

AGAINST FLEXIBILITY

To be published at 96 CORNELL L. REV. ____ (2011).

by David A. Super*

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.

Both public and private law should be understood 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. 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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*Professor of Law, University of Maryland. The author appreciates the insightful comments of Bruce Ackerman, David Bogen, Richard Boldt, Barbara Bosserman, Rosa Castañeda, Danielle Citron, Bob Ellickson, Mark Graber, Vicki Jackson, Jon Michaels, Michael Van Alstine, Steve Wagner, Brad Wendel, and Greg Young as well as the participants in the Temple, UCLA, University of Kansas, University of Virginia, Vanderbilt, Washington and Lee, and Yale Law School faculty workshops. It benefited from the outstanding research of Sabrina Hassanali, Jayni Shah, Elizabeth Simpson, and Janet Sinder.

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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 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. Yet the country eagerly defers to a Constitution written over two centuries ago by barely a quarter of the states now in the Union at a time when politics, commerce, and society were fundamentally different – and when a substantial majority of the people was denied any voice whatsoever. Commentators attribute much of this country's fabulous wealth to the law's having encouraged people make contracts committing themselves in advance to courses of action they may later regret. Yet much of the current economic crisis results from individuals' and businesses' overcommitting themselves in a future they too-dimly understood – some of which commitments the law is setting aside through bankruptcy and bail-outs.

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.¹ The early Federalists believed that deciding important questions in elections was improper; those matters should await the convening of the legislature.² On the other hand, modern constitutional law cautions (albeit rather unpersuasively) that the legislature's failure to exercise sufficient discretion itself may render unconstitutional its delegations of discretion to the executive;³ more meaningfully, it warns against the vagueness resulting from insufficient exercises of discretion.⁴ Administrative law 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 selected.

¹*Compare, e.g.*, FRANZ NEUMANN, *THE RULE OF LAW: POLITICAL THEORY AND THE LEGAL SYSTEM IN MODERN SOCIETY* (1986) (arguing that exercising discretion across a broad range of subjects, rather than with particular events in mind, is essential for maintaining personal freedom); E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 266* (1975) (finding the rule of law an unqualified good), *with* JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* (1979) (rejecting this view).

²Thus, for example, Roger Sherman condemned specific instructions 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). *See generally* Mark A. Graber, *Enumeration and Other Constitutional Strategies for Protecting Rights: The View from 1787/1791*, 9 U. PA. J. CONST. L. 357 (2007).

³*A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

⁴*Kolender v. Lawson*, 461 U.S. 352 (1983); *Lanzetta v. New Jersey*, 306 U.S. 451, 458 (1939).

Pre-commitment in policy-making is appealing in large part because it is *not* well-informed, serving as a sort of veil of ignorance⁵ to filter out some self-serving biases. Expanded executive powers are available to Presidents Bush and Obama alike. Courts will enforce our contracts no matter which of us 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, it conflicts with the fundamental precept of the Information Age. And with technological and cultural change proceeding at a feverish pace, decisions made in the past, even the recent past, increasingly seem intolerable obstacles to progress.

Courts and scholars have considered at great length the proper timing of particular kinds of decisions. 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 and *who* should make it.⁶ Although one choice occasionally dictates the other, far more often law can delegate or withhold authority independently of any stipulations about when that authority is exercised. Thus, preferring that trusted actors – the police, prosecutors, administrative agencies, judges, or the private sector – make a decision does not require that they dither upon receiving that delegation. Analyses of the timing of legal decisions also typically focus on public officials substantively regulating the private sector.⁷ 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.

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 costs 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

⁵See JOHN RAWLS, A THEORY OF JUSTICE 136-42 (1971)(seeking to “nullify the effects of specific contingencies which put men at odds and tempt them to exploit social and natural circumstances to their advantage”).

⁶Professor Kaplow asks many of the same questions this article does, Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992), but he fails to differentiate between changes in the timing of decisions and their delegation from legislative to enforcement authorities. *Id.* at 561-62. As a result, he 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.

⁷*Id.* at 561-64; HENRY M. HART, JR., & ALBERT M. SACHS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 145-58 (William N. Eskridge & Philip P. Frickey, eds. 1994); H.L.A. HART, THE CONCEPT OF LAW 125-29 (2d ed. 1994).

and psychological predispositions, law often postpones decision-making counter-productively. In particular, while information typically becomes more plentiful over time, other inputs to legal decisions, particularly decisional resources, often become scarcer over time and postponed legal decisions often have considerably less value.

This article recognizes that different actors may have different interests about when particular decisions ought to be made and implemented – those that oppose any action at all may first try to stall, those that see the political winds turning against them may try to hurry – and sometimes these timing preferences are strong enough to affect bargaining on the substance of policies.⁸ 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. And precommitment often will 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 occurs 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 provides 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 seeks to understand 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 chooses Hurricane Katrina as an example in part because it represented one of the most egregious failures of government in recent times and in part because disasters would 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. Yet the ironic result in a crisis is that too much flexibility leads to a paralysis of options. Federal, state, and local planning processes so valorized discretion that they made many too few useful investments of decisional

⁸Jacob E. Gersen & Eric A. Posner, *Timing Rules and Legal Institutions*, 121 HARV. L. REV. 543 (2007).

resources. When the hurricane approached, the demand for decisions far outstripped the supply of decisional resources.

This same imbalance continued in the hurricane's aftermath. This is evident in a comparison of 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 post-disaster environment. The surfeit of flexibility the other two agencies had preserved for themselves required decisional resources far beyond their capacity in the post-disaster environment. Even when they eventually did act, their hurried exercises of discretion proved substantively defective.

This follows a broader pattern. On the one hand, the policy-making community undervalues the utility of information available in advance of a crisis, such as that concerning the general vulnerability of people with very low incomes. On the other, it overvalues information that arises in a crisis, such as that about the particular track a storm may be projected to take. It also underestimates the cost of government officials' producing timely decisions once they finally receive the late-breaking information.

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 pro-flexibility literature fails to disaggregate decisions in this manner. 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.⁹ Many legal materials whose relative "rule-ness" scholars debate actually 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, section A provides a typology of discretion intended to provide more texture than 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). It also allows limiting flexibility to the aspects of a larger decision for which delay really is cost-effective. Section B then provides an abbreviated survey of the kinds of substantive and procedural debates that arise

⁹Kaplow, at 561-62 n. 6; Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 239-49 (1993).

about exercises of discretion 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. 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 a subordinate decision-maker’s immunity from reversal.¹⁰ Ronald Dworkin distinguishes between “strong” and “weak” forms of discretion in quite similar terms.¹¹ 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.¹² 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 assessing directly 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.

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 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.

1. Stages in Policymaking

Formulating legal directives typically involves several stages. 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 decisional stages can be identified in the formulation of most policies.

¹⁰Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 637 (1971).

¹¹RONALD. DWORKIN, *TAKING RIGHTS SERIOUSLY* 14, 32-33 (1977).

¹²George C. Christie, *An Essay on Discretion*, 1986 DUKE L.J. 747, 749-50.

Notwithstanding the custom of distinguish 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 law-making as well.

First, someone must exercise *initiative discretion*, to decide that action will be taken in a particular area. Administratively, for example, OSHA must decide which of many workplace toxins it will regulate. Legislatively, Congress must decide 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.

Second, someone must exercise *normative discretion*, deciding what values will be pursued through that action. Thus, the Occupational Safety and Health Act declares that OSHA must pursue the complete elimination of workplace hazards if feasible and, as interpreted by the Court, may not consider the costs to industry unless the regulation would destroy its economic viability. 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; it has attacked unconscionable contracts in pursuit of both distributive and procedural justice.¹³

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 shall 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.¹⁴ 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 per child per month. State legislatures decide what blood alcohol content is required to be considered drunk and

¹³Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965).

¹⁴On occasion, quantitative discretion is essentially binary: some official or agency determines that a program should indeed operate.

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 suffice 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 policy-makers is a substitute. Our commitment to limiting these matters to our highest-level decision-makers, and the scarcity of decisional resources at that level, limits the number of legal initiatives that may be started or redirected at any given time.¹⁵ The amount of informational inputs required to exercise initiative or normative discretion vary, but those inputs usually are “legislative facts”:¹⁶ typically available widely and hence inexpensive.

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 caselaw, resulted from our acceptance that bureaucrats and lower court judges could exercise quantitative discretion on important matters without direct oversight from senior officials. 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.

The sharp differences among these types of discretion have implications both for the advisability of delegating them to subordinate authorities and for the optimal timing of those decisions. Answering those two questions, however, requires quite different analyses.

2. Creative and Abrogational Discretion

The preceding subsection describes each stage of decision-making in affirmative terms, as way-stations toward the formulation of a policy. 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) 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

¹⁵See NELSON POLSBY, HOW CONGRESS EVOLVES: SOCIAL BASES OF INSTITUTIONAL CHANGE 145-47 (2004)(describing this phenomenon consistent with the Framers’ preference for a limited federal government).

¹⁶HART & SACKS, *supra* note 7, at 360-61.

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.

Abrogational discretion also, however, may operate more surgically. It may be camouflaged as creative discretion at a lower level. Thus, a nominal exercise of quantitative discretion in setting the blood alcohol content may transform the regime's norms from public safety to abstinence promotion if it criminalizes any detectable degree of intoxication; 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.¹⁷ 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. OSHA inspectors may elect not to take action against an employer 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. 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.¹⁸

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. Someone holding abrogational discretion under these circumstances may be reluctant to use it if she or he likes the prior rule even less than the one subject to abrogation. Indeed, standing rules may prevent parties from invoking the courts' abrogational authority where the default rule would serve them as badly or worse.¹⁹

In other cases, however, abrogational authority carries with it the authority to re-make the decisions voided. This implied creative discretion, rather than the dismantlement of a particular policy, often is the primary source of disputes over the exercise of abrogational discretion. Letting a random employer exceed OSHA toxic emissions standards 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 the agency rejected. An administrator's discretionary withholding of child care funds from states with

¹⁷See 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).

¹⁸See *Hill v. Gateway 2000*, 105 F.3d 1147 (7th Cir. 1997)(enforcing arbitration clause contained with product in sealed box).

¹⁹See, e.g., *Heimberger v. School District of City of Saginaw*, 881 F.2d 242 (6th Cir. 1989)(finding plaintiff lacked standing to challenge concededly unlawful policies because defendant had announced the intent to impose a harsher policy that was lawful should plaintiff prevail).

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;²⁰ others, however, appear to reflect concern about the courts' competence and legitimacy exercising creative discretion to replace the policies they might abrogate.²¹ 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.²² Similarly, the D.C. Circuit's increasing tendency to leave in place agency actions it has found unlawful – to remand without vacating²³ – to avoid exercising the 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 would consume decisional resources most inefficiently. It also is likely to produce inequitable inconsistencies.²⁴ 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.²⁵ 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 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

²⁰See, e.g., *Jefferson v. Hackney*, 406 U.S. 535 (1972)(finding several possible legitimate explanations for Texas's payment of higher benefits to predominately white categories of welfare recipients than it did to the category that primarily served people of color); *Lindsey v. Normet*, 405 U.S. 56 (1972)(turning aside a muddled attack on state landlord-tenant law).

²¹See, e.g., *Dandridge v. Williams*, 379 U.S. 471 (1970)(refusing to strike down cap on the level of welfare benefits any family could receive, noting the absence of a coherent, judicially administrable principle on which the increment for larger families should be determined); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (noting the difficulty of determining the degree to which each school district might be disadvantaged by disparate property tax bases).

²²See Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1132, 1144-53, 1168-83 (1999)(discussing expanded state court enforcement of individual rights); *In re Extension of Boundaries of Hattiesburg*, 840 So. 2d 69 (Miss. 2003)(upholding broad, subjective judicial role in setting municipal boundaries).

²³See *Checkosky v. SEC*, 23 F.3d 452, 466 (D.C. Cir. 1994)(documenting prevalence of practice); Kristina B. Daugirdas, *Evaluating Remand Without Vacatur: A New Judicial Remedy for Defective Agency Rulemakings*, 80 N.Y.U. L. REV. 278 (2005)(criticizing the practice).

²⁴Peter 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; Alfred Aman, *Administrative Equity: An Analysis of Exceptions to Administrative Rules*, 1982 DUKE L.J. 277.

²⁵This sequence is sometimes reversed in practice: having enacted a sweeping statute or regulation, Congress or an agency may have second thoughts and establish an exceptions procedure. See, e.g., 8 U.S.C. §§ 801-808 (2006)(providing for congressional review of administrative actions). 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.

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

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 this scale. The challengers then assert that their opponent's institutional superior – the Constitution, Congress, rule-makers, a higher court, or whoever – has exercised discretion at least that far down the scale, thus creating a conflict; policies' defenders do the opposite. Critics commonly see a betrayal of a higher authority's choices on initiative, norms, or structure in the challenged policy; defenders may assert that the challenged action is the obedient calculation of a minor quantitative element that the pre-ordained structure requires consistent with the pre-ordained scope of initiative and norms. Thus, for example, in *Citizens to Preserve Overton Park v. Volpe*,²⁶ plaintiffs asserted that Congress had exercised initiative, normative, and structural discretion to protect parks and natural areas against encroaching highways; they asserted that the Department of Transportation had contravened those choices, thus rejecting the congressional initiative, by substituting illicit economic norms, and by selecting a devolutionary structure. The government, by contrast, asserted that Congress had only loosely invoked its initiative discretion, leaving normative and structural questions to the agency; in the alternative, it asserted that it was merely exercising quantitative discretion in determining the ratio of environmental harms to construction costs that requires rerouting a planned highway.

²⁶401 U.S. 402 (1971).

The classic test of the validity of agencies' interpretations of federal statutes under *Chevron, USA v. Natural Resources Defense Council*²⁷ revolves around how much discretion has Congress already exercised: Step One – “whether Congress has spoken to the precise question at issue”²⁸ – 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 extend farther up that hierarchy than it admits: that its actions do not “reasonabl[y]” fit with congressional choices.²⁹ In other words, a claim prevails at Step One if it can demonstrate 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 it resolved. 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 that a higher level, typically those to initiate, or to determine the norms for, policymaking. When federal courts apply weaker *Skidmore*³⁰ deference, or state courts decline to follow the *Chevron* model,³¹ 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 because they fail to follow the Administrative Procedure Act's (APA's) dictates for rulemaking or adjudication,³² courts are prepared to intrude more in defense of legislative sovereignty.

Prior to *Wickard v. Filburn*,³³ many constitutional law cases turned on whether the Constitution had limited Congress's initiative discretion; similar arguments persist in local government law, under home rule regimes³⁴ and particularly under Dillon's Rule.³⁵ 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

²⁷467 U.S. 837 (1984).

²⁸*Id.* at 847.

²⁹*Id.*

³⁰*Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

³¹*E.g.*, *Connecticut State Med. Soc'y v. Connecticut Bd. of Exam'rs in Podiatry*, 546 A.2d 830, 834 (Conn. 1988).

³²*U.S. v. Mead*, 533 U.S. 218 (2001).

³³317 U.S. 111 (1942).

³⁴Terrance Sandalow, *The Limits of Municipal Power under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643 (1964).

³⁵Dillon'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. GERALD FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* 45-50 (1999).

other. Cases such as *Dandridge v. Williams*³⁶ (on finding constitutional norms) and *U.S. v. Humphrey's Executor*³⁷ (on finding constitutional structures) shape the former argument; those such as *Washington v. Davis*³⁸ (on inferring the norms underlying challenged actions) and *CFTC v. Schor*³⁹ (on interpreting structures) guide the second inquiry. Similar twin inquiries occur in testing lower courts' adherence to controlling precedent, Rosenberg's "secondary discretion."⁴⁰

Where the higher authority's exercise of discretion clearly has 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; the arbitrary and capricious or abuse of discretion standard in administrative law⁴¹ 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;⁴² more commonly, they simply find that the agency acted within its discretion.⁴³ Programs in which the underlying statute and rules exercise relatively little discretion often are held not to generate individually-enforceable rights.⁴⁴

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 reannounces, the rule it thinks best.⁴⁵

2. Procedural Challenges

Procedural challenges to public actions also depend on this hierarchy. Some discretion simply cannot be delegated. In criminal law, the initiative, norms, structure, 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.⁴⁶ In other areas of law, the government may reserve flexibility by paying a specified procedural cost. If an administrative agency chooses to leave a point open in rule-making, it must allow regulated individuals to argue that point in adjudicatory actions conforming to due

³⁶397 U.S. 471 (1970).

³⁷295 U.S. 602 (1935).

³⁸426 U.S. 229 (1976).

³⁹478 U.S. 833 (1986).

⁴⁰See *supra* note 10 and accompanying text.

⁴¹5 U.S.C. § 706(2)(A) (2006).

⁴²*Webster v. Doe*, 486 U.S. 592 (1988).

⁴³*Id.*, at 617 (Scalia, J., dissenting).

⁴⁴*Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981).

⁴⁵See *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86 (1993)(declaring that most new Supreme Court holdings have retrospective effect); *but see* Roger Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 28 HASTINGS L.J. 533 (1977)(suggesting exceptions to this rule).

⁴⁶See *supra* note 4 and accompanying text.

process; by deciding the point in advance, it can foreclose such arguments.⁴⁷ Here again, litigation may revolve around determinations about how much discretion did the rule-writing authority actually exercise in its rules. Here, however, challengers seeking broader hearing rights will wish to *minimize* the extent to which the rules have resolved important questions.⁴⁸

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.⁴⁹

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 procedural rules typically disallow inquiries into the decision-maker's motives.⁵⁰ 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 can render all prior exercises of discretion irrelevant. That apparently was the rationale of *Clinton v. New York*,⁵¹ which denied the President the power to render portions of legislation ineffective with a "line-item veto." Critics of the residual exception to the hearsay prohibition make a similar same point, which has led to various (largely unsuccessful) efforts to cabin it.⁵² 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 a pervasive failure of enforcement.

⁴⁷Atkins v. Parker, 472 U.S. 115 (1985); Heckler v. Campbell, 461 U.S. 458 (1983).

⁴⁸See, e.g., SEC v. Chenery Corp., 318 U.S. 80 (1943)(rejecting the agency's assertion that prior judicial decisions had established a firm standard that bound it and requiring new procedures to consider that question).

⁴⁹Hampton v. Mow Sun Wong, 426 U.S. 88 (1976); Kent v. Dulles, 357 U.S. 116 (1958).

⁵⁰U.S. v. Morgan, 313 U.S. 409 (1941).

⁵¹524 U.S. 417 (1998).

⁵²Eleanor Swift, *Abolishing the Hearsay Rule*, 75 CALIF. L. REV. 495 (1987); Randolph 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, 433 (1986)..

On the other hand, policymaking can become confused by misplaced reliance on relatively dormant abrogational discretion. We may excuse subordinate authorities' exercises of 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. Our political process similarly relies on exceptions for hardship or fairness,⁵³ 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 justices 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.

Assumptions about the efficacy of abrogational discretion also can 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. 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.⁵⁴

Abrogational discretion exercised too much, too little, or according to illicit criteria can raise serious equity concerns. Within the criminal justice system, 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. Conversely, many will suspect favoritism if someone is given a free ride for an offense that typically yields severe punishment.⁵⁵ 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: abrogational authority nominally limited to quantitative discretion – determining whether the defendant's conduct was sufficiently severe to warrant death – has been expanded to rewrite the system's norms perniciously.

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.⁵⁶ 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

⁵³PETER H. SCHUCK, *THE LIMITS OF LAW: ESSAYS ON DEMOCRATIC GOVERNMENT* 158-59 (2000).

⁵⁴MICHAEL B. KATZ, *THE PRICE OF CITIZENSHIP: REDEFINING THE AMERICAN WELFARE STATE* 328-40 (2001).

⁵⁵See Geoffrey Hazard, *Criminal Justice System: Overview*, in 2 *ENCYCL. OF CRIME & JUSTICE* 450 (Sanford Kadish, ed., 1983).

⁵⁶For a nuanced and valuable exception to this pattern, see TODD D. RAKOFF, *A TIME FOR EVERY PURPOSE: LAW AND THE BALANCE OF LIFE* (2002).

postponed decisions. 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 allowing⁵⁷ or rejecting⁵⁸ pre-hearing 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.⁵⁹ 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.⁶⁰ At its best, this debate does indeed focus exclusively on the timing of legal decisions. Unfortunately, these debates tend to frame a continuum of options artificially as a dichotomy, and an unrealistic one at that: every rule requires some interpretation, and every standard with practical relevance forecloses some options. 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.

When administrative law scholars address economics, they typically focus on outcomes: 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. 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.

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 include those of courts, legislatures, administrative agencies, and private parties responding to legal rules. The agencies that produce

⁵⁷Ewing v. Mytinger & Casselberry, 339 U.S. 594 (1950).

⁵⁸Fuentes v. Shevin, 407 U.S. 67 (1972).

⁵⁹E.g., MICH. COMP. LAWS § 600.5714 (2010).

⁶⁰See, e.g., Kaplow, *supra* note 6; LARRY ALEXANDER & EMILY SHERWIN, THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW (2001). FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE (1991); Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983).

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 privilege 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 decisionmaking. 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 inefficient delays are likely when the government cannot arrange for enough decisionmaking to meet demand. Similarly, just as the government may try to relieve queuing in a constrained market with rationing or priority schemes, so too administrative agencies may try to expedite some kinds of decisions at the cost of even more severe delays for others. In both cases, the infrastructure required to gather the information needed to administer the priority system injects its own additional inefficiencies, sometimes rivaling 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. Section A examines the ways in which these inputs may be scarce, noting that scarcity often varies with time. Section B considers the social value of legal decisions, also in temporal terms. Section C then explores the law's options for addressing a perceived shortage of one or another input, finding that delay is often counter-productive.

A. Scarcity of Inputs to Legal Decisions

Each of the inputs to a legal decision has a cost, with that cost typically rising 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 see 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.

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. We avoid discussing deficiencies in decisional or enforcement capacity as they embarrass the law, while lawyers often regard normative ambiguity as an intriguing challenge or 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 criticize 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”⁶¹ seeks to remedy informational deficits far more than decisional, normative, or enforcement ones.⁶²

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.⁶³ Although Ronald Coase and others long ago identified agency costs within firms as a particular type of shortage of decisional resources,⁶⁴ 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.⁶⁵ Classical economics still tends to treat consumers’ preferences – in effect, their expressed norms – as exogenous and inviolable.⁶⁶ Most economic discourse similarly tends to assume perfect enforcement of contracts, *i.e.*, the infinite, costless availability of enforcement resources.⁶⁷ 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 which of the workers exposed to a toxin will become sick; nobody knows what the decedent might have accomplished but for her untimely demise. In other situations, it may be theoretically available but at an unrealistic, exorbitant price: no doubt modern forensics laboratories could work wonders resolving minor slip-and-falls or speeding infractions.

Scarcity of information also may result from the law’s own procedural rules. These rules can increase the costs of obtaining and using some kinds information or bar access to some information altogether. Delays can change those procedural rules, either as a direct result of the change in timing⁶⁸ or because the delay is incidental to a reassignment of decisional authority. For example, the desirability of administrative rulemaking, 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

⁶¹Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

⁶²Compare 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 (1985)(denying that right when no new information is likely to be in dispute).

⁶³RICHARD G. LIPSEY ET AL., ECONOMICS 476-77 (10th ed. 1993)

⁶⁴R.H. COASE, THE FIRM, THE MARKET, AND THE LAW 33-55 (1988).

⁶⁵BARRY SCHWARTZ, THE PARADOX OF CHOICE: WHY LESS IS MORE 23 (2004).

⁶⁶But see *id.*, at 33 (discussing demand-creating advertising).

⁶⁷But see OLIVER WENDELL HOLMES, THE COMMON LAW 302-03 (1881)(discussing enforcement and failure as both being plausible outcomes of a contract).

⁶⁸For example, different rules may apply in a preliminary hearing and a later trial.

than an adversarial or semi-adversarial adjudicative process and in part on whether the policy addresses sufficiently recurrent issues that adjudications would be duplicative.⁶⁹ 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 believing that the procedures likely to be employed in making a decision at a later stage would be disadvantageous,⁷⁰ or expecting higher litigation costs,⁷¹ might oppose delay on that basis. Parties seeking the early resolution of a dispute may believe that the procedures that would guide an immediate decision 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.⁷²

Finally, information may be scarce because what we have is too chaotic to analyze efficiently.⁷³ 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,⁷⁴ the costs parties and courts incur litigating the applicable legal rule,⁷⁵ the costs risk-averse regulated expend ensuring compliance with the law,⁷⁶ entities 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. 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.⁷⁷ Legislators, agency staff, judges, or those in the private sector empowered to make legally significant decisions may be pre-occupied with other matters. More subtly, they may lack the analytic capacity to appreciate fully the information and normative commands pertinent to a problem.⁷⁸ They may be biased,⁷⁹ incompetent,⁸⁰ or overwhelmed.⁸¹

⁶⁹See *Nat'l Petroleum Refiners' Ass'n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973)(finding rule-making a sufficiently desirable process that courts should infer authority in ambiguous statute).

⁷⁰KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 216 (1971).

⁷¹Christie, *supra* note 12, at 777.

⁷²See, e.g., *FTC v. Standard Oil of California*, 449 U.S. 232, 247 (1980)(acknowledging that defending a price-fixing investigation would cost millions but declining to permit judicial intervention before a final order).

⁷³BARRY SCHWARTZ, *THE PARADOX OF CHOICE: WHY LESS IS MORE* 23 (2004).

⁷⁴Kaplow, *supra* note 6, at 563-64.

⁷⁵SCHAUER, *supra* note 60, at 145-49; Ruth Gavison, *Legal Theory and the Role of Rules*, 14 HARV. J.L. & PUB. POL'Y 727, 750 (1980).

⁷⁶HENRY J. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS* 24 (1962); Kaplow, at 564.

⁷⁷Here again, the issue typically is cost rather 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.

⁷⁸See 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).

When facing a shortage of decisional resources, 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 postpone the decision until its own resources are less dear.

A shortage of enforcement capacity does not prevent decisions from being made. It can, however, eliminate most of any decision’s value. Law coerces compliance with its decisions and deters parties’ resort to some extra-legal means in order to motivate parties to commit their resources to gathering the necessary information, clarifying the normative principles, and funding decisional capacity.⁸² The ability to enforce a decision can fluctuate over time. A public official coming to the end of her or his term may need to make decisions 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

Legal decisions’ value 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, the courts hold expedited preliminary injunction proceedings 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.⁸³ More generally, earlier decisions reduce parties’ need to include hedges against multiple contingencies in their plans.⁸⁴ They also may reduce the parties’ costs of learning the law,⁸⁵ increasing compliance and the social benefits the law is designed to yield. 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.⁸⁶ Postponing decisions also may force rushed decisions of secondary matters that can only be addressed once the initial decision has been rendered.

⁷⁹See, e.g., *Gibson v. Berryhill*, 411 U.S. 564 (1973)(rejecting decision-maker for financial bias).

⁸⁰See *Tanner v. United States*, 483 U.S. 107 (1987)(describing but refusing to allow response to gross misbehavior in jury room).

⁸¹*Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965)(finding complexity of abusive contract terms beyond the capacity of contracting consumer to understand).

⁸²Although 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.

⁸³FED R. CIV. PROC. 65(a) (2010).

⁸⁴ 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.

SCHAUER, *supra* note 75, at 77.

⁸⁵Kaplow, *supra* note 6, at 564; *but see* Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 93 YALE L.J. 65, 270 (1983) (suggesting that *ex ante* legal advice may cost more than representation in later litigation).

⁸⁶Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335, 335-40 (1990).

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.⁸⁷ The very act of participating in democratic decision-making⁸⁸ or participatory adjudication⁸⁹ 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.⁹⁰ Postponing a decision also may be beneficial if no decision may ultimately be needed.⁹¹

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 to its own terms but it wastes the adaptations made in response to the now-voided judgment.⁹² Delayed or reversed decisions will rarely be preferable unless the increased availability of inputs will improve the decisions' quality significantly.⁹³

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.

⁸⁷In old movies, the prospective heirs renounce their vices and become uncharacteristically generous to compete for their elderly relative's affections. Once the testator renders a decision, the losers' incentives for pro-social behavior ceases. See also ROALD DAHL, *CHARLIE AND THE CHOCOLATE FACTORY* 277 (rev. ed. 1973)(testing of children's moral fiber ends when chocolate factory awarded to Charlie Bucket); WILLIAM SHAKESPEARE, *KING LEAR* (1605)(upon deciding on the division of his kingdom, Lear suffers humiliation at the hands of deceitful heirs).

⁸⁸BRUCE ACKERMAN & JAMES S. FISHKIN, *DELIBERATION DAY* 52-59 (2004).

⁸⁹Jerry Mashaw, *Dignitary Process: A Political Psychology of Liberal Democratic Citizenship*, 39 U. FLA. L. REV. 433, 436-38 (1987).

⁹⁰See, e.g., Ronald M. Levin, *Nonlegislative Rules and the Administrative Open Mind*, 41 DUKE L.J. 1497, 1505 (1992).

⁹¹Professor Kaplow suggests that when a problem's frequency is low, it should be left for *ex post* resolution. Kaplow, *supra* note 6, at 563. 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.

⁹²Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1177-80 (2006); Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1037-40 (1990); Jonathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 CHI.-KENT. L. REV. 93 (1989); Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367 (1988); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 595-602 (1987). 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." *United States v. Bensimon*, 172 F.3d 1121, 1127 (9th Cir. 1999).

⁹³Some 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 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 60, at 157. 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.

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.⁹⁴ 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.⁹⁵ 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.⁹⁶ 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,⁹⁷ normative guidance,⁹⁸ or decisional capacity.⁹⁹ These and other decisional work-arounds¹⁰⁰ effectively serve as lower-quality substitutes for the desired inputs.¹⁰¹ 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.¹⁰² 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;¹⁰³ they may respond to decisions based on sub-par inputs the way supermarket shoppers do to aesthetically marred fruit. Because decisions are 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

⁹⁴David M. Trubeck, et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 114 (1983).

⁹⁵*See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)(rejecting members of the public the right to enforce the Endangered Species Act).

⁹⁶HOLMES, *supra* note 67, at 96 ("the 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*").

⁹⁷*See, e.g.*, U.C.C. § 3-307(b) (1977)(presuming the validity of most signatures on checks).

⁹⁸EINER ELHAUGE, STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION 41-69 (2008).

⁹⁹*See, e.g.*, *United States v. United Mine Workers*, 330 U.S. 258, 293 (1947)(requiring compliance with even unlawfully issued injunctions until lifted).

¹⁰⁰Most simply, judges, juries, and other decision-makers can simply make its best guess when deciding with inadequate information, murky legal guidance, or limits on their capacity.

¹⁰¹With the passage of years, some of these simplifications can gain great dignity, displacing the rules they helped cabin. 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW* 337 (1895)(describing *Quia Emptores Terrarum*, which simplified English estates in land in 1290).

¹⁰²*See* Werner Z. Hirsch, *reducing Law's Uncertainty and Complexity*, 21 U.C.L.A. L. REV. 1233 (1974)(analyzing the conditions under which such simplifications may be more or less desirable).

¹⁰³TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 38-64 (2006).

applicable norms are murky, decisional resources scarce, or enforcement of any decision is uncertain, it 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. Statutes of limitations recognize that information degrades over time. Constitutions lock in decisions based on norms that their framers fear might not endure.¹⁰⁴ Wills allow testators to determine 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. 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.¹⁰⁵ Administrative law allows sweeping, largely standardless delegations of law-making authority to agencies because of their superior flexibility.¹⁰⁶ Politicians across the ideological spectrum pay homage to state and local government for their presumed greater flexibility.¹⁰⁷ Popular history long has blamed inflexible strategic planning – the Schlieffen Plan and its Russian counterpart – for catapulting Europe into the First World War.¹⁰⁸ Similarly, schoolchildren are taught to admire Robert E. Lee for his flexibility and scorn George McClellan for his lack of it.¹⁰⁹ 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"¹¹⁰ and all manner of uncomfortable decisions.

Enthusiasm for reserved flexibility also pervades legal scholarship.¹¹¹ The typical justification for reserving discretion is a critique of rule-making. It sets up a trade-off between the clarity and simplicity of

¹⁰⁴Tom Ginsburg, et al., *Commitment and Diffusion: How and Why National Constitutions Incorporate International Law*, 2008 U. ILL. L. REV. 201.

¹⁰⁵HAROLD DEMSETZ, ECONOMIC, LEGAL, AND POLITICAL DIMENSIONS OF COMPETITION 25 (1982).

¹⁰⁶DAVIS, *supra* note 70, at 36-44.

¹⁰⁷Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 437-38 (1998).

¹⁰⁸JAMES JOLL, *EUROPE SINCE 1870: AN INTERNATIONAL HISTORY* 184 (1973).

¹⁰⁹THOMAS B. BUELL, *THE WARRIOR GENERALS: COMBAT LEADERSHIP IN THE CIVIL WAR* 92-96 (1997).

¹¹⁰HELEN FIELDING, *BRIDGET JONES'S DIARY* 17-18 (1996).

¹¹¹*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"); : 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"); Jonathan L. Zittrain, *The Generative Internet*, 119 HARV. L. REV. 1974, 1990 (2006)(touting a "flexible, robust platform for innovation from all corners"); Henry Hansmann, et al., *Law and The Rise of the Firm* 119 HARV. L. REV. 1333, 1395 (2006)("Flexibility in allocating ownership, control, and income rights is important in small firms"); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 828 (2006)(arguing that "more flexible" constitutional law would be more "political market-friendly"); 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"); Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1672 (2002)(praising flexibility as a value whose pursuit merits some sacrifice of stability).

a regulation, on the one hand, and its accuracy in achieving its substantive policy goals.¹¹² A bright-line rule is easy to understand and inexpensive to apply, yet it almost inevitably proves both over- and under-inclusive. 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.¹¹³ 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. Indeed, they may claim that the decision-maker put too *low* a value on information. Demanding still more information prior to decision¹¹⁴ could lead to even more delay.

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

A. Logical Errors Causing Flexibility to be Overvalued

Four common analytical errors that tend to cause underestimates of the costs of delay. First, commentators assume that more information is an unalloyed good. 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.¹¹⁵ 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 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.

¹¹²See, *e.g.*, Diver, *supra* note 60, at 70-71.

¹¹³Christie, *supra* note 12, at 754.

¹¹⁴*Id.*, at 764-65.

¹¹⁵Perhaps this statement is too sanguine: current debates about anti-terrorist wiretapping at times seem to focus exclusively on the value of additional information without regard to the costs of obtaining it.

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. They exaggerate the value of information they hope to receive if they wait (or overstate the deficiencies in their present store). For example, Professor Kaplow implies that decisions at the enforcement stage are cheaper than *ex ante* rule-making.¹¹⁶ 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. 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, 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.”¹¹⁷ 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.¹¹⁸ (Decisions in limine also are more valuable to parties seeking to plan their strategies than rulings made at trial.¹¹⁹) And decisions that an actor may make honestly in advance may engender corruption, favoritism or bigotry if postponed until officials know the particulars of those affected.¹²⁰ 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. Professor Schauer warns that the costs of insufficient decisional resources must be balanced against those resulting from information shortages when decisions are made in advance.¹²¹

¹¹⁶Kaplow, *supra* note 6, at 562-63.

¹¹⁷Wilson v. Williams, 182 F.3d 562, 566 (7th Cir. 1999)(en banc).

¹¹⁸JAMES J. BROSNAHAN, AMER. LAW INST.-AMER. BAR ASS'N, MOTIONS IN LIMINE IN FEDERAL CIVIL TRIALS (2004).

¹¹⁹“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.” Pena v. Leombruni, 200 F.3d 1031, 1034-35 (7th Cir. 1999); *see also* MANUAL FOR COMPLEX LITIGATION 3d § 32.23, at 274 (1995)(endorsing pretrial motions in limine).

¹²⁰RUDOLF BAHRO, THE ALTERNATIVE IN EASTERN EUROPE 155 (David Fernbach trans. 1978).

¹²¹SCHAUER, *supra* note 75, at 149-50. He does suggest that decision-making improves with practice in some cases. *Id.* n. 16.

Awaiting more plentiful information also can result in disappearance of the normative consensus that would have guided a prompt decision. For example, giving convicts sentences whose lengths vary due to prison officials' decisions whether to award "good time" credit brings information into the decision about whether to release the offender – but it also brings different norms into the decision.¹²² More recently, California and some other states have developed systems in which long sentences precede parole with numerous conditions, strictly enforced. 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.¹²³ 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 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 parties' risk aversion.¹²⁴ The Contracts Clause¹²⁵ 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.¹²⁶ The Supreme Court has read the Contracts Clause broadly to preclude later legislation from abrogating administrative officials' promises on which private actors have relied.¹²⁷ Although this is unlikely to prevent Congress from changing tax rules in ways that effectively reduce reliance interests that prior law had established,¹²⁸ legislators tend to find the ability to rely on early decisions a crucial component of those decisions' value.¹²⁹ Initial debates about Social Security turned precisely on the question of whether to pre-commit to levels of support for the aged and persons with disabilities or to allow to "each

The sort of judgment to which he refers, however, is only one facet of decisional resources, along with the decision-maker's time.

¹²²James B. Jacobs, *Sentencing by Prison Personnel: Good Time*, 30 U.C.L.A. L. REV. 217, 234-40 (1982).

¹²³Michael 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); LITTLE HOOVER COMM'N, BACK TO THE COMMUNITY: SAFE & SOUND PAROLE POLICIES (2003), available at <http://www.lhc.ca.gov/lhcdir/172/report172.pdf>.

¹²⁴Daniel 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).

¹²⁵U.S. CONST. art I, § 10, cl. 1.

¹²⁶Goldberg, at 17-21.

¹²⁷U.S. v. Winstar Corp., 518 U.S. 839, 869 (1996).

¹²⁸Saul Levmore, *The Case for Retroactive Taxation*, 22 J. LEGAL STUD. 265, 270 (1993); Michael J. Graetz, *Legal Transitions: The Case of Retroactivity in Income Tax Revision*, 126 U. PA. L. REV. 47, 48 (1977).

¹²⁹Kyle D. Logue, *Tax Transitions, Opportunistic Retroactivity, and the Benefits of Government Precommitment*, 94 MICH L. REV. 1129 (1996); Daniel S. Goldberg, *Tax Subsidies: One Time vs. Periodic--An Economic Analysis of the Tax Policy Alternatives*, 49 TAX L. REV. 305 (1994); but see Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509 (1986).

generation ... the determination of what is just and adequate.”¹³⁰ Not only did those proposals lose out in the 1930s, but by the 1970s Social Security’s pre-commitment rationale had rendered it inviolable.¹³¹ Without an early decision, payments might still be social, but they could provide little security.

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 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 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.”¹³² Criminal law long has depended on delegating decisions to prosecutors to counter-balance the populist excesses of anti-crime legislation.¹³³ Yet the law can delegate vast authority to prosecutors without delaying decisions about charging and sentencing.¹³⁴

Finally, distributional concerns may override the desire to achieve the most efficient timing where the costs of delay are born unequally. Delay in resolving civil litigation ordinarily cause the ultimate decision’s value to decline more rapidly for plaintiffs than the delay produces value for defendants,¹³⁵ making it socially inefficient, but defendants may have sufficient political influence to prevent the legislature from committing more resources to the courts. The right to a speedy trial decision in criminal cases¹³⁶ and to timely decisions in public benefits administrative hearings¹³⁷ 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.¹³⁸ Here again, however, as valid as the concerns may be, they can be accommodated without dictating the timing of legal decisions. Even if policy-makers

¹³⁰MARTHA DERTHICK, POLICYMAKING FOR SOCIAL SECURITY 185 (1979).

¹³¹*Id.*, at 203-04.

¹³²BAHRO, *supra* note 120, at 155.

¹³³Franklin E. Zimring, *Penal Policy and Penal Legislation in Recent American Experience*, 58 STAN. L. REV. 323, 331-34 (2005).

¹³⁴Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 32-35 (2002).

¹³⁵Although 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.

¹³⁶*Barker v. Wingo*, 407 U.S. 514 (1972).

¹³⁷7 C.F.R. § 273.15(c)(1) (2010).

¹³⁸*State v. Brechon*, 352 N.W.2d 745, 748 (Minn. 1984); Douglas L. Colbert, *The Motion in Limine in Politically Sensitive Cases: Silencing the Defendant at Trial*, 39 STAN. L. REV. 1271 (1987)(finding prosecutorial motions in limine violate defendants’ fifth and sixth amendment rights); *but see* Christopher Mead, *Motions In Limine: The Little Motion that Could*, 24 LITIG. 52, 53 (1998)(finding federal courts increasingly receptive to prosecutorial motions in limine).

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.¹³⁹

Sometimes these four fallacies compound one another. Postponing normative choices in the hope of enlightenment from additional information can prove counter-productive 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 non-exclusive.¹⁴⁰ 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 "statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts".¹⁴¹ Critics have questioned the desirability of rule-making authorities postponing these normative decisions and delegating them to trial courts.¹⁴²

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.¹⁴³ Technology also may allow the identification of which persons suffered harm from toxic exposure before a statute of limitations expires.¹⁴⁴ On the other hand, technology may facilitate destructive uses of information – such as employment discrimination, insurance underwriting, or invasions of privacy based on genetic data – increasing the social cost of producing that information.¹⁴⁵ This can lead to policies prohibiting the assembly of particular kinds of information that might aid in a decision. Technology may complicate the process of decision, 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.¹⁴⁶ Science also can help refine default rules so that their invocation degrades the value of a decision less.¹⁴⁷

B. Conflating Procedural, Institutional and Temporal Concerns

¹³⁹See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1083 n. 67 (D.C. Cir. 1970) (requiring tenant-defendants invoking the implied warranty of habitability to pay their monthly rent into court to reduce potential harm to their landlords).

¹⁴⁰FED. R. EVID. 807 (2010).

¹⁴¹*Id.*

¹⁴²Ronald S. Longhofer, *Trial Practice: Michigan's New Catch-All Hearsay Exceptions*, 75 MICH. BAR J. 950 (1996).

¹⁴³Jamie A. Grodsky, *Genetics and Environmental Law: Redefining Public Health*, 93 CALIF. L. REV. 171, 177, 267-68 (2005).

¹⁴⁴Jamie A. Grodsky, *Genomics and Toxic Torts: Dismantling the Risk-Injury Divide*, 59 STAN. L. REV. 1671, 1687-88 (2007).

¹⁴⁵*Id.*, at 244.

¹⁴⁶See *id.*, at 242-43 (discussing the difficulties of validating findings about genetic markers and applying them in litigation and regulation).

¹⁴⁷*Id.*, at 243.

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 decisions declines so rapidly over time that the law requires an authority to exercise a certain amount of discretion before initiating a regulatory program. If a criminal statute, particularly one limiting important rights, is too vague, 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, although such authorizing principles can nonetheless leave a great deal open.¹⁴⁸ Some statutes require administrative agencies to act through rules,¹⁴⁹ although the impossibility of anticipating every possible contingency in rules has left courts reluctant to enforce those requirements aggressively.¹⁵⁰ 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.¹⁵¹

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.¹⁵² On the other hand, under some circumstances private actors may prefer to act first and have the opportunity to justify their actions to regulators.

Preservation of large amounts of discretion does make policy formation more incrementalist. 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 of discretion are preserved.¹⁵³ In addition, those opposing the exercises of

¹⁴⁸Yakus v. U.S., 321 U.S. 414 (1944).

¹⁴⁹Morton v. Ruiz, 415 U.S. 199 (1974).

¹⁵⁰Allison v. Block, 723 F.2d 631 (8th Cir. 1983).

¹⁵¹See Heckler v. Campbell, 461 U.S. 458, 467 n. 11 (1983)(allowing standardization of Social Security disability decisions where claimant retains means of appealing to adjudicator's discretion); FPC v. Texaco, Inc., 377 U.S. 33, 47 (1964)(same for regulatory permissions).

¹⁵²See, e.g., Kaplow, *supra* note 6.

¹⁵³See Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393 (1981).

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.¹⁵⁴ 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 rule-making or adjudication. And a general desire to minimize regulatory activity does not dictate when whatever authority that remains should be exercised.¹⁵⁵

The institutional counter-argument 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.¹⁵⁶ Some also suggest that clear, bright-line rules are essential to democratic legitimacy.¹⁵⁷ Lately, however, some scholars have argued that the involvement of the President and close presidential advisors in regulatory policy-making is broader than had been understood,¹⁵⁸ at least moderating this concern. In addition, Professor Mashaw questions whether any meaningful reduction in bureaucracies' discretion is achievable.¹⁵⁹ 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.

¹⁵⁴Peter Aranson, et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1983).

¹⁵⁵Some 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 Lon Fuller, *Freedom – A Suggested Analysis*, 68 HARV. L. REV. 1315, 1325 (1955)(declaring that planners lack sufficient information); FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 48-50 (1944)(arguing that complex activities need more competition, not more planning).

¹⁵⁶*Indus. Union Dep't, AFL-CIO*, 448 U.S. 607, 685 (1980)(Rehnquist, J., concurring); JOHN HART ELY, *DEMOCRACY AND DISTRUST* 133-34 (1980); see Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1295-96 (1984).

¹⁵⁷THEODORE LOWI, *THE END OF LIBERALISM* 92 (2d ed. 1969).

¹⁵⁸Nicholas Bagley & Richard Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260 (2006); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

¹⁵⁹Jerry Mashaw, *Prodelegation*, 1 J.L. & ECON. ORG. 81, 97 (1985). He posits 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 to elsewhere in the process. 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.

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 non-delegation doctrine,¹⁶⁰ long has been dismissed as ineffectual,¹⁶¹ at least at the federal level.¹⁶² If the Court will find sufficient constraint on delegated discretion in a statute requiring only that the executive act in a "generally fair and equitable" manner,¹⁶³ delegations have no meaningful limit.¹⁶⁴ 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. 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,¹⁶⁵ thus capturing the benefits of agencies' their expertise while minimizing the costs of politicized swings in policy.¹⁶⁶

The emblematic constraint on judicial discretion in the common law system – *stare decisis* and the measured evolution of the law¹⁶⁷ – 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, a case exercising quantitative discretion about what level of contacts with a forum state justifies its exercise of personal jurisdiction over a defendant¹⁶⁸ is less significant than the initial one exercising nor-

¹⁶⁰See *supra* note 3 and accompanying text.

¹⁶¹DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY* (1997).

¹⁶²State courts have given the doctrine more force, if not a great deal more coherence. *E.g.*, *Boreali v. Axelrod*, 517 N.E.2d 1350 (N.Y. 1987); *Thygesen v. Callahan*, 385 N.E.2d 699 (Ill 1979).

¹⁶³*Yakus v. United States*, 321 U.S. 414 (1944).

¹⁶⁴*But see Clinton v. New York*, 524 U.S. 417 (1998)(invalidating statute setting no standards at all for exercise of presidential authority to invalidate spending items and tax expenditures).

¹⁶⁵*But see Whitman v. Amer. Trucking Ass'ns*, 531 U.S. 457 (2001)(denying agencies any role in remedying insufficient legislative delegations).

¹⁶⁶See *Motor Vehicle Manufacturers' Ass'n v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29 (1983)(finding sudden change in policy problematic).

¹⁶⁷HART & SACKS, *supra* note 7, at 341-44.

¹⁶⁸*Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

mative 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 inquiry¹⁶⁹ – and less significant than a subsequent decision adding “tradition” to the inquiry’s guiding norms.¹⁷⁰ 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 fast-changing social and economic changes¹⁷¹ – 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. 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” and 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.¹⁷² 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,¹⁷³ making them subject to political correction. Choices that judges might otherwise doubt are deemed ratified by the lack of political resistance.¹⁷⁴ 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 ac-

¹⁶⁹*Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

¹⁷⁰*Burnham v. Superior Court*, 495 U.S. 604 (1990).

¹⁷¹See WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994)(advocating this approach).

¹⁷²HART & SACKS, at 286-87.

¹⁷³*Cummock v. Gore*, 180 F.3d 282 (D.C. Cir. 1999).

¹⁷⁴*Johnson v. Transportation Agency, Santa Clara Cty.*, 480 U.S. 616, 629 n.7 (1987); *id.* at 644 (Stevens, J., concurring).

countable 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 rule-making fluctuates considerably over time. At the moment, for a mixture of political, technological, and psychological reasons, the pendulum has swung very far against policy-making through rules and in favor of broad reservations of discretion, leaving many normative, structural, and quantitative issues open until closer to the time a policy needs to be implemented in particular cases. As just 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. Professors Thibout and Walker offer empirical evidence that people expect judges to have the flexibility to respond to their individual circumstances.¹⁷⁵

This myopic attention to policy obsolescence results from our increasing tendency to treat a very narrowly-defined conception of efficiency as the government's primary goal.¹⁷⁶ 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,¹⁷⁷ President Clinton's "reinventing government," and President Bush's even more quantitative performance evaluation systems.¹⁷⁸ The efficiency-driven economic model of state and local government manifests itself in increasing reliance on special districts, public authorities, and other unelected special purpose governments. 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.¹⁷⁹

¹⁷⁵JOHN THIBOUT & LAURENS WALKER, *PROCEDURAL JUSTICE* 77 (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 12, at 754-55.

¹⁷⁶See, e.g., Paula A. Monopoli, *Gender and Constitutional Design*, 115 *YALE L.J.* 2643 (2006)(describing a strong preference for a decisive, agentic executive).

¹⁷⁷Government Performance and Results Act of 1993, Pub. L. No. 103-62, 107 *STAT.* 285 (codified in scattered sections of 31 U.S.C.).

¹⁷⁸The tendency to view government as a business has shaped the selection of leaders, to the benefit of candidates promising executive skills. Over the past three decades, governors and former governors have run against current or former Members of Congress in seven presidential elections, winning six. The U.S. Senate, once the cradle of presidents, is now an orphanage: senators have failed to win eight successive elections, the longest such span in the nation's history. 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. These executives come to office promising to "clean up" the "mess," attacking the legislature as much as their predecessors or opponents. The complexity of state government has flummoxed some businessmen-governors, but many arrive in office equipped to exercise power more quickly and effectively than converted legislators. They also arrive without an intuitive appreciation for the role of the legislature.

¹⁷⁹Scholars, too, have increasingly accepted efficiency as a central normative foundation of government. Some of this emphasis

This efficiency-oriented political discourse relies heavily on business metaphors.¹⁸⁰ The business model of management features sweeping executive discretion, with few obvious analogues to administrative rules. Indeed, putting off decisions until they are required, rather than investing resources in a rule-making 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 government¹⁸¹ has, along with the demise of the anti-delegation doctrine,¹⁸² 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. The courts have been reluctant to require the executive to exercise its powers through rules¹⁸³ or to attach negative consequences to the failure to do so.¹⁸⁴ Many agencies’ rule-making processes have become so ossified that their requirements of time and resources exceed many policymakers’ tolerance.¹⁸⁵

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 the rule-making process, perhaps a reduction in the number of clearances an agency must obtain to publish proposed and final rules.¹⁸⁶ For now, however, it has produced an impulse to leave important issues unresolved and in the hands of the faster-moving executive.¹⁸⁷ Some have argued that we are strongly predisposed to expect decisiveness, even despotism, from our leaders.¹⁸⁸ We depend on leaders, and it is through their decisions that we are empowered.¹⁸⁹

is seen in conservative law-and-economics scholarship that sees cost-benefit analysis as a tool for reducing the scope of government regulation. More recently, however, liberals too have begun singing the praises of governing methods whose chief virtue is their efficiency.

¹⁸⁰Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L.Q. 1001, 1077 (2004).

¹⁸¹Kagan, *supra* note 158, at 2339-46.

¹⁸²*Whitman v. American Trucking Ass’n*, 531 U.S. 457 (2001).

¹⁸³*NLRB v. Bell Aerospace*, 416 U.S. 267 (1974); *SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

¹⁸⁴*See, e.g., American Hospital Ass’n v. Bowen*, 834 F.2d 1037 (D.C. Cir. 1987) (declining to find the lack of formal rules constrains agency’s exercise of discretion through informal policy guidance); *but see U.S. v. Mead Corp.*, 533 U.S. 218 (2001) (affording less deference to interpretations of statutes through such guidance). Indeed, *Perry v. Sindermann*, 408 U.S. 593 (1972), gives the executive an incentive *not* to constrain its discretion: those constraints may create property rights enforceable through the Due Process Clause.

¹⁸⁵David 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).

¹⁸⁶Super, at 1306-07 n. 121 (giving examples of those clearances and why they tended to interact to clog the regulatory process); Peter L. Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 WAKE FOREST L. REV. 745, 766-75 (1996) (identifying strong disincentives to rule-making that have evolved since presidential candidates began “running against big government”).

¹⁸⁷This may be seen perhaps as a special case of skepticism that rules can ever be effectual in resolving important disputes. *See Duncan Kennedy, Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1699-1701 (1976) (stating that argument broadly).

¹⁸⁸George R. Goethals, *Presidential Leadership*, 56 ANN. REV. PSYCH. 545, 548-49 (2005).

¹⁸⁹Ronit Kark, et al., *The Two Faces of Transformational Leadership: Empowerment and Dependency*, 66 J. APPLIED PSYCH. 246,

In addition, the set of actors with whom one identifies often dictates one's policy views.¹⁹⁰ The same phenomenon that is "flexibility" from the perspective of decision-makers can be "instability"¹⁹¹ or "equivocation"¹⁹² 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.¹⁹³ Recent experience with corruption can build empathy with those being regulated and support rules seeking to cabin administrative discretion.¹⁹⁴ Periodic corruption scandals apparently have failed to make enough of an impression to temper the preference for discretionary administration.¹⁹⁵ 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.¹⁹⁶

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.¹⁹⁷ Leaders are the prototypical member of the group that selects them; other members of the group naturally identify with the leader.¹⁹⁸ 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.¹⁹⁹ As a result, empathy with decision-makers dominates current 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 evident wise course.²⁰⁰

Unconstrained discretion also may appeal to policymakers, particularly those that previously held such discretion in the business world. Ordinarily, one would expect regulated entities to champion rule-making to give them definite rules against which to plan. At present, however, many business interests' collective efforts are concentrating on reducing the substantive scope of regulatory authority.²⁰¹ This leaves debates about *how* that authority is exercised largely up to the executive and its allies. Identifica-

254 (2003).

¹⁹⁰See 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 landowners).

¹⁹¹SCHAUER, *supra* note 60, at 155-58.

¹⁹²ALEXANDER & SHERWIN, *supra* note 60, at 56.

¹⁹³SCHAUER, at 137-45

¹⁹⁴*Id.*, at 151-52.

¹⁹⁵Reuters, *Firms with White House Ties Get Katrina Contracts*, Sept. 11, 2005.

¹⁹⁶Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

¹⁹⁷Michael 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. PSYCH. 303, 305 (2006); Kenneth J. Levine, *Voter Decision Making: The Tensions of Personal Identity, Personal Ethics, and Personal Benefit*, 49 AM. BEHAVIORAL SCIENTIST 63, 65, 73 (2005).

¹⁹⁸Michael A. Hogg, *A Social Identity Theory of Leadership*, 5 PERSONALITY & SOC. PSYCH. REV. 184, 187-90 (2000).

¹⁹⁹*Id.*, at 190.

²⁰⁰One place where this generally is not true is the courts. At the same time we promote broader discretion for the executive and legislative branches, we seek to rein in "activist judges" and "runaway juries." Perhaps we have greater difficulty imagining ourselves in those positions. 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. Moreover, the political insulation of federal, and some state, judges may make flexibility seem costlier.

²⁰¹See *supra* note 186 and accompanying text.

tion with policymakers also may distort our calculation of the economics of deferred decision-making. All information processing activities have a cost to the government. The process of sorting among alternatives – the exercise of power – is a particularly pleasing form of work for policymakers, who may discount its cost.²⁰²

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 prefer discretionary administration.²⁰³

IV. DISCRETION AND DISASTER RESPONSE

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. On its face, disaster response 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. Evidence that maximizing reserved discretion is counter-productive even in coping with disasters therefore would strongly undercut the case for legal procrastination generally.

Disasters precipitate an acute imbalance between the demand and supply of administrative decisions. The rapid increase in demand is apparent. Agencies must adjudicate of claims for relief benefits and accusations that some people claimed benefits inappropriately. Another class of decisions is requests for prospective guidance: what to do in an unfamiliar situation, which regulations may be disregarded, and the like. People in the way of disasters tend to honor clear, directive statements from authorities.²⁰⁴ Maintaining broad discretion on how to respond to a disaster commonly results in conflicting official viewpoints. Although democratic societies value a diversity of opinion in normal times, during a disaster it can cause costly indecision.²⁰⁵ Finally, agencies face a host of intramural managerial decisions about how to compensate for lost administrative infrastructure. More generally, disasters temporarily expand the administrative state's substantive agenda, incapacitating some institutions to which agencies commonly defer and suspending some of the rationales for limiting agencies' interventions.

²⁰²SCHWARTZ, *supra* note 73, at 23.

²⁰³Michael Wenzel & Prita Jobling, *Legitimacy of Regulatory Authorities as a Function of Inclusive Identification and Power over Ingroups and Outgroups*, 36 EUR. J. SOC. PSYCH. 239 (2006).

²⁰⁴HARRY ESTILL MOORE, ET AL., NAT'L ACADEMY OF SCIENCES, BEFORE THE WIND: A STUDY OF THE RESPONSE TO HURRICANE CARLA 124 (1963).

²⁰⁵*Id.*

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: shelter, food, safe water, health care, transportation, communications, energy, and sometimes even air. The suddenness of a disaster, and resulting shortages of information,²⁰⁶ 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 information, time, and communications short, officials outside of the disaster area are ill-equipped to fill the gap.²⁰⁷

An organization anticipating sudden, severe imbalances between the demand for administrative decisions and the resources for supplying those decisions can prepare in several ways. Although efforts to increase the supply of decisional resources draw the most attention, those efforts typically have limited impact. The relative infrequency of disasters makes holding a large decisional capacity in ready reserve infeasible. Even those decisional resources that can be marshaled may be difficult to transport into the stricken areas and require time to orient to the situation.

Far more effective is to reduce demand for administrative judgments in times of crisis by deciding as much as possible prior to the disaster. One obvious step is for an agency to ensure that it does not carry backlogs of work from prior periods that would distract it when a crisis hits.²⁰⁸ Because it cannot know when a disaster will suddenly require their full attention, this entails keeping current on decision-making at all times. More importantly, the agency can sacrifice flexibility to complete part of the decision-making process in advance. 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 failed 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

²⁰⁶Even many individuals with direct experience retain many unrealistic ideas about disasters. FISCHER, *supra* note **Error! Bookmark not defined.**, at 19.

²⁰⁷Regardless 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.” RICHARD A. POSNER, *CATASTROPHE: RISK AND RESPONSE* 12 (2004).

²⁰⁸Backlogs 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. *See Heckler v. Day*, 467 U.S. 104 (1984) (overturning order limiting Social Security Administration's delays adjudicating disability applications); *but see Harley v. Lyng*, 653 F. Supp. 266, 276 (E.D. Pa. 1986) (declaring that “hunger takes no holidays” in ordering state to expedite action on food stamp applications).

Disasters can expose the harm adjudicative backlogs cause. Inspection of the bus that crashed during the evacuation from Hurricane Rita was delinquent when the emergency arose. At that point, Texas lacked the administrative resources to make up the shortfall and elected to waive its inspection regime, with tragic results. Similarly, Texas for many months had failed to resolve serious operational problems with its primary public benefits computer system. 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.

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.

This Part shows how agencies following the standard prescription of retaining flexibility floundered both before and after Hurricane Katrina while one often criticized as rule-bound and inflexible rose to the occasion quickly and effectively. Subsection 1 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 2 compares three agencies' responses to Hurricane Katrina to demonstrate the dangers of relying on "just-in-time" policy-making.

A. Deferred Decision-making and Disaster Planning

The rapturous embrace of administrative discretion is dubious in theory; Hurricane Katrina proved it calamitous in practice. Since the catastrophe, officials and their defenders routinely insist that they could not possibly have anticipated of its scope and severity. In fact, thirteen months earlier over 300 people from 13 parishes, 20 state agencies, and 15 federal agencies participated in a simulated response to a hypothetical Hurricane Pam whose characteristics were eerily similar to Katrina's.²⁰⁹ 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.²¹⁰ 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) issued in January 2005 is more of an invitation to plan than a plan proper. "The Federal Government encourages processes that support informed cooperative decisionmaking."²¹¹ "State and local governments are encouraged to conduct collaborative planning with the Federal Government as part of a 'steady-state' preparedness for catastrophic incidents."²¹² At times, it assigns tasks to particular officials in the case of a disaster, 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 remains heavily dependent on ad hoc information gathering and exercises of discretion at the time of a disaster.²¹³

²⁰⁹S. Rep. No. 109-322, at 113.

²¹⁰*See, e.g.*, 42 U.S.C. § 5131 (2006)(providing funds for the creation and updating of federal and state disaster plans); 2003 La. Act 40 ("to preserve the lives and property of the people of the state of Louisiana, it is hereby found and declared to be necessary: ... That 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").

²¹¹NATIONAL RESPONSE PLAN 282 (Dec. 2004).

²¹²*Id.*, at 44

²¹³For example, the word "assess" or "assessment" appears more than 300 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

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." 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."²¹⁴ 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."²¹⁵

New Orleans's purported disaster plan was similar.²¹⁶ Throughout, its authors determinedly refused to surrender meaningful discretion. The plan insists on the importance of "[p]roper and coordinated planning"²¹⁷ but fails to provide it. Instead, it repeatedly extols the virtues of training, enjoins all to work well and harmoniously, and insists that it desires a positive outcome. "The Office of Emergency Preparedness and the Office of Communications shall 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 populations."²¹⁸ "Emergency management has to be prepared to address the long-term operations needed to return the community to normalcy."²¹⁹ Planners clearly understood that their agencies might cease to function once a disaster hit,²²⁰ yet for the most part they declined even to formulate default rules to govern important issues in that event.

Mayor Nagin recognized shortly after taking office that 100,000 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 largely unrelated light rail public transit system within the city.²²¹ 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."²²² Similarly, it noted that "[t]hroughout the Parish persons with special needs, require special consideration regarding notification, transportation, and sheltering."²²³ It blandly promised that "[t]ransportation will be provided

time nor decisional resources will be in any scarcity at the time of a disaster.

²¹⁴S. Rep. No. 109-322, at 551.

²¹⁵*Id.*, at 552.

²¹⁶CITY OF NEW ORLEANS COMPREHENSIVE EMERGENCY MANAGEMENT PLAN (2005)[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>.

²¹⁷*Id.*, 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.*

²¹⁸*Id.*, at 3.

²¹⁹*Id.*, at 11.

²²⁰*Id.*, at 6.

²²¹S. Rep. No. 109-322, at 154.

²²²CEMP, at 11.

²²³*Id.*, at 5.

to those persons requiring public transportation from the area” without another word of how that transportation will be arranged.²²⁴

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.²²⁵ Participants in the Hurricane Pam exercise responded by proposing that federal, state, and local governments pool their resources to provide some 600 buses and 1,200 drivers fifty hours before expected landfall.²²⁶ Even this effort would only have accounted for about a quarter of the people in New Orleans known to lack personal transportation, 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 that “school and municipal buses will be used to transport evacuees who do not have transportation.”²²⁷ The regional plan was similarly mum about how to move displaced persons from emergency shelters to temporary housing: it leaves “tasks,” “coordinating instructions,” “personnel,” and “communications requirements” on that issue “TBD.”²²⁸ 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.”²²⁹ This failure to develop any sort of plan for sheltering individuals with special needs outside the New Orleans area forced local officials to leave them in the Superdome, with disastrous results.²³⁰

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.²³¹

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 72 hours in advance, evacuation of special needs populations 60-64 hours in advance, and a mandatory evacuation order for the general public 48 hours before expected landfall.²³² Anything

²²⁴*Id.*, at 8.

²²⁵S. Rep. No. 109-322, at 114.

²²⁶*Id.*

²²⁷SOUTHEAST LOUISIANA CATASTROPHIC HURRICANE FUNCTIONAL PLAN 78 (2004).

²²⁸*Id.*, at 30-31.

²²⁹*Id.*, at 82.

²³⁰H. Rep. No. 109-396, at 65 (2006).

²³¹CEMP, at 8.

²³²*Id.*, at 8.

less risked stranding residents as roadways became clogged with traffic and ultimately flooded.²³³ Yet even here, the plan's authors are so jealous of their discretion that they effectively instruct people not to take it 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."²³⁴

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 the details and logistics, and ended up issuing it less than 24 hours before landfall.²³⁵ Although Amtrak and northern Louisiana public transit systems were more than 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.²³⁶

Not only did this profligacy with decisional resources greatly increase the number of people stranded in the City, but this faith in ad hocery prevented the state from responding timely to the consequences of the predictably delayed evacuation order. With large thousands of people in the Superdome and Convention Center enduring increasingly desperate conditions, some officials were shooing away offers of buses at the same time others were seeking to round them up.²³⁷ 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 post-disaster evacuations.²³⁸

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.²³⁹ 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 decisional resources

²³³*Id.*, at 9-10.

²³⁴*Id.*, at 7.

²³⁵S. Rep. No. 109-322, at 248.

²³⁶*Id.*, at 249, 373.

²³⁷Laura Maggi, *Roundup of Buses for Storm Bungled; Blanco Documents Show Staff Confusion*, NEW ORLEANS TIMES-PICAYUNE, Dec. 6, 2005, at 1.

²³⁸Bill Walsh, *FEMA's Dome Airlift Plan Never Got Off the Ground; Concept Not Viable, National Guard Says*, NEW ORLEANS TIMES-PICAYUNE, Dec. 9, 2005, at 4.

²³⁹SCHAUER, *supra* note 60, at 145-49; Kaplow, *supra* note 6, at 570. Recognition that Congress could not formulate and enact timely responses to each disaster was a major impetus for enacting permanent federal disaster relief legislation. SUBCOMM. ON NATURAL DISASTER RELIEF, COMM'N ON INTERGOVERNMENTAL RELATIONS, NATURAL DISASTER RELIEF I (1955).

exceeding supply will be addressed through one or another form of inefficient but largely invisible rationing.²⁴⁰

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.²⁴¹ The more questions left for ad hoc decision-making, the greater the chances that the decision-maker will make an improvident choice.²⁴² Our identification with decision-makers²⁴³ 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.²⁴⁴ The Court has held that both transaction costs and the risk of inconsistent results justify foreclosing issues that claimants might otherwise raise in hearings.²⁴⁵

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.²⁴⁶

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 skew decisions profoundly by race and wealth.²⁴⁷

Fifth, this approach ignores the inefficiencies of leaving the public uncertain about what rules to follow²⁴⁸ and other transaction costs as policy continually changes.²⁴⁹ Norms clearly defined in advance can prove particularly vital to effective disaster responses, such as timely evacuations.²⁵⁰ Where plans are ambiguous, however, chaos is likely, and the only hedge against that chaos is likely to be the unilateral

²⁴⁰David A. Super, *The Political Economy of Entitlement*, 104 COLUM. L. REV. 633, 672-77 (2004).

²⁴¹See Diver, *supra* note 158, at 431-34 (arguing that the danger of substantive errors varies with the age of a policy initiative).

²⁴²SCHAUER, at 149-55.

²⁴³See *supra* notes 190-196 and accompanying text.

²⁴⁴SCHAUER, at 153-54.

²⁴⁵*Heckler v. Campbell*, 461 U.S. 458 (1983).

²⁴⁶See SCHAUER, at 149 (suggesting consideration of competing uses for decisional resources).

²⁴⁷James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1, 50 (1995); 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).

²⁴⁸SCHAUER, at 137-45; Diver, *supra* note 60, at 73-74.

²⁴⁹Michael P. Van Alstine, *The Costs of Legal Change*, 49 U.C.L.A. L. REV. 789 (2002); Kaplow, *supra* note 129, at 611-20.

²⁵⁰MOORE, *supra* note 204, at 142-44.

exercise of arbitrary power.²⁵¹ 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 it increases political accountability.²⁵² FEMA Administrator Michael Brown may have been fired, 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.²⁵³ 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 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. Michael Brown has been portrayed as an especially frivolous and callous official, but even the most attentive and compassionate policy-maker would 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.

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 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. First, the

²⁵¹*Id.*

²⁵²Kagan, *supra* note 181, at 2331-39; Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L., ECON. & ORG. 81, 95-99 (1985).

²⁵³Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461 (2003).

Food Stamp Program has a detailed set of federal eligibility rules and procedures promulgated as rules.²⁵⁴ 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. 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.²⁵⁵ 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 following day.²⁵⁶ 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 non-discretionary 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 order and its failure to access a hospital ship sitting just off of the Louisiana shore through much of the critical early recovery period – 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.²⁵⁷ 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 law²⁵⁸ 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 structure²⁵⁹ and gave each state a fixed amount of money that it could spend as it pleased.²⁶⁰ 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.

²⁵⁴7 C.F.R. pts. 271-280 (2005).

²⁵⁵Interview with Carolyn Foley, Assistant to the Deputy Administrator of FNS for Family Nutrition Programs, May 22, 2010.

²⁵⁶*Id.*

²⁵⁷*See, e.g.,* Gordon Russell, *Nagin Gets Mixed Reviews; Evacuation Plans, Superdome Use Criticized*, NEW ORLEANS TIMES-PICAYUNE, Oct. 23, 2005, at 1.

²⁵⁸Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 STAT. 2105 (1996) (codified in scattered sections of 7, 8, and 42 U.S.C.)[hereinafter PRWORA].

²⁵⁹Under AFDC, states determined the income eligibility limit and the maximum grant level. 43 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. 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. 42 U.S.C. § 1315.(2006).

²⁶⁰*Id.* § 604.

It turns out that although TANF offers states considerable *regulatory* flexibility, they lack corresponding *budgetary* flexibility. Since the state financial crises that the recession of 2001 triggered,²⁶¹ virtually all TANF block grant and state maintenance of effort funds have been committed. 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 upon in the absence of any federal program at all. 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.²⁶² 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. 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.²⁶³ 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. States, fearing scandals or market distortions resulting from one-time cash grants, still had to spend their own funds to provide vouchers or on-going aid. 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. 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 rulemaking, not adjudication. In a disaster, when those resources are acutely scarce, having as many pre-determined 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, USDA's superior disaster response owed much to clear policies developed through prior crises, leaving only modest details to be filled in.

CONCLUSION

²⁶¹David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2611-14 (2005).

²⁶²TANF Emergency Response and Recovery Act of 2005, Pub. L. No. 109-68, 119 Stat. 2003 (Sept. 21, 2005).

²⁶³These 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.

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.²⁶⁴ 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 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.

²⁶⁴William Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1976); Barbara H. Fried, *Ex Ante/Ex Post*, 13 J. CONTEMP. LEGAL ISSUES 124 (2003).