetary* flexibility.³⁸⁶ Since the state financial crises triggered by the recession of 2001,³⁸⁷ virtually all TANF block grant and state maintenance of effort funds have been committed.³⁸⁸ Thus, states had to meet any incremental relief costs occasioned by Hurricane Katrina from their general funds, the same source that they would have depended on in the absence of any federal program at all.³⁸⁹ Recognizing that balanced budget requirements and the impending loss in tax revenues from the storm's disruption of their economies would limit what states could do, Congress enacted legislation authorizing additional TANF funding for disaster relief. Several factors, however, blunted these funds' impact. First, it took Congress several weeks to authorize them.³⁹⁰ Thus, states' decisions in the first critical days following the disaster were made with respect to what they thought they could afford within their own budgets. Second, to avoid the even greater delays that a formula fight might trigger, Congress provided money for evacuees as a proportional increase in every state's block grant.³⁹¹ Thus, New York received enough extra money to put each of its evacuees through graduate school; Texas, Arkansas, and Tennessee did not receive enough even to house them all.³⁹² Third, Congress restricted a large portion of the money to providing a particular kind of aid—one-time cash payments—that some states did not favor.³⁹³ States, fearing scan-

³⁸⁶ David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2585 (2005) (noting that after 1996, Congress froze funding for TANF and then reduced its available funds).

³⁸⁷ See generally *id.* at 2611–14.

³⁸⁸ See R. Kent Weaver, *The Structure of the TANF Block Grant*, BROOKINGS (2002), http://www.brookings.edu/papers/2002/04welfare_weaver.aspx (noting that by 2001, “most states were spending all of their current TANF allotments[] and many had begun drawing on reserves from past years”).

³⁸⁹ See GENE FALK, CONG. RESEARCH SERV., RS222446, TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF): ITS ROLE IN RESPONSE TO THE EFFECTS OF HURRICANE KATRINA 3–4 (2005), available at <http://www.policyarchive.org/handle/10207/bitstreams/4200.pdf> (explaining how TANF would be used in the post-Katrina relief effort).

³⁹⁰ See TANF Emergency Response and Recovery Act of 2005, Pub. L. No. 109-68, 119 Stat. 2003.

³⁹¹ See FALK, *supra* note 389, at 4 (noting that the increase was 20% of the state's yearly block grant).

³⁹² These states were doubly disadvantaged: their low historic expenditures on anti-poverty programs resulted in their receiving only about one-quarter the national average TANF grant per poor person under the original block grant formula, and they had a disproportionately high number of evacuees among whom to divide the increment. See WENDELL PRIMUS & ED LAZERE, CTR. ON BUDGET & POLICY PRIORITIES, SUPPLEMENTAL GRANTS SHOULD BE EXTENDED FOR FISCAL YEAR 2002, at 1 (2001), available at <http://www.cbpp.org/archiveSite/2-6-01wel.pdf> (describing the wide disparities in TANF funding per poor child among the states).

³⁹³ TANF Emergency Response and Recovery Act of 2005 § 3(a)(1); see MARK GREENBERG, CTR. FOR LAW & SOC. POLICY, NEW TANF LAW PROVIDES ADDITIONAL FUNDS FOR KATRINA RELIEF: KEY IMPROVEMENTS STILL NEEDED 1–5 (2005), available at <http://www.clasp>

dals or market distortions resulting from one-time cash grants, still had to spend their own funds to provide vouchers or on-going aid.³⁹⁴ Finally, focusing only on expanding one kind of aid rather than expanding states' capacity to meet the totality of survivors' and evacuees' needs, Congress disallowed reimbursement of expenditures made before the effective date of the legislation.³⁹⁵ This left Alabama, which had moved quickly to provide cash grants to survivors and evacuees with its own funds, both embittered and with reduced capacity to meet new needs.

All of this suggests that agencies need more rigorous principles for identifying matters that ought to be handled through rule making, not adjudication. In a disaster, when those resources are acutely scarce, having as many predetermined policies as possible can allow agencies to focus on the plethora of unpredictable problems that arise just as stockpiling food and drinking water can free scarce transportation resources for other needs. The whimsical choices between adjudication and rulemaking that current doctrine permits can cause obvious harm in disasters, which in turn can alert us to more subtle inefficiencies in more normal times. By contrast, the USDA's superior disaster response owed much to clear policies developed through prior crises, leaving only modest details to be filled in.³⁹⁶

c. *Stockpiling Decisional Resources Through the Courts*

Judicial construction of ambiguous statutes, rules, and common law principles offer another means of resolving policy questions in advance of a crisis. Current doctrine, however, makes this form of decisional stockpiling difficult, particularly in situations typical of disasters. Indeed, the courts play the least role in the very situations where they are most needed: where the most discretion has been reserved for operational officials.

One aspect of normative discretion fundamental to people in areas vulnerable to disasters is the degree of risk that the government's preparations may tolerate. The Bush Administration, it could be argued, had a relatively high tolerance for risk in putting inexperienced people in charge of FEMA and underfunding FEMA and the Army Corps of Engineers. Because of the rarity of disasters, the political

.org/admin/site/publications_archive/files/0185.pdf (describing and criticizing legislation); ROBERT GREENSTEIN, CTR. ON BUDGET & POLICY PRIORITIES, MEETING THE BASIC NEEDS OF HURRICANE KATRINA VICTIMS: RECOMMENDATIONS FOR FEDERAL POLICYMAKERS 10–12 (rev. Oct 20, 2005), available at <http://www.cbpp.org/files/9-9-05pov.pdf> (describing hurricane survivors' range of needs, including on-going living expenses).

³⁹⁴ See TANF Emergency Response and Recovery Act of 2005 § 5 (allowing states to use unspent balances received under the regular TANF program for these purposes).

³⁹⁵ *Id.* § 3 (disallowing payments conscientious states made prior to Congress's acting).

³⁹⁶ See *supra* notes 375–79 and accompanying text.

process is unlikely to be much help either in guiding the executive branch to an appropriate balance between the competing claims of people in vulnerable areas and the general taxpayer or in ensuring that it complies with any standards it adopts. These decisions can, however, be made democratically if addressed sufficiently in advance³⁹⁷ by Congress setting functional standards.³⁹⁸ Unfortunately, courts are likely to deny standing to persons facing injuries relatively remote in time,³⁹⁹ those fearing injuries that might ultimately befall others,⁴⁰⁰ and those objecting to policies that increase the probability of an injury without assuring that the injury will occur.⁴⁰¹ As a result, such legislation might not prove enforceable. Even after suffering losses in a disaster, residents of the stricken area might not have standing to enforce standards for rebuilding.⁴⁰²

To a similar effect, courts might decline to enforce such legislation absent clearly expressed intent to allow private suits.⁴⁰³ Moreover, if FEMA or another agency issued such standards administratively, it likely would deflect Congress from doing so itself. Yet those regulations likely would not be judicially enforceable.⁴⁰⁴

The absence of rules giving individuals objective expectations would eliminate executive agencies' accountability through the Due Process Clause.⁴⁰⁵ The absence of an accepted common baseline for judging agencies' actions opens the door to invidious discrimination. Even where legitimate logistical problems or simple incompetence

³⁹⁷ See MOORE, *supra* note 312, at 142–44 (advocating democratic decision making only in situations where standards of norms are clearly enunciated).

³⁹⁸ See Super, *supra* note 297, at 701–03 (describing how debates over functional standards provide greater transparency than those about arbitrary appropriations amounts). These standards might, for example, direct that levees be sufficient to withstand all floods except those expected every fifty or one hundred years or that public buildings be designed to withstand earthquakes up to a certain severity. If Congress were not prepared to be so specific, it could establish criteria for determining which precautions were affordable. Cf. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 402 (1971) (enforcing a requirement conditioned on the availability of a “feasible and prudent alternative”).

³⁹⁹ See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992) (emphasizing that imminence or actuality is required for standing).

⁴⁰⁰ See *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 883 (1990) (requiring a showing of injury to the plaintiff specifically).

⁴⁰¹ See *Allen v. Wright*, 468 U.S. 737, 753 (1984) (stating that a “judicially cognizable injury” is required).

⁴⁰² Cf. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105–10 (1983) (denying injunctive relief on the basis that the plaintiff did not demonstrate that he would be wronged again).

⁴⁰³ See *Gonzaga Univ. v. Doe*, 536 U.S. 273, 278–86 (2002) (rejecting a § 1983 claim because the statute in question did not unambiguously create individual rights that could provide a private cause of action).

⁴⁰⁴ See *Alexander v. Sandoval*, 532 U.S. 275, 282–85 (2001) (holding that a private cause of action can stem from a regulation only insofar as the regulation it interprets or applies is a statute that allows for such private cause of action).

⁴⁰⁵ See Super, *supra* note 297, at 648–52.

causes an agency's failure, the demoralizing suspicion of bias will be difficult to dispel.⁴⁰⁶

The Court's limiting these causes of action, and its general resistance to allowing recovery for grievous harms that governmental incompetence causes even the most dependent people⁴⁰⁷ exacerbates the harm from the postponement of exercises of discretion. When lack of transportation, lack of resources for alternative accommodations, or skepticism about warnings left tens of thousands of people still in the city, the government urged them to gather at its shelters in the Superdome and the Convention Center.⁴⁰⁸ The evacuation order and the directive to gather in the shelters deprived both evacuees of the benefits of communal norms and willingness to provide mutual aid that they would have enjoyed in their neighborhoods.⁴⁰⁹ One could argue, therefore, that it made them utterly dependent on the state both for the basic means of subsistence and for the effectiveness of its controls on antisocial behavior. Having done so, the state then failed to provide security, food, water, sanitation, or the means to depart. As a result, many people were terrorized by vicious thugs, and many more suffered thirst, hunger, and preventable illnesses.⁴¹⁰

Separately, many seriously ill persons perished during and after the hurricane because the nursing homes where they resided lacked the means to evacuate them before the storm or the capacity or commitment to care for them afterwards.⁴¹¹ Although the state did not affirmatively cause their illnesses, neither can the free market fairly be said to have ordained their fate: the nursing home industry is one of the most heavily regulated in the country, and with Medicaid paying roughly half of all long-term care bills, nursing homes' rates and incomes are substantially controlled by state fiat rather than the price mechanism.⁴¹² These, too, were effective wards of the state.

Clear decisions about the expectations individuals may have of their government would allow courts to compensate those facing disproportionate hardships when those expectations are not met. In-

⁴⁰⁶ See David A. Super, *Are Rights Efficient? Challenging the Managerial Critique of Individual Rights*, 93 CALIF. L. REV. 1051, 1133-35 (2005).

⁴⁰⁷ See *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 196-97 (1989) (allowing recovery only where the state has increased someone's vulnerability).

⁴⁰⁸ See *supra* Part IV.B.2.

⁴⁰⁹ Those that stayed behind in their homes, perhaps distrusting the state's ability to provide aid, were similarly deprived of neighborly support.

⁴¹⁰ See generally Wil Haygood & Ann Scott Tyson, "It Was as if All of Us Were Already Pronounced Dead": *Convention Center Left a Five-Day Legacy of Chaos and Violence*, WASH. POST, Sept. 15, 2005, at A1 (describing the "nightmarish" conditions in the days and weeks after Katrina struck).

⁴¹¹ Anne Hull & Doug Struck, *At Nursing Home, Katrina Dealt Only the First Blow*, WASH. POST, Sept. 23, 2005, at A1.

⁴¹² See Malcolm J. Harkins III & Julia McMillen, *Uncharted Waters: Managed Care and Long Term Care Provider Contracts*, 30 J. HEALTH & HOSP. L. 179, 179-81 (1997).

stead, we effectively immunize incompetence by providing discretion to fumble. Where we make a public function discretionary, we feel compelled to immunize them from damage awards to ensure that officials respond to the political process rather than to the courts.⁴¹³ This immunity means that costs of government blunders are not spread.⁴¹⁴ In disaster, that means the cost of blunders such as mismanagement of Superdome and Convention Center fall on those that already lost the most. Where it is obvious *ex ante* what ought to be done, such as provide security and provisions for shelter, clear rules will both increase likelihood that officials will do it and provide clear basis for spreading losses by the unfortunate victims of official neglect.

3. *Maintaining Expert Decision Making in Partisan Times*

Current “wartime” political conditions also affect the quality of agencies’ decision making. They encourage a bunker mentality that tends to reward loyalty over competence in appointing public officials.⁴¹⁵ The temptation to make patronage appointments is particularly strong for positions responsible for aiding persons not viewed as one’s constituents. Under President George H.W. Bush, for example, FEMA was considered a “dumping ground” for political appointees.⁴¹⁶ The administration even transferred some officials to FEMA as punishment for political transgressions.⁴¹⁷ FEMA’s responses to Hurricanes Hugo and Andrew and to the Loma Prieta earthquake provoked public criticism and provided the impetus for FEMA’s reform under President Clinton.⁴¹⁸ After carrying several disaster-prone coastal

⁴¹³ This immunity is the combined product of doctrines such as official immunity for individuals and the refusal to recognize a private right of action under statutory language preserving broad discretion. See, e.g., *Gonzaga Univ. v. Doe*, 536 U.S. 273, 278–86 (2002). A third barrier to recovery, sovereign immunity, is far less directly affected by the extent of discretion afforded officials.

⁴¹⁴ On the benefits of spreading the cost of losses occasioned by the government’s poor performance, and the possibility that liability might result in loss minimization as well, see *Ciraolo v. City of New York*, 216 F.3d 236, 242–50 (2d Cir. 2000) (Calabresi, J., concurring) and PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 100–21 (1983).

⁴¹⁵ Indeed, revolutionaries often regard moderates, rather than their ideological opposites, as the biggest obstacles to achieving their grand visions. Moderates, however, often make good public administrators: those not motivated by an extreme political vision are more likely to enter public service out of a general sense of professionalism. An antimoderate atmosphere therefore can create a scarcity of competent public administrators. See David A. Super, *The New Moralizers: Transforming the Conservative Legal Agenda*, 104 COLUM. L. REV. 2032, 2089–92 (2004).

⁴¹⁶ R. STEVEN DANIELS & CAROLYN L. CLARK-DANIELS, *TRANSFORMING GOVERNMENT: THE RENEWAL AND REVITALIZATION OF THE FEDERAL EMERGENCY MANAGEMENT AGENCY* 7 (2000), available at <http://www.fema.gov/pdf/library/danielsreport.pdf>.

⁴¹⁷ *Id.*

⁴¹⁸ See *id.* at 12–13. Six days were required after each hurricane before sufficient quantities of food and clothing arrived. *Id.* at 12.

states, he appointed officials all of whom had considerable experience in disaster management either within FEMA or on the state level.⁴¹⁹

In addition, administrations in politically charged times tend to elevate too many decisions to their political appointees. This overreliance wastes the adjudicative capital accumulated in civil servants.⁴²⁰ USDA's career staff could target its resources far more accurately than FEMA's political staff because of its experience in prior crises elsewhere during other administrations.

Also, when the two parties' programs differ sharply, voters can use elections to reward managerial achievements only if they are willing to swallow policies they strongly dislike. Intense partisanship sharply reduces the ranks of accepted impartial experts that can serve as effective watchdogs over deficient administration.⁴²¹

In short, we have designed an administrative system that provides sweeping discretion on the assumption that we will select decision makers with an extraordinary degree of expertise. Yet at present our political system screens not for expertise but rather for ideology. The results of this mismatch can be lethal, as they were during Hurricane Katrina.

4. *Expanding Agencies' Decisional Resources to Respond to Crises*

Although the civil service has a reputation as an ossified, inflexible personnel system,⁴²² the truth is somewhat more nuanced. Measures to guard against politicization have indeed resulted in convoluted procedures for hiring and promotion and even more arduous ones for discipline and discharge.⁴²³ In practice, the same rules that inhibit partisan appointees from punishing civil servants for their political beliefs also limit superiors' ability to remove lethargic and inept workers. Yet despite all of the antigovernment rhetoric from both parties over the past few decades, public service remains a noble calling. Many people entering government eschew higher wages and superior promotion opportunities in the private sector in favor of the satisfaction of serving society.

Civil servants may resent and resist being asked to work extra hours on an ongoing basis to cover for politicians' refusal to budget sufficient funds for the activities they want government to undertake.

⁴¹⁹ See *id.* at 13.

⁴²⁰ See SCHAUER, *supra* note 89, at 149 n.16 (suggesting that because decision making is a skill improved with practice, stripping civil servants of their ability to make decisions, in favor of political appointees, could result in the weakening of civil servants' decision-making skills).

⁴²¹ See *supra* note 415 and accompanying text.

⁴²² Christopher Lee, *Civil Service Overhaul Has History of Bipartisan Support: Four Presidents Sought Changes*, WASH. POST, Sept. 5, 2005, at A29.

⁴²³ *Id.*

Time and again, however, civil servants have risen to the task of meeting genuine emergencies, such as disasters. Once a civil servant does agree to work more hours or travel to the affected area to aid in disaster relief, little extra effort is required to integrate her or him into the effort: the civil servant's skills are integrated with the government program, she or he understands the criteria on which it makes decisions, and her or his rate of pay, chain of command, travel procedures, and so forth are already set. This has given the government significant capacity to expand its decisional capacity in crises, similar to resorts canceling leaves and assigning overtime during busy holiday weekends.

Two recent movements, however, have reduced this capacity considerably. Subsection a below addresses the first movement, examining some of devolution's shortcomings that disasters lay bare. Subsection b then examines the second movement, discussing the impact of privatization on disaster response.⁴²⁴ Shifting responsibility to other levels of government or to private entities can shift choices about the timing of decisions to those with less information or competing agendas. Disasters expose flaws in both of these methods of cabining the administrative state.

a. *Disasters and Federalism*

Fragmentation of responsibility across levels of government, and within agencies of the federal government, has undermined disaster management efforts in the United States.⁴²⁵ Political boundaries obstruct public and private relief efforts.⁴²⁶ Although politics can affect disaster response at any level of government, those considerations can be particularly paralyzing for fragmented local authorities operating from limited experience and information.⁴²⁷

⁴²⁴ Some go farther, arguing that vulnerability to disasters and inadequate disaster relief result from excessive state intervention in the economy. Barun S. Mitra, *Dealing with Natural Disaster: Role of the Market*, in *LIBERTY AND HARD CASES* 35, 50–58 (Tibor R. Machan ed., 2002) (“[T]here have been constant attempts by governments in most countries, particularly in this century, to intervene in the marketplace and consequently to hamper the ability of the people to deal with natural calamities effectively.”).

⁴²⁵ Waugh & Hy, *supra* note 255, at 4–8; see David A. Super, *Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law*, 157 U. PA. L. REV. 541, 543–45 (2008) (faulting decentralization for the failure to address poverty in the wake of Hurricane Katrina).

⁴²⁶ See Waugh & Hy, *supra* note 255, at 6 (explaining how the “political . . . context of FEMA’s development has had a profound impact on the federal emergency management effort and, in turn, on state and local efforts”).

⁴²⁷ See MOORE, *supra* note 312, at 139–41 (explaining how a fragmented response to Hurricane Carla posed difficulties for local authorities in Texas); see also KATHLEEN J. TIERNEY ET AL., *FACING THE UNEXPECTED: DISASTER PREPAREDNESS AND RESPONSE IN THE UNITED STATES* 48 (2001).

Disasters require a great deal of decision making that is relatively unguided by personal experience. Even in disaster-prone areas—such as the Gulf and southern Atlantic coasts, along the San Andreas Fault, and in the “tornado alleys” of the South and Midwest—the location and severity of disasters vary enough that most individuals feeling the brunt of any particular disaster may lack much reliable relevant experience.⁴²⁸ Federal career officials that have responded to several disasters in different parts of the country will have key insights that local and even state officials do not.

The comparison between the performance of the Food Stamp Program and TANF in the wake of Hurricane Katrina also raises questions about the efficacy of devolution, a concept often justified as enhancing flexibility. TANF is not only flexible but also has devolved that flexibility to the states.⁴²⁹ The Food Stamp Program, by contrast, retains a highly centralized policymaking structure that some criticize as anachronistic.⁴³⁰ Yet the greater experience and access to information of the federal food stamp administrators allowed them to move much more rapidly.⁴³¹ Moreover, relations between different levels of government inevitably contain adversarial elements, with each trying to shift financial burdens onto the other (and to defend themselves against such shifts).⁴³² A disaster lays bare the inefficiency of resolving those tensions, yet that inefficiency remains at other times.

b. *Disasters and Privatization*

Disasters provide a valuable caution on excessive administrative outsourcing. Long-time civil servants in Texas, for example, had the experience to adapt an antiquated computer system to process benefits for evacuees.⁴³³ They also had the dedication to their mission to

⁴²⁸ Experience with minor, nonthreatening events of a similar type can lull people into complacency. See RONALD W. PERRY ET AL., *EVACUATION PLANNING IN EMERGENCY MANAGEMENT* 36–37 (1981).

⁴²⁹ See Sheryll D. Cashin, *Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities*, 99 COLUM. L. REV. 552, 560 (1999) (“[O]utside a few socially conservative congressional mandates, states have very broad discretion on how to spend TANF funds.” (footnote omitted)).

⁴³⁰ See Super, *supra* note 234, at 1303 (explaining how many states criticized the Food Stamp Program “for its inflexibility and heavy-handedness”).

⁴³¹ See Elaine M. Ryan, *A Call for Partnership Now*, POL’Y & PRAC., Dec. 1, 2005, at 1 (describing food stamps as “[p]erhaps the most effective federal program in the time of national disaster” and noting that “[p]rogram enrollment was fast-paced” after Hurricane Katrina hit).

⁴³² See Super, *supra* note 386, at 2568–71 (noting that unless a particular function is popular, different levels of government will try to shift the burden of undertaking that function onto each other).

⁴³³ Editorial, *Privatization Lessons Learned*, AUSTIN AMERICAN-STATESMAN, Dec. 29, 2006, at A14 (describing Texas’s private contractor’s employees as lacking the skills to perform the jobs of their public employee predecessors).

work long hours of overtime.⁴³⁴ Ironically, as they were laboring to help evacuees, Texas told almost three thousand of these civil servants it was laying them off to privatize administration of public benefit programs.⁴³⁵

Although contractors can provide large numbers of people rapidly, this source of staffing for specialized government functions is likely to prove problematic for several reasons. First, the shortage of resources and the inability to wait impairs the government's bargaining position, allowing contractors to extract substantial rents. Second, the hurried purchase increases the likelihood of a costly flaw in the terms of the contract; when assigning civil servants to respond to a disaster, the government can rely on employment contracts made without time pressure. Third, those same time pressures may offer cover for cronyism in the letting of contracts. Fourth, the lack of repetition attenuates contractors' incentives to perform well. Fifth, with applicable experience in particularly short supply during disasters, the staff the contractor hires are likely to require more acculturation to the program's operation, from interviewing techniques to entering data into the program's computer to identifying suspicious claims to what sorts of referrals might prove beneficial. This unfamiliarity inevitably will result in delays, errors, and limits on the functions to which the contractors' staff may be assigned. Finally, because this staff is unlikely to be present at the next disaster, privatization fails to develop that expertise where it can be applied rapidly to future disasters.

More broadly, privatization to for-profit entities tends to shift control of governmental operations away from prospective controls, built around the cooperative principles of public service and securing the broader community, and toward retrospective controls, built around the law of contract and the threat of sanctions for breach. Whatever the merits of this approach under ordinary circumstances,⁴³⁶ the dangers of this shift become particularly apparent in a disaster as ordinary contract law tends to break down.

Nor is reliance on the nonprofit sector a cure-all. Seeking to fill gaps in a woefully underdeveloped governmental evacuation plan-

⁴³⁴ See Jason Spencer, *Gradually, Help Is Getting to Needy Evacuees: Recovery Center Is Struggling with Staffing, Long Lines to Arrange Housing and Other Aid*, HOUSTON CHRONICLE, Oct. 2, 2005, at B12 (describing food stamp offices' struggles to keep up with evacuees' demands); see also Becky Bowman, *Relief Center Overwhelmed; Hundreds Waiting Outside in the Heat Are Left out When the Doors Close Early*, HOUSTON CHRONICLE, Sept. 29, 2005, at B1 (describing the food stamp office as so overwhelmed that its staff had as many applicants as they could handle until 7 p.m. by early afternoon).

⁴³⁵ *Central Texas Digest*, AUSTIN AMERICAN-STATESMAN, Oct. 11, 2005, at B2.

⁴³⁶ See Jon Michaels, *Deforming Welfare: How the Dominant Narratives of Devolution and Privatization Subverted Federal Welfare Reform*, 34 SETON HALL L. REV. 573, 660-68 (2004) (arguing that the optimal way to achieve welfare reform is through a "balanced federalism" in which private providers act as partners with the federal government).

ning, New Orleans officials sought to develop a faith-based alternative, Operation Brother's Keeper, a year before Katrina.⁴³⁷ Although the churches they approached were willing to cooperate in principle, the Herculean task of coordinating their efforts with public authorities and one another stalled the plan.⁴³⁸

Privatization to charities avoids some of these pitfalls but still involves others. Private charities tend to prize flexible reaction more than planning, preserving discretion and postponing decisions. In fact, the American Red Cross's failures in Katrina's wake were strikingly similar to some of FEMA's.⁴³⁹ Also, because they have fewer resources than the government, private charities often are even more fastidious about whom they aid. The Red Cross repeatedly has aroused deep resentment in disaster-stricken communities when, after the first wave of relief, it begins to ask questions required to meanstest further aid.⁴⁴⁰ Charities, even those with large bureaucracies such as the Red Cross, have less experience protecting the integrity of aid funds than public welfare agencies.⁴⁴¹ It therefore should not be surprising that the Red Cross both struggled to root out false claims and delayed needed aid with ill-designed verification rules.⁴⁴²

5. *Prioritizing Adjudications*

Agencies' shortfalls in decision-making resources inevitably will force them to ration these resources. Often, the first step in this rationing turns out to be nothing more than a simple queue. When the agency's backlog reaches politically unacceptable levels, the agency may be forced to identify lower-priority steps in its adjudicatory process to jettison. The clamor for expeditious relief of disaster victims make these shortcuts almost impossible to oppose.

Once implemented, however, these low-priority features of adjudications identified during disasters may become candidates for elimi-

⁴³⁷ A NATION STILL UNPREPARED, *supra* note 301, at 248–49 (2006).

⁴³⁸ *Cf. id.* at 249 (“Although Operation Brother's Keeper was in place before landfall, it was not fully developed as logistical issues such as rally points and destinations had not been determined.”).

⁴³⁹ *Cf.* Stephanie Strom, *Red Cross Head Quits; Board Woes, Not Storm, Are Cited*, N.Y. TIMES, Dec. 14, 2005, at A32 (“Public officials, survivors and even Red Cross volunteers have lobbed complaints about the [Red Cross's] performance, on issues like its absence in the flood plains most directly affected by the storm.”).

⁴⁴⁰ RUSSELL R. DYNES, ORGANIZED BEHAVIOR IN DISASTER 194–95 (1970).

⁴⁴¹ See Hema V. Sheno, Note, *Compassion Without Competence: Mandating a Financial Oversight Committee in New Disaster Relief Nonprofit Organizations*, 74 BROOK. L. REV. 1253, 1254–62 (2009).

⁴⁴² For example, at a time when gasoline was largely unavailable on the Gulf Coast, it required *survivors* from the Mississippi coast to travel fifty miles inland to apply for aid and then, when they arrived, announced it would not process any application without a photograph of a damaged house. Jerry Mitchell, *Katrina: The Recovery*, CLARION-LEDGER (Jackson, Miss.), Oct. 4, 2005, at 1A.

nation in non-crisis situations if programs seem to operate well without them. This can produce both good and bad results over time. Research has found that, contrary to some claims,⁴⁴³ people believing in a strong government role in responding to disasters are no less likely to prepare for a disaster themselves; thus, a robust government policy seems to create little moral hazard.⁴⁴⁴ Accordingly, disaster relief programs largely abandon work requirements and other common tests of moral character. The programs rely on the known etiology of recipients' distress—disaster rather than presumed sloth—as a surrogate for moral worthiness. This is true even though some disaster victims are thugs and even though many of the people that suffer in the disaster also had been destitute before the disaster and treated by public benefit programs as unworthy.

This inconsistency suggests that the substantial resources public benefit programs expend adjudicating individuals' moral worthiness may be a relatively dispensable features of public benefits law. The disaster experience will be particularly helpful in making this case if, as seems likely, displaced persons receiving aid without the usual tests of moral worth turn out to be independently motivated to secure steady incomes by finding work. On the other hand, the Department of Health and Human Services (HHS) granted states waivers to deny claimants appeal rights in disaster Medicaid programs.⁴⁴⁵ The constitutionality of these waivers is open to question: the core of those rights originated not in HHS's regulations but in *Goldberg*.⁴⁴⁶ It nonetheless suggests that HHS may be contemplating a broader assault on those rights, a broader assertion that the resources they consume could be better expended elsewhere.⁴⁴⁷ In either instance, however,

⁴⁴³ See Saul Levmore, *Coalitions and Quakes: Disaster Relief and Its Prevention*, 3 U. CHI. L. SCH. ROUNDTABLE 1, 2 (1996) (suggesting that "people might decline to take preventative steps, including the purchase of insurance, because they expect relief in the event of disaster").

⁴⁴⁴ Cf. Risa Palm & John Carroll, *Illusions of Safety: Culture and Earthquake Hazard Response in California and Japan* 93, 95 (1998) (finding that a notion of "shared belief in individual responsibility for the future" has resulted in Americans preferring less government involvement in repair and restoration after a disaster).

⁴⁴⁵ See 42 U.S.C. § 1320b-5 (2006) (granting HHS authority to waive certain requirements of the Social Security Act during national emergencies); see also Dennis G. Smith, Director of Center for Medicaid and State Operations, U.S. Dep't of Health & Hum. Servs., Letter to State Medicaid Directors and State SCHIP Directors, Attachment, at 4 (Sept. 16, 2005) (Multi-State Section 1115 Demonstration Application Template), <http://www.cms.gov/smdl/downloads/SHO091605.pdf>.

⁴⁴⁶ See 397 U.S. 254, 264 (1970) (holding that welfare recipients were entitled to a hearing before the termination of their benefits).

⁴⁴⁷ As in the disaster, HHS could argue that the funds spent on fair hearings could provide significant additional health care to low-income people. Although one can easily enough calculate the number of doctors' visits or prescriptions whose costs are equivalent to the fair hearing system's budget, that does not mean that eliminating fair hearings would provide *additional* care. To support that conclusion, HHS would need to establish

serious questions can be raised as to whether these choices ought to be made primarily through the exercise of abrogational discretion. If the disaster experience has taught us that our normative or structural decisions about these programs are defective, we should reopen those decisions rather than merely evade them.

CONCLUSION

In today's contentious legal culture, universally accepted verities are in very short supply. One norm that has approached that status has been flexibility. Regarding decision making as an exercise of power, and hence consumptive, makes legal actors that exercise discretion promptly seem impetuous and those that postpone action, awaiting more information, appear judicious and prudent. In fact, decision making is the law's principal productive activity. Exercises of discretion therefore should be timed in the same manner that other productive enterprises are: by seeking the time at which the cost of required inputs is lowest relative to the value of the output that it can produce.

Not a little ironically, another principle with broad acceptance among contemporary scholars is that legal analysis should proceed from an *ex ante* perspective to the extent possible.⁴⁴⁸ Implicit in many arguments for *ex ante* reasoning is the value of early decisions in guiding private parties—and the value lost when those exercises of discretion are delayed. Unfortunately, contemporary thinking about the timing of legal decisions tends to ignore both this diminished value of delayed decisions as well as the increased costs of the necessary inputs. Indeed, all too often it does not conduct even the crudest cost-benefit analysis of delay but either assumes that retaining discretion is sagacious or confounds temporal issues with procedural and institutional ones, the latter dominating.

The calamity that Hurricane Katrina wrought provides a vivid reminder of the costs of flexibility. So, too, does the present financial crisis, in which regulators steadfastly postponed the exercise of discretion until the value of their potential decisions had declined by hundreds of billions of dollars. In these cases, and countless others, the

that the savings from eliminating fair hearings would not simply supplant state general funds that currently support the same services. In an era of widespread Medicaid cuts, such supplantation seems highly probable.

⁴⁴⁸ See, e.g., Barbara H. Fried, *Ex Ante/Ex Post*, 13 J. CONTEMP. LEGAL ISSUES 123, 158 (2003) (agreeing "on the general case for sticking with *ex ante* perspective in decision-making under uncertainty"); William Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 885 (1976) ("The value . . . of courts is a function in major part of the predictability of their decisions, and decision according to the original meaning of the statute rather than according to the ever-shifting preferences of successive legislatures is probably an important source of that predictability . . .").

supposedly parsimonious retention of unexercised discretion has been exposed as the wasteful procrastination that it is. The only remaining question is whether we can learn from these mistakes or are bound to repeat them.

