



## UNDUE PROCESS

Adam M. Samaha

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*This Article explores the relationship of the U.S. Constitution to the costs of government decision making. Constitutional law clearly can escalate these costs, as when the Due Process Clauses are read to mandate additional procedure not otherwise favored by decisionmakers. This much is understood. But the Constitution and its doctrine sometimes put downward pressure on decision costs. We lack a systematic investigation of when this is, and should be, true. The Article makes three general claims: (1) The entire Constitution tends to reduce decision costs insofar as it is a focal point for confining disputes, and empirical work suggests that adherence to the document might not accomplish much else. (2) However, individual components of the text and its doctrine often increase rather than decrease the costs of government decision making. (3) This situation is not ideal. An intelligently crafted federal constitutional law of “undue process” seems just as attractive as “due process,” and some courts have experimented with the former. Neither process theory nor implementation problems separate the two concepts, as long as courts are not tasked with optimizing government process. Yet the desirability of a generic undue process claim is tempered by the very conventions that allow the Constitution as a whole to reduce decision costs. Undue process claims therefore ought to be exceptional, even if occasionally potent, elements of federal constitutional practice. The most plausible occasions for successful objections are identified.*

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\* Assistant Professor, University of Chicago Law School. Thanks to Al Alschuler, Emily Buss, Adam Cox, Richard Epstein, Jacob Gersen, Bernard Harcourt, Eric Posner, William Rubenstein, Lior Strahilevitz, David Strauss, and Cass Sunstein for their helpful comments and suggestions, and to workshop participants at the University of Chicago Law School and the University of Minnesota Law School. Excellent research assistance was provided by Shane Davis and Fred Yarger.

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*He has no equal on earth, being created without fear. . . . [O]f all the sons of pride he is the king.<sup>†</sup>*

*But because he is mortal, and subject to decay, as all other earthly creatures are, . . . I shall in the next following chapters speak of his diseases, and the causes of his mortality . . . .<sup>††</sup>*

#### INTRODUCTION

Locating the law of due process is too easy. Our statutes, regulations, case reporters, and academic journals are packed with ideas about when government makes decisions too precipitously, or without adequate participation, or with insufficient assurance of accuracy. For example, the minimum process necessary for a lawful government decision under the Fifth and Fourteenth Amendments is a renowned feature of the U.S. Constitution. And its associated

<sup>†</sup> *Job* 41:25-26 (Jerusalem).

<sup>††</sup> THOMAS HOBBS, *LEVIATHAN* 212 (Oxford Univ. Press 1996) (1651).

scholarship has an almost immeasurable scope.<sup>1</sup> Such inquiries are often connected to an attitude about government. They treat the state as a force to be feared and constrained, by process if nothing else.<sup>2</sup> On this view, the most valuable parts of the Constitution include its Due Process Clauses, preservation of habeas corpus, overlapping authority on matters of war and peace, and elaborate requirements for statute making and constitutional amendment. Among the heroic instances of judicial intervention are marquee cases like *Gideon v. Wainwright*,<sup>3</sup> *Goldberg v. Kelly*,<sup>4</sup> *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*,<sup>5</sup> and *Hamdan v. Rumsfeld*.<sup>6</sup>

If you want to understand “undue process”—the point at which government decision making becomes too tardy, or too inclusive, or too careful as a matter of law—there is far less material competing for your attention. This is certainly true for constitutional law and theory. We do not have an integrated examination of the Constitution for the caps it places, and should place, on decision costs. Although the text seems to lack a crosscutting guarantee against undue process, certain lines of constitutional law do cabin government procedure. Animating their drive for recognition is a conviction that an efficacious and efficient state is necessary to successful social life: that “the vigor of government is essential to the security of liberty,” not to mention other demands for social justice.<sup>7</sup> A vigorous state and sensible resource allocation

1. For the years 1995 through 2005, more than 850 articles with “due process” in the title appear in Westlaw’s JLR database. Notable earlier efforts include Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366 (1911), and Lowell J. Howe, *The Meaning of “Due Process of Law” Prior to the Adoption of the Fourteenth Amendment*, 18 CAL. L. REV. 583 (1930).

2. See, e.g., David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565, 2590 (2003) (“[T]he very reason that we adopted a Constitution was that we understood that the people and their representatives would be tempted to violate basic principles in times of stress.”); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 125 (1994) (“To the extent that there is any ‘original understanding’ of the division of power between the President and Congress, it is that both are to be feared, neither is to be trusted, and if either one grows too strong we might be in trouble.”); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2344 (2006) (“[A] starting point for our government is the evil of government efficiency.”).

3. 372 U.S. 335 (1963) (requiring state-provided lawyers for certain criminal defendants).

4. 397 U.S. 254 (1970) (requiring hearings before termination of certain welfare benefits).

5. 343 U.S. 579 (1952) (denying presidential power to solve a labor-management dispute through mill seizure without clearer signs of congressional consent).

6. 126 S. Ct. 2749, 2772-75, 2786-97 (2006) (finding insufficient statutory authority for the trial of certain detainees by special military commission); *id.* at 2799 (Breyer, J., concurring) (lauding judicial insistence on statutory authorization, absent emergency); *id.* (Kennedy, J., concurring) (endorsing such legislation as “the result of a deliberative and reflective process engaging both of the political branches”).

7. THE FEDERALIST NO. 1, at 35 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see, e.g., SOTIRIOS A. BARBER, WELFARE AND THE CONSTITUTION 15 (2003)

are jeopardized by excessive hand-wringing, all-inclusive roundtable deliberation, and unrealistic hopes for perfection. On this view, we ought to cheer for arcane provisions like the default date for congressional assembly and the rules of presidential succession,<sup>8</sup> along with the Double Jeopardy, Speedy Trial, and Full Faith and Credit Clauses.<sup>9</sup> We should celebrate pitifully obscure decisions such as *Hollingsworth v. Virginia*,<sup>10</sup> *Klopper v. North Carolina*,<sup>11</sup> and *Plaut v. Spendthrift Farm, Inc.*<sup>12</sup>

Even casual observers understand that government decision making can be too costly as a matter of ordinary policy. Opposition to excessive decision costs is shared by everyone from Ronald Dworkin and Richard Posner<sup>13</sup> to Charles Dickens and Franz Kafka.<sup>14</sup> Most of us already see that decision costs are as real as error costs, and that sometimes “the process is the punishment”<sup>15</sup> or “[j]ustice delayed is justice denied.”<sup>16</sup> Anyone who forgot these lessons was reminded of them by the trial of Slobodan Milosevic and the relief effort following Hurricane Katrina. The international criminal proceedings against Milosevic lasted four years, cost perhaps tens of millions of dollars, and failed to reach judgment before the defendant died.<sup>17</sup> In New Orleans, the delays were much shorter yet still devastating. Thousands were stranded for days without food, shelter, or medical care. Many were in places accessible to the news

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(“[C]onstitutional government, is still *government* . . .”); STEPHEN HOLMES, *PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY* 153 (1995) (“The American Constitution is an instrument of government, not an obstacle to government . . .”); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2263 (2001) (“[B]ureaucracy also has inherent vices (even pathologies), foremost among which are inertia and torpor.”).

8. See U.S. CONST. art. I, § 4, cl. 2, *superseded* by U.S. CONST. amend. XX, § 2; *id.* art. II, § 1, cl. 6; *id.* amend. XX, §§ 3-4; *id.* amend. XXV.

9. See *id.* art. IV, § 1; *id.* amends. V, VI.

10. 3 U.S. (3 Dall.) 378 (1798) (discussed below in Part II.B.2.a).

11. 386 U.S. 213 (1967) (discussed below in Part II.B.1).

12. 514 U.S. 211 (1995) (discussed below in Part II.B.2.c).

13. See RONALD DWORKIN, *Principle, Policy, Procedure, in A MATTER OF PRINCIPLE* 72, 77-78 (1985) (denying rights to the most accurate procedures); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 563 (6th ed. 2003) (summing error and decision costs).

14. See CHARLES DICKENS, *BLEAK HOUSE* 13-14 (Stephen Gill ed., Oxford Univ. Press 1996) (1853) (discussing the everlasting suit of *Jarndyce v. Jarndyce*); FRANZ KAFKA, *THE TRIAL* 234-36 (Willa Muir & Edwin Muir trans., Alfred A. Knopf 1992) (1925) (describing the door-keeper to Law).

15. MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 30-31 (1979); *cf.* GRANT GILMORE, *THE AGES OF AMERICAN LAW* 111 (1977) (“In Hell there will be nothing but law, and due process will be meticulously observed.”).

16. LAURENCE J. PETER, *PETER’S QUOTATIONS* 276 (1977) (attributing the quotation to William Gladstone); *cf.* WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. I, ll. 70-80 (Dover Publ’ns, Inc. 1963) (1623) (“For who would beare . . . the Lawes delay . . . But that the dread of something after death . . . Puzels the will . . .”).

17. See David Scheffer, *Jostling over Justice*, FOREIGN POL’Y, May-June 2006, at 4; *see also* Eric A. Posner, *Political Trials in Domestic and International Law*, 55 DUKE L.J. 75, 146-47 (2005).

media but not to relief workers operating within a confused and multi-layered decision structure.<sup>18</sup>

But is excessive process, like inadequate process, a constitutional problem in the United States? The best answer is awkward: *the entire Federal Constitution is about reducing decision costs but most of its parts are not*. As to the whole, the characterization does not rely on a deep theory about the proper substance of constitutional law. Like it or not, the text is a focal point that tends to confine the scope of disputes.<sup>19</sup> In fact, this is just about the only sound reason to pay attention to the text. Some empirical work in economics and political science, largely ignored in the law literature, suggests as much.<sup>20</sup> But the local picture is unlike the global view. In contrast with state constitutions inspired by the Magna Carta,<sup>21</sup> enforceable undue process norms are somewhat exceptional in federal constitutional law, whether we focus on plain text or judicial doctrine. Ordinarily the judiciary imposes procedural minima, not maxima, through its federal constitutional decisions.

The question is whether this state of affairs is defensible. Can judicially enforced and other due process norms comfortably coexist with the usual absence of undue process norms? There is room for debate on this point but the answer is likely no, as a matter of principle. The arguments are almost equally strong for generic, entrenched, judicially enforceable due process and undue process norms. The current tilt toward due process is probably an artifact of centralization fears in past generations—a slant that underestimates nonsalient process costs borne by the general public, along with the threat of a government that is crippled or that leverages its control over procedure to obtain submission or bribes. Furthermore, whatever hope or hesitation one should have about supreme judicial review in due process disputes largely carries over into undue process territory. Asking the judiciary to engineer “optimal process” through constitutional doctrine is imprudent, but a modest undue process norm would likely accomplish more good than harm. Like modern due process doctrine, the claim could incorporate deference to other officials and be fenced off from generally applicable rulemaking.

But the concrete issues are not about pure principle, nor are we faced with redrafting the Constitution. This restricts the scope of defensible undue process claims. Establishing a generic undue process norm might entail the kind of creativity that is disfavored by the decision-cost minimizing role of the existing

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18. See SELECT BIPARTISAN COMM. TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA, A FAILURE OF INITIATIVE: FINAL REPORT, H.R. REP. NO. 109-377 (2006); DOUGLAS BRINKLEY, THE GREAT DELUGE 19-24, 90-92 (2006). Blame is still being studied and assessed.

19. See David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717, 1725, 1731-35 (2003) (using the focal point idea against dead hand objections); *infra* Part II.A.1.

20. See *infra* Part II.A.2.

21. See *infra* Part II.B.1.

text. Oddly, then, the one global element of federal constitutional law likely to reduce decision costs—fidelity to text as understood through some interpretive method—is the most important barrier to infusing undue process norms into every government operation. Indeed, the opportunity for judicial review itself tends to increase decision costs, which are not easily reduced by ready-made constitutional rules for this field.

The analysis below proceeds in three parts. Part I identifies several episodes in which government process arguably has run out of control, and it introduces connections and distinctions between due and undue process. The concepts of decision and decision costs are then specified. Part II searches federal constitutional law for its relationship to undue process. The connection is two-fold. First, the Constitution tends to cut decision costs insofar as it is a reference for dispute resolution. Contemporary empirical studies prompt the question whether constitutional law is capable of doing much else. Second, certain federal constitutional provisions and doctrines serve undue process missions. A potentially explosive phenomenon involves lower court extensions of *Mathews v. Eldridge*.<sup>22</sup> These cases intimate a federal undue process claim with a scope rivaling the area now reached by conventional due process doctrine, and they motivate much of the normative analysis in Part III. No one has presented a constitutional theory of undue process to date,<sup>23</sup> but certain due process theories can be retrofitted to provide guidance. The question of judicial review is also taken up in Part III. It concludes that neither theory nor practical issues of enforcement will easily distinguish due from undue process. They are global norms of approximately equal attractiveness. But textualism and incremental judicial reasoning can confine the latter without eliminating the former. Many undue process claims are self-defeating in a way that most due process claims are not. The closing sections of this Article isolate the most plausible undue process objections.

## I. DECISION AND COST

### A. Nightmares

#### 1. *Stroud Township*

Woodwind Estates, Ltd., wanted to build affordable subdivision housing in Stroud Township, Pennsylvania. It qualified for over one million dollars in low-income housing tax credits to do it. But the state agency administering the credits conditioned their use on the development being complete within about

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22. 424 U.S. 319 (1976) (refusing to require a pre-deprivation hearing as a matter of “due process”).

23. Preliminary thoughts can be found in Adam M. Samaha, *Undue Process: Congressional Referral and Judicial Resistance in the Schiavo Controversy*, 22 CONST. COMMENT. 505, 522-28 (2005).

twenty-eight months. Some local politicians and residents had no interest in allowing the developer to meet that deadline or any other. They were concerned about “the socioeconomic background of prospective tenants.”<sup>24</sup> This was not a reason for rejecting the plan under the relevant ordinance, however, and the town planning commission’s attorney concluded that the development qualified for approval as a subdivision. None of this mattered. The commission first declared that the plan lacked certain technical information. Next it sat on the revised plan for six months. Then it recommended denial of the plan, which was the course followed by the local board of supervisors. The board maintained that the plan had to follow the more demanding procedure for a planned unit development. The developer started to seek judicial review in state court,<sup>25</sup> but it was too late. Concluding the homes could no longer be built before the state agency’s deadline, the developer cancelled the project. The developer later sought damages in federal court asserting a violation of “substantive due process.”<sup>26</sup>

## 2. *Katrina and FEMA*

Hundreds of thousands of people were displaced from their homes by Hurricane Katrina in August 2005. Televised pictures of those stranded in New Orleans were available every day. As news coverage became less intense, new bureaucratic problems mounted. One involved applications for disaster assistance from the Federal Emergency Management Agency (FEMA). Three months after the storm, approximately 80,000 applications were listed as unprocessed by FEMA.<sup>27</sup> Many of the applicants for housing assistance were fortunate in the sense that the Red Cross had placed them in hotels and motels free of charge, and the federal government had taken over payment obligations for that effort. But FEMA wanted to discontinue the hotel/motel program and this decision escalated storm victims’ demand for swift processing of their assistance applications. A putative class action was filed on their behalf, requesting preservation of hotel/motel housing and challenging FEMA’s processing delays as a violation of the right to “due process” of law.

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24. *Woodwind Estates, Ltd. v. Gretkowski*, 205 F.3d 118, 120-21 (3d Cir. 2000) (describing the developer’s evidence at trial).

25. *See Woodwind Estates, Ltd. v. Gretkowski*, 39 F. Supp. 2d 537, 539 (M.D. Pa. 1999).

26. *See Woodwind Estates*, 205 F.3d at 122, 125.

27. *See McWaters v. FEMA*, 408 F. Supp. 2d 221, 227, 232 & n.13 (E.D. La. 2005) (opinion modified Jan. 12, 2006).



### 3. *Death row*

Some observers estimate that the total cost of reaching an execution is over one million dollars and substantially greater than imposing lesser penalties.<sup>28</sup> Part of the cost is associated with procedural protections for the accused, from pretrial proceedings to habeas corpus. In addition, many capital defendants are indigent and the state may not leave them without legal assistance at trial or for an initial appeal.<sup>29</sup> These outlays do not purchase speed, however. For an inmate on death row in 2004, the average time since the last sentence of death was about ten years.<sup>30</sup> Such figures can be used to question the burden on taxpayers and the possibility of deterrence, but the situation could be injurious to inmates as well. Years in prison facing death might impose unjustifiable suffering. A few foreign nations that retain the death penalty now have court-imposed limits on the delay between sentence and execution, and some U.S. lawyers contend that death sentences should be abrogated as cruel and unusual punishment when delay is excessive and attributable to the government.<sup>31</sup> One complication is deciding how to fashion a test for “excessive” delay. Some Supreme Court Justices might be comfortable with multi-factor inquiries, perhaps evolving into rules. Others seem to believe it is their duty to construct hard-and-fast constitutional doctrine up front, or not at all.<sup>32</sup>

### 4. *Filibusters*

In 1806, the rules of the Senate were revised, omitting nondebateable previous question motions. This new edition of the rules opened the way, perhaps inadvertently, to the modern filibuster.<sup>33</sup> By the end of the century, senators developed a practice by which they could threaten legislation and

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28. See PHILIP J. COOK & DONNA B. SLAWSON, *THE COSTS OF PROCESSING MURDER CASES IN NORTH CAROLINA* 1, 97-99 (1993) (studying net excess cost to a state and its counties per sentence and execution); Katherine Baicker, *The Budgetary Repercussions of Capital Convictions*, 4 *ADVANCES ECON. ANALYSIS & POL’Y* No.1, Art. 6, at 2, 10-14 (2004), <http://www.bepress.com/bejeap/advances/vol4/iss1/art6> (studying county expenditures).

29. See, e.g., *Murray v. Giarratano*, 492 U.S. 1, 7-11 (1989) (plurality opinion).

30. See THOMAS P. BONCZAR & TRACY L. SNELL, *Capital Punishment, 2004*, BUREAU OF JUST. STATS. BULL., Nov. 2005, at 15 app. tbl.3 (revised Feb. 1, 2006) (providing data for states with ten or more inmates on death row), available at <http://www.ojp.usdoj.gov/bjs/abstract/cp04.htm>.

31. See, e.g., *Knigh v. Florida*, 528 U.S. 990, 995 (1999) (Breyer, J., dissenting from denial of certiorari); *Lackey v. Texas*, 514 U.S. 1045, 1045-46 (1995) (Stevens, J., respecting denial of certiorari).

32. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 *U. CHI. L. REV.* 1175, 1183 (1989); Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 *HARV. L. REV.* 22, 26 (1992).

33. See SARAH A. BINDER & STEVEN S. SMITH, *POLITICS OR PRINCIPLE? FILIBUSTERING IN THE UNITED STATES SENATE* 1-27, 33-40 (1997) (claiming previous question motions were sometimes used by *opponents* of proposals, who achieved a day or more of delay by losing on the motion).

appointments with open-ended debate. Senate rules were amended during the twentieth century to address the filibuster, but the tactic was not eliminated. Rule XXII currently requires three-fifths of all senators to successfully invoke cloture,<sup>34</sup> and contemporary practice usually avoids the spectacle of filibuster supporters actually having to hold the floor. Although filibusters may be controlled informally, the practical effect of Senate practice is to enhance the power of minority factions and even individual senators compared to outcomes under a majority voting rule for cloture. Some believe that the status quo is unconstitutional.<sup>35</sup>

##### 5. "Peanut butter"

For certain types of orders, the Food and Drug Administration (FDA) must conduct trial-type hearings to resolve objections.<sup>36</sup> An ingredient-based definition for any product calling itself "peanut butter" was one such order as of 1959. In that year, FDA proposed that "peanut butter" contain at least 95% peanuts. Manufacturers of the leading brands were unhappy. Theirs contained only 87% peanuts.<sup>37</sup> Two years later, the agency blinked and published an order cutting the peanut-content requirement to 90%. The manufacturers were unmoved. FDA issued a revised order in 1965, but the 90% clause remained, and the order could not take effect before the manufacturers' objections were resolved. The agency got around to holding a hearing in late 1965. With extensive testimony and cross-examination, it went on for twenty weeks and 7736 pages of transcript.<sup>38</sup> It was not until 1968 that the FDA completed its revised order. The Third Circuit denied a challenge to the final version in 1970, which salvaged the 90% clause.<sup>39</sup>

Worry about agency ability to swiftly and efficiently adopt major new rules is the theme of administrative law's ossification literature.<sup>40</sup> The concern extends to notice-and-comment rulemaking, not just formal rulemaking with

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34. See STANDING RULES OF THE SENATE, S. DOC. NO. 106-15, R. XXII, cl. 2 (2000).

35. See, e.g., John C. Roberts, *Majority Voting in Congress: Further Notes on the Constitutionality of the Senate Cloture Rule*, 20 J.L. & POL. 505, 520 (2004). But see, e.g., Michael J. Gerhardt, *The Constitutionality of the Filibuster*, 21 CONST. COMMENT. 445 (2004).

36. The current version of the statute is codified at 21 U.S.C. § 371(e)(1) (2006).

37. See *Peanut Butter: Notice of Proposal to Establish Definition and Standard of Identity*, 24 Fed. Reg. 5391 (proposed June 25, 1959) (judging by the weight of the finished food); Robert W. Hamilton, *Rulemaking on a Record by the Food and Drug Administration*, 50 TEX. L. REV. 1132, 1143 (1972).

38. See Hamilton, *supra* note 37, at 1143-44.

39. See *Corn Prods. Co. v. FDA*, 427 F.2d 511, 517 (3d Cir. 1970). The current version of the order is at 21 C.F.R. § 164.150 (2005).

40. See, e.g., Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1385-86, 1412 (1992); Richard J. Pierce, Jr., *The APA and Regulatory Reform*, 10 ADMIN. L.J. 81, 82-84 (1996); *infra* note 262.

trial-type hearings.<sup>41</sup> Some commentators blame courts. Attempting to better insulate a proposed rule from a judicial “hard look” at the record and the agency’s decision,<sup>42</sup> an agency might lard on explanations, justifications, and responses to public comments. This boosts the resources necessary for such rulemaking, slows the progression from a proposal to an enforceable rule, and may increase the probability that any rule will do more harm than good in fields of rapid change. In the alternative, agency officials might abandon both formal and notice-and-comment rulemaking in favor of less overt mechanisms for making policy.<sup>43</sup>

### 6. *Yucca Mountain*

In the 1950s, the National Research Council of the National Academy of Sciences (NAS) began studying how best to store underground the radioactive waste from nuclear power plants and weapons production.<sup>44</sup> There remained the decision about where to locate any such facility, but a coalition formed to prevent radioactive waste from continuing to accumulate at more than one hundred sites around the country. In 1982, Congress granted the Department of Energy (DOE) authority to build and operate an underground geologic repository, and it charged the Environmental Protection Agency (EPA) and the Nuclear Regulatory Commission (NRC) with composing rules on emissions and licensing for the facility.<sup>45</sup> DOE conducted a preliminary investigation and recommended three sites for more intensive study. The President signed off on the recommendation in 1985. Then Congress narrowed the options in 1987, ordering DOE to study only one site: Yucca Mountain, Nevada, a ridge ninety miles from Las Vegas in an area that has already been used to test nuclear weapons.<sup>46</sup>

Much more process was to come, including public input, scientific investigation, agency rulemaking, state and local political reaction, and litigation. More than one hundred public hearings and a year and a half of public comment took place between 1995 and 2001.<sup>47</sup> At the tail end of that

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41. See 5 U.S.C. §§ 553, 556-557 (2006).

42. See, e.g., *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 34 (1983) (holding an agency acted arbitrarily and capriciously by offering inadequate basis and explanation for a rule change); cf. 5 U.S.C. § 553(c) (2006) (requiring “a concise general statement of [rule] basis and purpose”).

43. See JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 10-14, 19, 224-54 (1990) (examining a shift after 1976 from new general safety standards to motor vehicle recalls).

44. See NAT’L RESEARCH COUNCIL, *THE DISPOSAL OF RADIOACTIVE WASTE ON LAND* (1957).

45. See 42 U.S.C. §§ 10132-10134, 10141(a)-(b) (2006).

46. See *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1259-60 (D.C. Cir. 2004) (per curiam).

47. See 42 U.S.C. § 10134(a)(1) (2006) (requiring hearings near Yucca); OFFICE OF

period, EPA, NRC, and DOE spent two years developing new standards for a repository at Yucca in light of statutorily required advice from NAS.<sup>48</sup> Nearing the Act's twentieth anniversary in 2002, the Secretary of Energy found the Yucca site suitable and recommended it for a permit application to NRC.<sup>49</sup> This triggered an additional procedural check. The 1982 legislation granted Nevada's governor or legislature a veto over the project, which could be overridden by a congressional resolution.<sup>50</sup> Nevada's governor objected and Congress overrode his opposition.<sup>51</sup> Yet construction remains stalled. DOE is still working on a permit from NRC. And the D.C. Circuit recently held that the repository must be designed to reasonably assure no excess radiation emission for perhaps one million years, in accord with statute and NAS recommendations.<sup>52</sup> EPA had hoped that ten thousand years would be sufficient, but the agency must revise its rule and DOE must reassess its design. DOE's current goal is to open the facility in 2017.<sup>53</sup>

### B. Conceptual Introduction

Lawyers have traced and deconstructed the concepts of "procedure" and "substance" for so long that the questions are no longer very interesting. It is widely understood that procedural rules (however specifically defined) can trump substantive rights (however specifically defined), and that these substantive values can bend procedural norms. The degree to which the

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CIVILIAN RADIOACTIVE WASTE MGMT., U.S. DEP'T OF ENERGY, RECOMMENDATION BY THE SECRETARY OF ENERGY REGARDING THE SUITABILITY OF THE YUCCA MOUNTAIN SITE FOR A REPOSITORY UNDER THE NUCLEAR WASTE POLICY ACT OF 1982, at 32 (2002) [hereinafter DOE RECOMMENDATION] (estimating site evaluation costs at \$4 billion).

48. See Yucca Mountain Site Suitability Guidelines, 66 Fed. Reg. 57,298 (Nov. 14, 2001) (codified at 10 C.F.R. pts. 960, 963); Disposal of High-Level Radioactive Wastes in a Proposed Geologic Repository at Yucca Mountain, NV, 66 Fed. Reg. 55,732 (Nov. 2, 2001) (codified in scattered parts of 10 C.F.R.); Public Health and Environmental Radiation Protection Standards for Yucca Mountain, NV, 66 Fed. Reg. 32,074 (June 13, 2001) (codified at 40 C.F.R. pt. 197).

49. See DOE RECOMMENDATION, *supra* note 47, at 45-46.

50. See 42 U.S.C. §§ 10135(b)-(c), 10136(b)(2) (2006). The statute also attempts to eliminate procedural roadblocks to a vote on a siting resolution in either House, including time limits on floor debate. See *id.* § 10135(d)-(f). Assuming the resolution is presented to the President for a highly improbable veto option, there is no problem under *INS v. Chadha*, 462 U.S. 919 (1983) (discussed below in Part II.B.2.a).

51. See Pub. L. No. 107-200, 116 Stat. 735 (2002).

52. See *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1267-73, 1299-1301 (D.C. Cir. 2004) (*per curiam*); see also Energy Policy Act of 1992, Pub. L. No. 102-486, § 801(a), 106 Stat. 2776, 2921-23 (1992) (stating that the agency rules must be "based upon and consistent with" the findings and recommendations of NAS). NAS recommended a time period it thought feasible for scientific analysis and long enough to include the greatest radiation risks. See NAT'L RESEARCH COUNCIL, TECHNICAL BASES FOR YUCCA MOUNTAIN STANDARDS 6, 55 (1995).

53. See U.S. Dep't of Energy, Yucca Mountain Repository Schedule (July 19, 2006), available at [http://www.ocrwm.doe.gov/info\\_library/newsroom/documents/CtrSchedule.pdf](http://www.ocrwm.doe.gov/info_library/newsroom/documents/CtrSchedule.pdf).

judiciary might be illegitimately clouding the surviving distinctions is also exhaustively investigated by academics. Attention to the procedure/substance dichotomy threatens more than tedium, however. It can overshadow equally important problems involving government decision making. One of them is the issue of process, or decision cost, that is excessive as opposed to inadequate. Existing constitutional law and theory sometimes grapple with this dimension, sometimes within the looser understandings of “due process of law.” But only sometimes, and not systematically.

The six controversies detailed above help expose the dimension of undue process. They arise in wildly different settings, they implicate vastly different trade-offs, and they scrape several ideological sensitivities. But in one way they are fundamentally the same: each poses a question about decision costs. A decision is on the agenda of a government official or institution, and the process surrounding that decision is generating burdens of debatable value. The decision might be trivial or monumental. The costs might be suffered primarily by private parties or substantially shared with frustrated government officials. The cause of the burden might be official self-interest and bad faith, or resource constraints and negligence, or interest-group tactics and coalition-building politics. Because different syndromes are at work, different remedies might be appropriate. But regardless of the culprits, victims, and goals at stake, government decision making can be excessively burdensome or even, as we shall see, unconstitutional.

Some conceptual slipperiness should be noted before going further, however. To an extent, the due/undue distinction can be deconstructed just like the substance/process distinction. Shifting the status quo, legal entitlements, and our perspective may convert some orthodox-sounding due process objections into complaints about decision costs, and vice versa. Think about a simple adversarial dispute in which *A* sues *B* for possession of land. If *A* bears the burden of persuasion, *A* will demand some process for introducing favorable evidence. *B* presumably is disadvantaged by this “due” process demand in that *B* is more likely to suffer an adverse decision, and *B* might then resist *A*’s demand as “undue” process, or ask for additional (“due”) process to combat the persuasiveness of *A*’s evidence. While granting both demands for more process might enhance judicial accuracy, the arguments have a zero-sum quality. So if instead *A* was in possession of the property and *B* filed suit, or *B* otherwise had the burden of persuasion, nothing analytically significant has changed. One might now label *B*’s initial demand for process a question of “due” process and label *A*’s possible resistance a complaint about “undue” process, but the structure of these disputes is the same. In fact, *A* might argue for more process as a remedy for unjustified attention to *B*, thus combining an “undue” process objection with a “due” process solution. The reverse is also possible: an argument to cut off any more process for *B* so that *A*’s interests are not lost from view. The due/undue distinction could then be characterized as an artifact of the status quo, substantive entitlements, or labeling conventions, and

one might say the court's mission in any event is to offer "optimal" process to warring parties.

More will be said on these subjects below but a few points can be made here. The present inquiry concerns the role of the U.S. Constitution and judicial review in limiting decision costs. Optimizing government process is the ultimate policy goal, but that directive might not make sense as enforceable constitutional law. The latter might aim for something less or different, especially if courts will have the final word on the relevant questions.<sup>54</sup> Aside from this complication, it is plainly true that commitments to substantive entitlements affect how process claims—all process claims—play out. Dedication to a particular conception of political speech or physical liberty or private property can make irrelevant the precise method of injury. Process can be the means of imposing burdens on highly valued entitlements, much like a fine or a tax; accordingly, labels like "due" and "undue" may become unimportant. It is also true, however, that these substantive commitments can be sticky. When constitutionally grounded, entitlements are difficult to rearrange and so stable patterns of due and undue process claims are likely to emerge. Although these entitlements can be threatened by officials who either ignore their substantive value or attend to excessive protocol when making decisions, both kinds of threats should be recognized.<sup>55</sup>

In some ways, the most intriguing cases involve softer entitlements, where the scales are not already seriously tipped in one direction or where decision costs are suffered by less visible groups. Certain government procedures are more sensitive to one kind of decision cost than another, by design or otherwise. When *A* sues *B* in a simple property dispute, costs are borne by third-party taxpayers  $C_{1-n}$  who are not ordinarily thought to have justiciable legal entitlements at stake.<sup>56</sup> The costs are nonetheless real, and if the adjudicator is systematically overgenerous in granting process demands from both the *As* and *Bs* of the world, then we have an undue process issue. This is so even if process rights for *A* and *B* are perfectly well apportioned between them.<sup>57</sup> Here the unaddressed problem is a decisionmaker too focused on

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54. See *infra* Part III.A.

55. See *infra* Part II.B.2.b. Hence "undue process" concerns can be addressed *through* entitlements. Some of these entitlements are usually considered substantive, like speech rights. See U.S. CONST. amend. I. Others might be called procedural, like the warrant requirement for certain seizures and the prohibition on excessive bail. See *id.* amends. IV, VIII. The latter provisions cap process burdens on suspects and ensure process burdens for the state, where a contrary allocation presents risks that are in some sense intolerable—that is, where we are more concerned about one type of error (mistaken detention) than another (mistaken physical liberty).

56. See, e.g., *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1862-64 (2006). A taxpayer complaint would presumably demand less process for the litigants, not additional process for taxpayer input on the dispute—beyond what is necessary to establish the problem and cure it going forward.

57. This may also be so even if the parties would be happy with less effort—although

salient parties in maximizing information and accuracy, participation and case-specific legitimacy, or some other value. Similarly, when *A* applies for financial assistance from a government agency or when *B* is detained on suspicion of criminal activity, potential assistance applicant *C*<sub>1</sub> and possible crime victim *C*<sub>2</sub> face risks that could be heightened by procedural safeguards for *A* and *B*.<sup>58</sup> Moreover, trade-offs are being made along multiple dimensions. The burdens of delayed decisions, types of error, and financial cost are suffered differently by different people depending on the circumstances. When *A* and *B* are locked in a custody dispute and focused on accuracy and their participation, child *C* might suffer more from a delayed disposition than from any conceivable outcome on the merits.<sup>59</sup> All of this makes it difficult to wash away due and undue process distinctions by rearranging typical entitlements for a given type of dispute, even when constitutional and other constraints permit it.

The six exemplary “nightmares” are reconsidered at the end of this Article. They involve process costs and trade-offs of the variety just indicated. But before constitutional law can be understood on these points, the concept of decision cost and its leading components should be specified.

### C. Working Definitions

#### 1. Decision

To make certain nothing important in constitutional law is overlooked, our working definitions ought to be inclusive. “Decision” can therefore take a common meaning, albeit restricted to state actors. It means *the resolution of an issue on the agenda of a government official or institution, involving a choice among courses of action or inaction that alters the status quo*. This reaches well beyond critical forks in human affairs. It includes not only promulgation of an enforceable regulation but also the choice of rulemaking procedures; not only holdings in Supreme Court cases but also denials of certiorari; not only enactment of statutes but also ending of debate. In any case, we should assume that consequences follow decisions and that undoing those consequences would cost something. Furthermore, any decision can be characterized along several dimensions.<sup>60</sup> Three are worth noting, because they directly impact tolerance

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self-help will sometimes be available (for example, negotiated settlement), and there may be offsetting public benefits to a public resolution of the dispute. See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085, 1087 (1984) (promoting a judicial role in explicating public values); William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 236, 238-42, 261 (1979) (suggesting precedent production as an adjudicatory output that might be best provided with government intervention).

58. See *infra* Part III.B.2.d (discussing quasi-*Mathews* cases).

59. See Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 22-24 (1987).

60. See CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 17 tbl.1.1, 21 tbl.1.2 (1999) (studying judicial decisions and employing

for decision costs and the incentives of interested parties to engage in conduct that increases them.

First, a decision occupies an area. It aims to affect the environment within a subdivision of all government power. Compare, for example, a congressional appropriation for a pilot project with a federal prescription drug benefit.<sup>61</sup> Second, a decision might have a prescribed duration. Some decisions are definitely temporary. Their makers want the decision to expire on a date certain absent additional effort, as with sunset provisions in legislation and constitutions.<sup>62</sup> Other decisions have no such expiration date and their time frame is in that sense indefinite. Third, and closely related, different degrees of resilience attach to a decision, regardless of an expiration date. Often a decision is, formally, just as easy to take back as it was to make. Ordinary statutes are like this. Alternatively, law sometimes makes a decision more difficult to unsettle than to issue. Federal courts treat their final judgments this way: Congress and Article III tribunals might have flexibility in deciding which judgments should issue and when they become final, but the Supreme Court has held that reopening those judgments raises constitutional questions.<sup>63</sup> This is not to suggest that formal law alone dictates resilience or duration. Statutes with sunset provisions are sometimes habitually renewed, while inertia, agenda control, and path dependence can harden initial decisions as well as any resilience rule. The point is that decisions cover variable amounts of territory, in terms of their expected longevity and area of impact.

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categories of narrow/wide, shallow/deep, minimal/nonminimal, and strong/weak stare decisis).

61. Cf. William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216 (2001) (pointing out variety in statutory impact). Sunstein separates the theoretical depth of a decision from its operative width. See SUNSTEIN, *supra* note 60, at 16-19. Both ideas can be combined into "area." To the extent that deep theoretical commitment affects other decisions, it increases the area of decision.

62. See U.S. CONST. art. I, § 2, cl. 3; *id.* art. I, § 3, cl. 2; *id.* art. I, § 9, cl. 1; *id.* art. V; Jacob E. Gersen, *Temporary Legislation*, 74 U. CHI. L. REV. (forthcoming 2007). The Supreme Court has imported a similar idea into constitutional doctrine: the suggestion that race-based affirmative action in university admissions can survive for only twenty-five more years. See *Grutter v. Bollinger*, 539 U.S. 306, 342-43 (2003); cf. *Ashcroft v. ACLU*, 542 U.S. 656, 671-72 (2004) (recognizing the possibility of intervening technological change and a different outcome at trial).

63. See *infra* Part II.B.2. Law might attempt to make reversal even easier than the initial decision. But these rules are often undesirable and unstable. Decisionmakers might spin-cycle through contradictory outcomes, or the formal arrangement will disintegrate. A purported majority voting rule, for example, may effectively become an ongoing supermajority requirement, as proponents of change anticipate instability without a long-term agreement from members of the minority. See David M. Barton, Comment, *Constitutional Choice and Simple Majority Rule*, 81 J. POL. ECON. 471, 474-79 (1973) (analyzing submajority rules); see also Adrian Vermeule, *Submajority Rules: Forcing Accountability upon Majorities*, 13 J. POL. PHIL. 74, 74-79, 89-92 (2005) (claiming that institutions thankfully use submajority rules, if at all, for preliminary, procedural, and agenda-setting decisions that tend to be difficult to reverse).



Part of making a decision is plugging values into these three variables. As the values become clearer, it becomes easier to evaluate whether reaching the decision was cost-justified. When the decision is meant to temporarily govern a thin slice of human life with little significance to the governed parties, probably no substantial effort should be expended on the decision. The opposite is usually true for decisions that affect the lives of many people, in ways intensely important to them, with no sunset to limit the experiment, and when course corrections are especially difficult.<sup>64</sup>

## 2. *Decision costs*

The idea of “decision cost” has been used by academics for decades,<sup>65</sup> usually without elaboration. The present study calls for some specification because not all of the concept is intuitive.

The key distinction is between decision costs and error costs. Decision costs are associated with reaching a decision; error costs are a possible consequence of that decision. Thus decision costs are generated before reaching any decision at all. Error costs, in contrast, depend on a decision. There is disagreement over precisely what counts as cost rather than benefit, but for now the concept can be inclusive. “Decision costs” therefore means *any burden, such as a resource expenditure or opportunity cost, associated with reaching decision*. This covers time, money, and emotional distress from uncertainty, conflict, worry, and the like.<sup>66</sup> And it reaches everyone who bears these costs, whether public or private actors. Civil litigation, for instance, generates decision costs for taxpayers, judges, plaintiffs, defendants, witnesses, and others as disputants move toward settlement or judgment.

One obvious driver of decision costs is “process.” Every official decision is arrived at by a method. Occasionally it is elaborate, as with the decision trees and influence diagrams recommended for complex problems by some decision analysts.<sup>67</sup> In other circumstances an official will rely on less, including snap

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64. See 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*423 (“[M]ore time and circumspection are requisite in causes, where the suitors have valuable and permanent rights to lose . . . .”); Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 17 (1996).

65. Early development of the concept appears in JAMES BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* ch. 6 (1962) (analyzing voting rules), and Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 400-02, 441-51 (1973) (calling for a summation of “direct costs” and error costs, and emphasizing their interaction). A related label is “evaluation costs.” E.g., John R. Hauser & Birger Wernerfelt, *An Evaluation Cost Model of Consideration Sets*, 16 J. CONSUMER RES. 393, 395 (1990).

66. See Charles R. Adrian & Charles Press, *Decision Costs in Coalition Formation*, 62 AM. POL. SCI. REV. 556, 556 (1968); Vernon L. Smith, *Rational Choice: The Contrast Between Economics and Psychology*, 99 J. POL. ECON. 877, 888 (1991).

67. See PAUL GOODWIN & GEORGE WRIGHT, *DECISION ANALYSIS FOR MANAGEMENT JUDGMENT* 143-44 (3d ed. 2004).

judgment governed by heuristics. Either way, the issue of process is unavoidable. And the concept can be defined as *any conduct for the purpose of reaching a government decision*, including conduct that is lawfully compelled by or from private parties. This definition captures action designed to influence a decision even if it is ultimately ignored, while limiting the concept to action associated with the decision-making environment. Thus the rules of debate on the Senate floor govern process, as do the rules of discovery for civil litigation, but a speed limit does not.<sup>68</sup>

Typical features of government process can be quickly isolated. Process always includes at least one decisionmaker and an agenda. No official is able to consider every issue, so the labor of each is divided and devoted to different (if overlapping) issue agendas, which are constructed in several ways.<sup>69</sup> Beyond this, three elements are important. First is the selection of participants. In addition to those with decision-making authority, a given process determines who else should have input. Second, information collection is part of every process except, perhaps, snap judgments. Decisions with any scrap of reflection will rely on data and other forms of knowledge, such as testimony during a public hearing, or prices on an information market, or an applicable rule of decision. Third, a process, especially one with multiple participants and significant information-gathering efforts, involves some kind of deliberation. Deliberation—as in thinking through the proper resolution of a problem—is not always easy to separate from information collection. But a process need not include an effort to gather more data than is already known, or an increase in participants. Each process element can be cumulative and each comes at a price.<sup>70</sup>

This working definition of process is so expansive, however, that it reaches conduct some prize for its inherent value or for consequences aside from reaching decision. The very task of enumerating decision costs turns on

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68. Cf. Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 204-06 (2004) (exploring adjudicatory procedure and focusing on institution-related conduct). I will not directly consider the steps by which decisions are implemented, or the costs to private parties of deciding how to respond to those decisions. This study is narrower, more manageable, and still useful. We can also ignore the fine points of the substance/procedure distinction in the Rules Enabling Act, 28 U.S.C. § 2072(a)-(b) (2006), and so painfully debated in post-*Erie* case law. See, e.g., *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 426-27 (1996) (citing *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938)). That distinction does not capture the right set of phenomena.

69. See, e.g., Andrew J. Taylor, *Domestic Agenda Setting, 1947-1994*, 23 LEGIS. STUD. Q. 373, 387-88 (1998); B. Dan Wood & Jeffrey S. Peake, *The Dynamics of Foreign Policy Agenda Setting*, 92 AM. POL. SCI. REV. 173, 174-75, 182 (1998).

70. When “substantive” law governs the standard for reaching a decision, it is obviously connected to “process.” But it can be distinguished. Often what we call substantive law is an aspiration for human conduct, rather than an instrument for achieving it. Most people are probably happy to have a legal norm of reasonably careful driving, but they might be perfectly willing to eliminate the “process” involved in implementing that norm if they could. “Process” so understood is a more likely candidate for sacrifice.

controversial normative judgments about what counts as “cost.” Debate within a democratic institution, for example, can be valued because it generates public information and helps interests evolve in a morally satisfying fashion. To others, democracy is essentially a transaction cost.<sup>71</sup> Similar judgments attach to error costs. Dividing injury from benefit depends on a normative framework. These divisions cannot all be stitched together here, of course. At the same time, disputed territory should not obscure large areas of agreement. Think about information collection. All else equal, we would rather that tax-paid government officials have relevant information with zero burden—that they immediately know everything they lawfully ought to know before making a decision. That is impossible, of course, and so information collection often entails regrettable costs.

Other decision-cost elements are obscure to the uninitiated. Some involve the methods for aggregating judgments when multiple decisionmakers have jurisdiction over the same issue. Countless scholars since Buchanan and Tullock have analyzed the decision-cost implications of voting rules in multimember bodies.<sup>72</sup> One message in this scholarship is that decision costs for any particular decision escalate, sometimes exponentially, as the voting rule dictates a greater degree of agreement among those eligible to vote. This is especially true if group preferences are relatively heterogeneous.<sup>73</sup> Accordingly, unanimous consent is the most dangerous voting rule from a decision-cost perspective. A majority rule is much less costly to satisfy on average. Of course there are advantages to striving for consensus. For example, overwhelming *ex ante* agreement might enhance the decision’s legitimacy, as in the willingness of affected parties to accept the outcome without struggle.<sup>74</sup> The lesson is about remembering the downside.<sup>75</sup>

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71. Compare BENJAMIN R. BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* xiv-xv, 117 (1984), with RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 154 (2003).

72. See BUCHANAN & TULLOCK, *supra* note 65, at 45-46, 63-84 (distinguishing decision costs from “external costs”). In their model, the good/harm done by a decision is just a function of who agreed to it.

73. See *id.* at 59-60, 68-69; Wayne L. Francis, *Legislative Committee Systems, Optimal Committee Size, and the Costs of Decision Making*, 44 J. POL. 822, 823-24 (1982); Dennis C. Mueller, *Constitutional Public Choice*, in PERSPECTIVES ON PUBLIC CHOICE 124, 127-32 (Dennis C. Mueller ed., 1997). These models sometimes count only the cost of persuading others, so decision costs are zero for a single decisionmaker. See, e.g., BUCHANAN & TULLOCK, *supra* note 65, at 68; Janet T. Landa, *The Political Economy of Swarming in Honeybees: Voting-with-the-Wings, Decision-Making Costs, and the Unanimity Rule*, 51 PUB. CHOICE 25, 32 (1986). That understanding is too narrow for present purposes.

74. See Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795-96 (2005).

75. An extension of this principle helps explain delegation trade-offs. We might think statutes entail higher average decision costs than agency regulations with the same content because there are more veto gates or the decisionmakers have less knowledge or for some other reason. Cf. Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 91-92, 96-99 (1985).

Another cost driver expands the analytical horizon into substantive law. It is the well-worn choice between rules and standards, which have different cost profiles over time.<sup>76</sup> A rule's specificity leaves less discretion at time 2 ( $t_2$ ) and so should reduce decision costs then and thereafter. The sacrifice is potentially higher error costs from hamstrung decisionmakers at  $t_2$ , along with higher decision costs at time 1 ( $t_1$ ) when the rule must be crafted. The ongoing open-endedness of a standard presents converse trades: the  $t_1$  decision costs associated with writing up a rule are avoided and error costs are hopefully minimized every time the standard is applied, yet the standard's application at  $t_1$  and  $t_2$  will probably have a higher average decision cost than a strict and specific rule. Rules/standards scholarship thus encourages a survey of costs over time.

This points to an additional consideration: dynamic interaction among these elements and their influence on behavior across time. For example, a decision's projected resilience could affect decision costs over time, although the relationship is complex. The voting rule for changing a decision can influence the willingness of people to attempt change. The difficulty is that the implications seem contrary to some of the standard political science for voting rules. A consensus voting rule is supposed to entail the greatest decision costs to achieve change, but the rule might scare off proponents of change who have little hope of achieving unanimity. Unless there are significant benefits from trying and failing, a demand for change might not materialize. Nor would the associated decision costs; the agenda would remain clear.<sup>77</sup> Similarly, a bare-majority voting rule suggests lower decision costs with a set agenda and a one-shot timeframe. But the cost advantage is less certain over time and when there is a fluid agenda. Choosing this seemingly low-decision-cost process might generate repeated campaigns for change and intolerable decision costs aggregated through  $t_n$ . If we care about sound policy over time and without a fixed agenda, we should also consider the dynamic interaction of decision dimensions and decision-cost elements.<sup>78</sup>

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76. See Isaac Erlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974) (including consideration of the costs to private parties associated with ascertaining the possibility of sanction); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559-63, 586-96 (1992) (adding a distinction between complexity and simplicity).

77. See POSNER, *supra* note 13, at 651 (using the example of the number of senators per state, entrenched in constitutional text); Cass R. Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633, 639 (1991) (suggesting constitutions might take controversial topics off the table). Another possibility is that high resilience will encourage a supremely costly fight at  $t_1$  that overwhelms future savings, if  $t_1$  participants account for the higher stakes and care about future time periods.

78. Penalties for law violations can affect decision costs as well. High penalties might deter people from conduct that even arguably violates positive law, thereby cutting the number of cases that need to be prosecuted. But federal constitutional law seems to impose caps on penalties rather than mandatory minimums. See, e.g., U.S. CONST. art. I, § 3, cl. 7 (limiting impeachment consequences); *id.* amend. VIII (barring excessive fines and cruel and

Lastly, high decision costs should be detached from the idea of “more process.” For the most part these values move in the same direction, but not always. Occasionally the solution to decision costs is changing the process in a way that makes it more resource intensive. Take delay. It might be that delayed decisions are the consequence of insufficient resources to complete all decisions on the agenda, and that additional resources will eliminate the delay at an acceptable cost to taxpayers and beneficiaries. The complaint rests on intolerable decision costs (delay), yet the remedy might be labeled “more process” (additional decisionmakers). This Article uses “undue process” as a broad term of art. It includes objections to decision costs of any kind, based on either the burden imposed on particular parties or globally, and successful objections need not dictate a protocol more streamlined than the status quo.

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The relevant phenomena should be clearer now. Government decisions are choices that alter the status quo. Their significance can be measured by the area they cover, their intended duration, and their resilience to change. Each decision arises out of a process, which requires a decisionmaker and an agenda, and which might include third-party participation, information gathering, and deliberation. All of this generates decision costs. Decision costs are likewise a function of voting rules in multimember bodies, the character of any law governing the decision, and the dynamic implications of these factors over time.

Finally, it is apparent yet worth stressing that decision costs are impossible to evaluate normatively without understanding their sources and consequences. This can only be done with reference to the goal of a decision and the trade-offs of shifting to an alternative process. The causes of decision costs are not inherently good or bad, nor would any sensible person want decision costs to be immeasurably low or infinitely high. But the judgments in between can be vigorously contested. To keep the inquiry inclusive, constitutional law ought to be investigated for any downward pressure it puts on decision costs, even if a net gain is unclear.

## II. CONSTITUTIONAL READINGS

If forced to characterize the U.S. Constitution as generally imposing either floors or ceilings on decision costs, the answer will come easily for many. Not without reason. Our constitutional text seems to be bursting with procedural mandates—from the announcement in Article I, Section 2 that House elections must be held biennially to the delayed implementation of congressional salary changes in the Twenty-Seventh Amendment. A careful review of federal

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unusual punishment); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) (limiting punitive damages); *cf.* U.S. CONST. art. II, § 4 (prescribing removal upon impeachment for certain misconduct). Penalties will not be an issue in this study.

constitutional law, however, uncovers a concern about decision costs. The following pages identify the best candidates for undue process claims. But before conducting that search, which draws on ground-level inquiries into isolated pockets of constitutional law and practice, it is worth setting the sights much higher.

#### A. *The Whole Text*

In a crucial sense, the entire Constitution limits decision costs. This is not a characterization of the document's content or an assertion about the understandings of past generations who proposed and ratified the bits of text that make up the document. It is a descriptive claim about the use of constitutional text today, and a supposition about the primary value of that text.

##### 1. *Focal points*

People in this country, as a matter of fact, refer to the U.S. Constitution in order to limit if not resolve issues. Insofar as issues are shaped or concluded with reference to the text, decision costs can be reduced compared to a state of the world in which no such text exists. The supremacy of this text, declared in Article VI and confirmed by much subsequent practice, supports this conclusion. Other sources of law might inform our understanding of the document but we may rely on its meaning to trump those sources and end inquiries. For at least some part of the Constitution, moreover, the reduction in decision costs is worth the inability to more easily respond to contemporary preferences.

Students of indeterminacy in constitutional law might be uncomfortable with these claims at first, but they should not be very controversial. The supremacy of the federal constitutional text attracts discussion only rarely, and the document is subject to only so many understandings. Much constitutional text is relatively open-ended, without question. Moreover, extracting meaning from the document requires choices regarding interpretive method that are themselves contested.<sup>79</sup> The most dogmatic arguments against meaning in texts are, however, unsatisfying. Extravagant postmodern claims about radical indeterminacy always had the unfortunate quality of disproving themselves just insofar as the claims were intelligible. And even if there is no singular objective meaning to a text that is external to a given reader, groups can nevertheless develop agreement on the outer boundary of textual meaning. Sophisticated

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79. Cf. Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 232, 247-56 & n.86 (discussing coordination by plain-meaning statutory interpretation, at least for cases that are "real dogs"); Adrian Vermeule, *The Judiciary Is a They Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549, 571-72 (2005) (pointing out distributional consequences of interpretive methods, which might undercut coordination desires).

critical scholars are quite able to acknowledge this.<sup>80</sup> Within the area of this social agreement on meaning, or at least the boundaries of possible meaning, debate is unnecessary and decision costs can be economized.

A particular agreement about textual meaning could be bad or derived from a morally suboptimal process, but neither undercuts the dispute-minimizing function of the document insofar as its readers come to widespread accord. Nor do we need to understand the precise mechanisms by which the U.S. Constitution achieved or maintains its status as supreme and worthy of respect. That written constitutions can be largely immaterial (Uzbekistan), and that unwritten constitutional conventions can constrain equally well (England), undercut the sufficiency and necessity of writings as tools of constraint without demonstrating their irrelevance.

It is admittedly difficult to ascertain the degree to which our use of the document controls outcomes and reduces decision costs. Certain disputes might be less costly to resolve without textual fidelity, which is probably increasingly true as the document ages. The clause requiring Presidents to be “natural born citizen[s]” might be an illustration,<sup>81</sup> compared to a situation in which voters have the freedom to decide whether this matters (whatever it means). In addition, much of what the constitutional text suggests might now occur because of status quo bias, persisting ideological preferences, or even physical architecture. Whether bicameralism would have survived in the absence of a supreme and entrenched Article I is an almost impossible counterfactual inquiry. At the same time, these are surely questions of degree alone. The text was useful in announcing an agreement and initiating government practices, regardless of other forces carrying them forward, and even today debates are tied up with constitutional text. Judges, elected officials, and others use the document to frame discussions and invigorate their arguments. So the text seems to matter.<sup>82</sup>

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80. Ely’s observation that “it’s a very bad lawyer who supposes that manipulability and infinite manipulability are the same thing,” JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 112 (1980), is not far from the sentiment of, for example, DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION (FIN DE SIÈCLE)* 60 (1997) (“[I]n many cases in which the ideological stakes are high, legal actors have had a choice between two (or more) interpretations or definitions of a particular rule . . .”), Jack M. Balkin, *Deconstruction’s Legal Career*, 27 *CARDOZO L. REV.* 719, 734 (2005) (noting that deconstruction as exercised in legal contexts should have suggested that “social construction placed constraints on legal decisionmaking and helped produce the internal sense in lawyers and judges that some arguments were better than others”), and Mark Tushnet, *Critical Legal Theory (Without Modifiers) in the United States*, 13 *J. POL. PHIL.* 99, 108 (2005) (“As critical legal studies developed, bold and overstated claims that *all* results were underdetermined were replaced by more defensible ones . . .”). A concise recap of the crits on constitutional law is Louis M. Seidman, *Critical Constitutionalism Now*, 75 *FORDHAM L. REV.* 575 (2006).

81. U.S. CONST. art. II, § 1, cl. 5; see Charles Gordon, *Who Can Be President of the United States: The Unresolved Enigma*, 28 *MD. L. REV.* 1, 1 (1968) (noting Barry Goldwater’s territorial birth).

82. See 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 35-39 (3d ed. 2000)

To an extent, then, our constitutional text is a focal point for resolving or confining disputes. The notion is familiar from game theory, in which it may explain how certain coordination problems are solved.<sup>83</sup> Thomas Schelling's famous example was a decision about where and when to meet in New York City. If the participants cannot communicate and have only one shot to individually select a location and time of day, the set of possible choices is so large that a meeting might seem hopeless. But some solutions were more salient than others to Schelling's respondents, especially if each participant thought about what their counterpart would think. An outright majority of Schelling's (New Haven) respondents chose Grand Central Station and another large majority chose noon.<sup>84</sup>

Among others, David Strauss has characterized the Federal Constitution as a kind of focal point. His insight was that a focal point theory could help overcome the dead-hand problem in constitutional law.<sup>85</sup> The problem is that most of the words contained in the written constitution were drafted and ratified before any of us were born and by people who are now deceased. That there are not more or different words to interpret is mainly the consequence of the same cross-generational obedience: our decision to abide by Article V, governing amendments, which was also put in place by dead people. They operated under conditions and with preferences that differ radically from today's. In a modern liberal democracy, insofar as the well-being of each person counts and dead people do not, a persuasive reason for abiding by the text is hard to come by. For example, actual consent of the living seems like a nonstarter under present circumstances if the concept has much meaning,<sup>86</sup> and the document's content is not perfect. After all, a vice president has a plausible textual argument under Article I, Section 3 for presiding at his or her own impeachment trial.<sup>87</sup>

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(taking the text as authoritative and foreclosing readings "contrary" to it); Strauss, *supra* note 19, at 1747 ("[E]veryone thinks the words of the Constitution should count for something."); see also H. JEFFERSON POWELL, *A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS* 6 (2002).

83. See, e.g., DAVID LEWIS, *CONVENTION: A PHILOSOPHICAL STUDY* 35-36 (1969); THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 54-58 (1963); Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1658-63 (2000).

84. See SCHELLING, *supra* note 83, at 55 n.1, 56.

85. Strauss, *supra* note 19, at 1733-35; David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 907-11 (1996); accord Sunstein, *supra* note 77, at 638-39, 642 (exploring the removal of issues from ordinary politics by constitutional entrenchment); see also Barak Cohen, *Empowering Constitutionalism with Text from an Israeli Perspective*, 18 AM. U. INT'L L. REV. 585, 613-15 (2003).

86. See RANDY BARNETT, *RESTORING THE LOST CONSTITUTION* 30-31 (2004); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 226 (1980).

87. See Michael Stokes Paulsen, *Someone Should Have Told Spiro Agnew*, in *CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES* 75, 75-76 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998).



A focal point theory begins to sidestep these difficulties. Reference to a written constitution will resolve and confine some disputes if enough people expect the reference, regardless of the document's pedigree or theoretical legitimacy. A resulting drop in decision costs is worth celebrating. In this respect, the U.S. Constitution might be the Grand Central Station of dispute resolution for questions of government operation. In fact, the document includes a provision that solves half of Schelling's coordination exercise: although it does not tell us where Congress is supposed to assemble, the text does establish a default time.<sup>88</sup> The particular date is far less important than the uncertainty and disagreement it avoids. This dispute-reducing characterization of the text might be particularly apt, considering Article VI supremacy and the difficulty of formal amendment. Such resilience means that the text sticks until an overwhelming agreement can be reached within the relevant institutions.

The argument is easily extended to Supreme Court judgments in constitutional cases.<sup>89</sup> That the Court has asserted its own supremacy in the interpretation of the U.S. Constitution<sup>90</sup> should make little difference. Nevertheless, other government officials do abide by the Court's judgments;<sup>91</sup> even Richard Nixon turned over his oval office recordings when so ordered. Federal courts are not always the most likely to provide correct answers to constitutional questions, of course, but that is not the test of whether judicial supremacy is a net positive development. Over the long run and compared to the alternatives, respecting the judgment of federal courts is defensible and entrenched practice. It is not necessary to include judicial judgments before the benefits of dispute reduction are enjoyed, however. Our use of the text by itself serves that end. This is sometimes easy to forget because the klieg lights of litigation are so often shut off in this context. At its most effective, the Constitution's role in dispute resolution is invisible.

## 2. *Empirical inquiries*

For all its advantages, the focal point function of constitutional text raises vexing questions. If the text actually constrains real-world operations, there remain issues of proportion. How much constitutional law solves pure coordination problems with rules to which no sane person attaches normative

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88. See U.S. CONST. art. I, § 4 (the first Monday of every December, unless altered by statute), *superseded by* U.S. CONST. amend. XX, § 2 (noon every January 3, unless altered by statute).

89. See Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1380-81 (1997); see also Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 43-45 (1993) (distinguishing judgments from holdings and opinions).

90. See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

91. See Daniel A. Farber, *The Importance of Being Final*, 20 CONST. COMMENT. 359, 364 (2003).

significance? How much of it covers (badly named) battle-of-the-sexes situations, where participants do prefer particular outcomes over others but prefer lack of agreement least of all?<sup>92</sup> All else equal, the more important constitutional law is to social well-being now, the less willing a country might be to adhere to its strictures when they conflict with today's needs and desires.

One response is to eliminate tension by opening room for contemporary choice. It might be that text and conventional interpretive methods fade for issues considered important by present-day participants.<sup>93</sup> Disputants will still have reason to show how their position can be adopted without doing violence to text and standard methods of interpretation, but resolution of the matter will not be dictated by those sources. If true, this observation ameliorates the dead-hand problem by jettisoning the focal point function, rather than abiding by it. The system would be sacrificing the ability of text and interpretation to save decision costs in perhaps every significant dispute.

A second response comes from another direction. One might conclude that our constitutional text actually covers few significant disputes and is good for little other than dispute minimization. We could then save the decision costs involved in fighting it, and the transition costs of change that has no sure value. Available numbers might disturb a legal scholar. Empirical work over the last twenty years suggests a variety of constitutional choices that have little or no measurable impact on social well-being. Past findings must be treated with care, of course. This field of rigorous statistical inquiry into whether and how constitutions matter is still developing, with important opportunities created by widespread constitutional change following the collapse of the Soviet Union. Occasionally the studies do not distinguish mere legal declarations from actual influence on social practices, or incorporate controversial choices about which sorts of well-being count. But the work done so far is suggestive. Much of what legal scholars and judges wrestle with might amount to insignificant squabbles, with case-specific distributive consequences at most.

*Democracies and dictatorships.* One long-running debate concerns the relationship to economic development of the choice between democracy and authoritarianism. Scholarly opinion shifted and divided over the years.<sup>94</sup> A particularly sophisticated investigation is the statistical study of 135 nations between 1950 and 1990 by Adam Przeworski and his co-authors. Although the patterns of economic growth diverge in wealthier countries—where democracies begin to use and benefit from economic inputs differently from dictatorships—the authors conclude that these two government forms do not appear to otherwise affect economic development. Democracies do tend to have higher per capita GDP growth. But, they contend, this is because

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92. See McAdams, *supra* note 83, at 1673 & n.56.

93. See Strauss, *supra* note 19, at 1743.

94. See Adam Przeworski & Fernando Limongi, *Political Regimes and Economic Growth*, J. ECON. PERSP., Summer 1993, at 51, 60-61 (collecting sources).

dictatorships experience faster labor-force growth.<sup>95</sup> The principal goal in studies of this sort is to question the necessity of authoritarianism for the economic development of poor countries, but the results are useful beyond that.

*Democratic institutional design.* If democracy in general lacks a clear advantage over dictatorship in growing national income, one cannot expect dramatic effects from every institutional design choice within democracies. Xavier de Vanssay and Z.A. Spindler studied one hundred countries using cross-sectional data from before the collapse of the Soviet Union. Their regressions indicated no significant effect on per capita GDP from certain entrenched constitutional attributes. The authors used dummy variables for these attributes but they swept widely, including bicameralism, federalism, and a supreme court with some scope of constitutional review.<sup>96</sup> Vanssay and Spindler did find a positive and significant effect from being “a federation” as opposed to “a unitary state,” but only for OECD countries.<sup>97</sup> The results also seem mixed when the dependent variable is spending. A simple study from the 1980s found no significant effect on government spending in U.S. states and local governments from borrowing limits, tax or spending limits, line-item veto powers, or gubernatorial term limits.<sup>98</sup>

*Rights, negative and positive.* Doubts have been voiced about the positive impact of rights provisions, as well. The Vanssay and Spindler study tested a list of constitutional rights provisions, including privacy, religious liberty, and social welfare guarantees, such as the right to an education, medical care, housing, and social security. Again the effect on per capita GDP does not

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95. See ADAM PRZEWORSKI ET AL., *DEMOCRACY AND DEVELOPMENT: POLITICAL INSTITUTIONS AND WELL-BEING IN THE WORLD, 1950-1990*, at 142, 166-67, 178-79 (2000). For a nice statement of difficulties in this field, including endogeneity, see Adam Przeworski, *Institutions Matter?*, 39 *GOV'T & OPPOSITION* 527 (2004).

96. Xavier de Vanssay & Z.A. Spindler, *Freedom and Growth: Do Constitutions Matter?*, 78 *PUB. CHOICE* 359, 365-66 (1994) (finding effects from the savings/investment rate, educational achievement, an index of “economic freedom,” and population growth, the last of which was inversely related to per capita GDP).

97. See *id.* at 363, 365; cf. JAN-ERIK LANE, *CONSTITUTIONS AND POLITICAL THEORY* 208-09 (1996) (studying OECD countries and finding little connection between economic outcomes and democratic institutional design, though corporatist regimes seem to have high incomes and transfer payments); John Gerring et al., *Centripetal Democratic Governance: A Theory and Global Inquiry*, 99 *AM. POL. SCI. REV.* 567, 575-79 (2005) (asserting some positive effect from more centralized and “inclusive” arrangements in democracies across a variety of outcomes, including per capita GDP).

98. See Burton A. Abrams & William R. Dougan, *The Effects of Constitutional Restraints on Government Spending*, 49 *PUB. CHOICE* 101, 112-13 (1986) (cross-sectional analysis finding a relationship with increasing severance tax capacity or median income, for example). Abrams and Dougan did find a link between line-item vetoes and state-level spending. But the relationship was positive and it disappeared when state and local spending were aggregated. See *id.* at 112. For contrasting results, see Niclas Berggren & Peter Kurrild-Klitgaard, *Economic Effects of Political Institutions, with Special Reference to Constitutions*, in *WHY CONSTITUTIONS MATTER* 167, 191 (Niclas Berggren et al. eds., 2002) (collecting three studies).

appear to be statistically significant.<sup>99</sup> Stephen Knack and Philip Keefer present similar conclusions in a study of average annual per capita GDP growth from 1974 to 1989. One independent variable they tested was an average combined score for civil and political liberties based on Freedom House's indexes from 1973 to 1986. They found no significant relationship to growth.<sup>100</sup>

*Rights and the disadvantaged.* Some might believe that individualistic rights adversely impact social equality. Such rights, like a vibrant takings clause, might activate judicial interference or a cultural orientation that thwarts equitable wealth distribution. Frank Cross recently attempted a first-cut test of these suggestions with a simple cross-sectional study of several economically developed Western nations. His regressions do not show a statistically significant effect from bills of rights and judicial review on poverty, either absolute or relative, although he does find a significant increase in transfer payments to the poor in countries with a bill of rights.<sup>101</sup> Cross's study is framed as a rebuttal of Ran Hirschl's provocative examination of constitutional judicial review in Canada, Israel, New Zealand, and South Africa. But the contrast is not terribly sharp. One of Hirschl's central empirical claims is that the constitutionalization of rights in these countries "has achieved little or no real change in arenas such as wealth redistribution, minority political representation, and the equalization of life conditions."<sup>102</sup>

Caveats are in order. Some constitutional choices certainly matter, according to the values of nearly everyone. The best known observation on this score is Amartya Sen's regarding famine as a product of political failure. He claims that, at least since World War II, no famine has occurred in a multiparty

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99. See Vanssay & Spindler, *supra* note 96, at 364 (getting a negative sign for bills of rights). One barrier to an effect from social welfare "rights" might be that courts are reluctant to enforce them even when these duties appear in constitutional text. See Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1136 (1999); Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, 82 TEX. L. REV. 1895, 1900-09 (2004) (exploring variations in judicial intervention, including South Africa's soft version).

100. See Stephen Knack & Philip Keefer, *Institutions and Economic Performance: Cross-Country Tests Using Alternative Institutional Measures*, 7 ECON. & POL. 207, 210, 215, 219-20, 226 (1995). *But cf.* Gerald W. Scully, *The Institutional Framework and Economic Development*, 96 J. POL. ECON. 652, 655-68 & n.3 (1988) (finding a link to GDP growth from 1960-1980, but using Freedom House indexes for 1973-1980 and converting them into dummy variables representing high and low ends of the scales).

101. See Frank B. Cross, *The Liberal Assault on the Constitution* (Jan. 2006), available at [http://ssrn.com/abstract\\_id=883113](http://ssrn.com/abstract_id=883113). Corporatism (as opposed to pluralism) seems related to higher absolute poverty rates, but the samples for Cross's poverty data are small ( $n = 9$  to 15). See *id.* at 23.

102. RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 151 (2004). Hirschl does state that the rights in question are "associated with precisely the opposite ethos, . . . planting the seeds for greater, not lesser, disparity in essential life conditions." *Id.* Note that three of Hirschl's four nations are not included in Cross's study. See Cross, *supra* note 101, at 23.

democracy with elections and a free media.<sup>103</sup> Insofar as the connection is causal, we have excellent reason to support basic democratic norms, even if there is disagreement about whether democracy could spur economic growth or should be used to fashion public-spirited citizens. Furthermore, several studies indicate effective protection of property rights, long-term contracts, and other market elements help with economic prosperity.<sup>104</sup> Some of these are protected, at least qualifiedly, with constitutional law and judicial review. Finally, it could be that judicial independence and constitutional judicial review have a positive effect<sup>105</sup>—although that result surely depends on the substance of judicial judgments, and it remains unclear exactly what those judgments should include.<sup>106</sup>

In any event, empirical studies cannot determine which dependent variables are normatively significant or are priorities. Many studies are fixated on GDP, an available number reported with relative accuracy. This is only one proxy for human well-being. Income disparity, health, environmental quality, and knowledge might be concerns, to take a few examples. So, too, for self-expression and sex equality in many wealthy nations, or the desire to integrate a particular church doctrine with state operations in various parts of the world. Some of these standards for well-being are not easily measured, making regressions difficult to run. Other standards might be measurable but reflect a

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103. See AMARTYA SEN, DEVELOPMENT AS FREEDOM 51-52 (1999) (“[F]amines are extremely easy to prevent if the government tries to prevent them . . .”); *id.* at 178-88 (counting Botswana and Zimbabwe as democracies, along with India, to claim that the observation holds for economically poor democracies); see also PRZEWORSKI ET AL., *supra* note 95, at 228 (finding life expectancy is longer in democracies, across national per capita income bands); Thomas D. Zweifel & Patricio Navia, *Democracy, Dictatorship, and Infant Mortality*, 11 J. DEMOCRACY, Apr. 2000, at 99 (asserting democracies have lower infant mortality rates at every level of per capita GDP). But see Michael Ross, *Is Democracy Good for the Poor?*, 50 AM. J. POL. SCI. 860, 860, 863-68, 871-72 (2006) (finding—based on some imputed values—democracies spend more money on public services but democracy has “little or no effect on infant and child mortality” if more countries are added to the dataset).

104. See, e.g., Ronald J. Daniles & Michael J. Trebilcock, *The Political Economy of Rule of Law Reform in Developing Countries*, 26 MICH. J. INT’L L. 99, 100-04 (2004) (collecting sources); Vanssay & Spindler, *supra* note 96, at 364; Wenbo Wu & Otto A. Davis, *The Two Freedoms, Economic Growth and Development: An Empirical Study*, 100 PUB. CHOICE 39, 57 (1999) (using panel data for about one hundred countries).

105. See Lars P. Feld & Stefan Voigt, *Judicial Independence and Economic Growth: Some Proposals Regarding the Judiciary*, in DEMOCRATIC CONSTITUTIONAL DESIGN AND PUBLIC POLICY: ANALYSIS AND EVIDENCE 251, 281 (Roger D. Congleton & Birgitta Swedenborg eds., 2006); Rafael LaPorta et al., *Judicial Checks and Balances*, 112 J. POL. ECON. 445, 448-55 (2004) (exploring the connection to economic and political freedom).

106. It also appears that countries with long constitutions are in trouble. See Alvaro A. Montenegro, *Constitutional Design and Economic Performance*, 6 CONST. POL. ECON. 161, 166-68 (1995) (measuring constitutional length by the number of “permanent articles” and suggesting an inverse correlation with per capita GDP in 1988 or thereabout). But any causal arrow is surely running from the nation’s problems to the document’s length. See *id.*

social-justice-based conclusion that some norms are inherently valuable, making any instrumental benefit less relevant.<sup>107</sup>

Yet uncertainty can elevate the importance of constitutional text and conventional interpretive method. These sources of meaning ought to guide constitutional choices more forcefully when we are less confident that the choice will make a difference.<sup>108</sup> We certainly could do worse than our present Constitution; the issue is how confident we are that substantial improvement could be achieved by change. Three houses of Congress would probably be worse than two. But the optimal number is unknown and possibly closer to zero. In such cases we can save the costs of creative decision making and transition based on hunches.

### B. *The Parts Elaborated*

The dispute-reducing functions of constitutional text, interpretive method, and judicial judgments reveal nothing about the specific content of federal constitutional law. And the message of the component parts need not reflect the principal function of the system. So far we have reason to believe that the U.S. Constitution and its conventional interpretation reduce decision costs compared to a universe without them, but we do not know if injunctions to cut such costs are embedded within enforceable provisions.

#### 1. *Cross-cutting norms*

Mainstream impressions of the Constitution tend to reflect the minimum process it requires, not the additional process it forbids. Procedural floors are certainly easy to locate. Consider the protocols for generating positive law. The institutions and procedures involved in Article I, Section 7 legislation and Article V amendment are elaborate, with bicameralism only one of many roadblocks. Of equal significance, the Fifth and Fourteenth Amendments guarantee “due process of law” before federal or state governments may deprive any person of life, liberty, or property. These provisions cover a wide range of private losses and are not expressly limited to a subset of government actors.<sup>109</sup> Nor do courts restrict their review to whether officials abide by the

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107. Cf. AMARTYA SEN, *COMMODITIES AND CAPABILITIES* 19 (2d ed. 1999) (distinguishing well-being from economic wealth); Martha Nussbaum, *Beyond the Social Contract: Capabilities and Social Justice*, in *THE POLITICAL PHILOSOPHY OF COSMOPOLITANISM* 196, 210 (Gillian Brock & Harry Brighouse eds., 2005) (stressing outcomes, as in “a list of entitlements that have to be secured to citizens, if the society in question is a minimally just one” where people are capable of “fully human living”).

108. I mean a difference to society at large, not simply the short-term interests of litigants, and when uncertainty about better outcomes is difficult to eliminate.

109. The Supreme Court has been unwilling to mandate individualized participation in general rulemaking processes, however. See *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 283, 285 (1984) (“The Constitution does not grant to members of the public

process secured in ordinary law. It is settled, as much as any point of constitutional law can be, that Fifth and Fourteenth Amendment deprivations ordinarily should be tested against what process is constitutionally “due” under the circumstances and with at least a measure of independent judicial judgment.<sup>110</sup> In addition, a special set of procedural guarantees applies in criminal matters, with a laundry list of constraints in the Fourth through Sixth Amendments.

Finding a comparable message of procedural parsimony is more difficult or at least counterintuitive. The very idea of constitutionally mandated ceilings on government process can seem bizarre, evidenced by the Stroud Township litigation. There the developer claimed that township officials, with knowledge of the expiration date on the developer’s tax credits, intentionally delayed processing the development plan to prevent low-income housing from being built. To characterize this claim, the lawyers and courts landed on the label “substantive due process.” The developer’s argument had nothing to do with skirting a conventional line between process and substance. The claim was emphatically about the process of government decision making; it is just that the objection was to interminable rather than inadequate process. Of course the developer was attempting to protect an economic interest, and it was required to convince the courts that this (substantive) interest was entitled to constitutional respect.<sup>111</sup> But this is also true when a party demands additional process, such as a hearing, to satisfy the requirements of “procedural due process.”<sup>112</sup> Insofar as substantive due process is a catchall label for unorthodox constitutional challenges, it might fit here. But it remains a misnomer and an indication that undue process objections are not considered mainstream.

Is the disparate salience of due and undue process well-grounded? Undue process sympathizers could assert that the spirit of the Constitution encompasses an active, albeit restrained, national government. Focusing on the trajectory leading to the original document gives this argument a little traction. Without question, advocates of the 1789 Constitution believed that the Articles

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generally a right to be heard by public bodies making decisions of policy . . . . Not least among the reasons for refusing to recognize such a right is the impossibility of its judicial definition and enforcement.”); *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) (“Where a rule of conduct applies to more than a few people it is impracticable that everyone should have a direct voice in its adoption . . . . Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.”).

110. See *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1856).

111. See *Woodwind Estates, Ltd. v. Gretkowski*, 205 F.3d 118, 123 (3d Cir. 2000) (finding a protected property interest where the developer’s plan “indisputably satisfied all of the requirements for approval under the ordinance,” which “substantially limit[ed]” the township’s discretion to disapprove).

112. See, e.g., *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999).

of Confederation hobbled national success by leaving too much authority in the separate states. One target was a form of supermajority voting rule: under the Articles, Congress needed the assistance of each state to carry out its domestic orders, including requisitions.<sup>113</sup> The 1789 Constitution, for all its procedural mandates, was also a referendum on national efficacy through a degree of centralization. As such, and compared to what came before, the Constitution might encompass some of the intuitions behind undue process objections. Contrast the written constitutional movements that followed the disintegration of the Soviet Union. In a sense, they moved in the opposite direction. Complaints about the Soviet government were not much a question of excessive weakness or veto gates within its structure.<sup>114</sup>

That said, the document's trajectory is a weak basis for manufacturing a cross-cutting undue process norm, at least if the commitment to textualism and conventional interpretive method is retained. There seems to be a hole in the text. The Fifth and Fourteenth Amendments make a commitment to due process without clearly encouraging undue process objections. The hole becomes more visible after state constitutions are examined. They do not include the broadest possible undue process dictate—for example, one that would cap decision costs in a given dispute regardless of the parties' demands for process. But they do appear to go further than the federal text. In fact, one of the more popular state constitutional provisions promises speedy and inexpensive justice, not only in criminal matters but also for civil litigation and possibly more. New Hampshire's provision is typical:

Every subject of this state is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.<sup>115</sup>

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113. See DANIEL A. FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* 28 (2d ed. 2005).

114. See, e.g., Joel C. Moses, *Democratic Reform in the Gorbachev Era: Dimensions of Reform in the Soviet Union, 1986-1989*, 48 *RUSSIAN REV.* 235, 235-36 (1989).

115. N.H. CONST. pt. 1, art. 14; see also ALA. CONST. § 13; ARIZ. CONST. art. 1, § 11; ARK. CONST. art. 2, § 13; COLO. CONST. art. 2, § 6; CONN. CONST. art. I, § 10; DEL. DECL. OF RTS. § 12; DEL. CONST. art. I, § 9; FLA. CONST. art. II, § 21; IDAHO CONST. art. I, § 18; ILL. CONST. art. I, § 12; IND. CONST. art. 1, § 12; KAN. BILL OF RTS. § 18; KY. CONST. § 14; LA. CONST. art. 1, § 22; ME. CONST. art. I, § 19; MD. CONST. art. 19; MASS. CONST. pt. I, art. XI; MINN. CONST. art. I, § 8; MISS. CONST. art. 3, § 24; MO. CONST. art. 1, § 14; MONT. CONST. art. II, § 16; NEB. CONST. art. I, § 13; N.Y. CIV. RTS. LAW ch. 6, art. 2, § 10; N.C. CONST. art. 1, § 18; OHIO CONST. art. 1, § 16; OR. CONST. art. I, § 10; PA. CONST. art. 1, § 1; R.I. CONST. art. 1, § 5; S.C. CONST. art. 1, § 9; S.D. CONST. art. VI, § 20; TENN. CONST. art. 1 § 17; UTAH CONST. art. 1, § 11; VT. CONST. ch. 1, art. 4; WASH. CONST. art. 1, § 10; W.V. CONST. art. 3, § 17; WIS. CONST. art. 1, § 9; WYO. CONST. art. 1, § 8; cf. GA. CONST. art. VI, § IX, ¶ I (“[T]he Supreme Court shall . . . by order adopt and publish uniform court rules and record-keeping rules which shall provide for the speedy, efficient, and inexpensive resolution of disputes and prosecutions.”).



Some scholars have been excited by the first part of these provisions, creating rights to remedies, without paying much attention to the last half.<sup>116</sup> The reference to prompt, speedy, and corruption-free justice is more intriguing for present purposes. It suggests a commitment to a type of undue process norm, one that receives occasional recognition in state courts.<sup>117</sup>

There is nothing new about these state constitutional provisions, either. Maryland, Massachusetts, New Hampshire, and Delaware adopted versions before the Federal Constitution was even drafted.<sup>118</sup> And the basic idea was modeled on a more ancient source. Over five-hundred years earlier, the first edition of the Magna Carta promised:

39. No free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land.

40. To no one will we sell, to no one will we deny or delay right or justice.<sup>119</sup>

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116. See, e.g., Jennifer Friesen, *Recovering Damages for State Bills of Rights Claims*, 63 TEX. L. REV. 1269, 1296 (1985). For an illuminating historical inquiry into the remedy sections of these clauses, see John C.P. Goldberg, *The Constitutional Status of Tort Law*, 115 YALE L.J. 524, 565 (2005).

117. Successful claims include *People ex rel. Christiansen v. Connell*, 118 N.E.2d 262, 265-69 (Ill. 1954) (invalidating a qualified statutory sixty-day waiting period before filing for divorce), *Maury County v. Porter*, 257 S.W.2d 16, 17 (Tenn. 1953) (invalidating a statutory bar on eminent domain compensation trials until one year after highway completion), and *Werner v. Milwaukee Solvay Coke Co.*, 31 N.W.2d 605, 606 (Wis. 1948) (holding that the trial court had a duty to rule, pre-trial, on the constitutionality of the Portal-to-Portal Act, which purported to foreclose liability). Cf. *Kristanik v. Chevrolet Motor Co.*, 70 S.W.2d 890, 893-94 (Mo. 1934) (construing a statute to permit reviewing courts to order, without rehearing, payment of certain worker's compensation claims). But many early claims attacked court filing fees and the like, and were largely unsuccessful. See, e.g., *Perce v. Hallett*, 13 R.I. 363, 365 (1881) (concluding that the constitutional provision does not forbid fixed court fees to raise revenue but rather "gratuities, or exactions, given or demanded for the direct purpose of influencing the course of legal proceedings"); A.E. DICK HOWARD, *THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA* 285-89 (1968) (noting a few victories in probate and as applied to an indigent litigant); see also *Irish v. Gimbel*, 691 A.2d 664, 672 (Me. 1997) (upholding medical malpractice screening panels, despite delay caused mainly by discovery); *Rochell v. City of Florence*, 182 So. 50, 51 (Ala. 1938) (upholding a statute requiring a hearing and twenty-four hour notice to a municipality before an ordinance is temporarily restrained).

118. See DEL. DECL. OF RTS. § 12 (1776); MD. CONST. art. XVII (1776); MASS. CONST. pt. I, art. XI (1780); N.H. CONST. pt. I, art. 14 (1784); see also Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 137-38 (1970) (separating the heritage of state remedies clauses from due process guarantees).

119. MAGNA CARTA chs. 39-40 (1215), reprinted in J.C. HOLT, *MAGNA CARTA* 461 (2d ed. 1992); see also HOWARD, *supra* note 117, at 284-85 (connecting the final sentence to state constitutions). For Coke's paraphrasing, which is like the state constitutional provisions, see SIR EDWARD COKE, *THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 55-56 (London, M. Flesher & R. Young, 6th ed. 1681) ("[F]reely without sale, fully without any denial, and speedily without delay."); *id.* at 56 (claiming "right" meant "law").

This was part of the English barony's effort to extract concessions from King John after a series of costly military campaigns, and it was a reaction to corruption and extortion in the royal courts. Litigation sometimes stalled for no reason other than selfish official whim, moved ahead only after the parties anted up something extra, or devolved into bidding wars among disputants. This might not seem so awful in a society with trial-by-battle. But it was a system that nevertheless irked the elites who demanded reform.<sup>120</sup> As a consequence, Blackstone could conclude in 1768 that "any delay in the granting [of the royal writs], or setting an unusual or exorbitant price upon them, would be a breach" of the Great Charter.<sup>121</sup>

The notion could not have been lost on those who ratified the original U.S. Constitution and brought about its first amendments. Early in 1788, *The Federal Farmer* criticized the original document for not enumerating additional rights in federal judicial proceedings, including an entitlement "to obtain right and justice freely and without delay."<sup>122</sup> Later that year, the ratification convention in James Madison's own Commonwealth of Virginia recommended amendments. One of them was a replica of the state constitutional provision quoted above.<sup>123</sup> The North Carolina convention proposed essentially the same amendment, although that state failed to ratify until a second convention in 1789.<sup>124</sup> Such clauses admittedly join a right to civil remedies with a right to speedy, inexpensive, and corruption-free justice; perhaps the former was rejected and not the latter. But it remains notable that no such specific language made its way into the Constitution.

Given this background, the Due Process Clauses are less likely to underwrite objections to decision costs in general, or perhaps even privately suffered process burdens. These provisions forbid certain "depriv[ations]" from persons "without due" process. That phrasing can fairly be read as a guaranteed floor, or a series thereof, not a ceiling. Thus when *A* sues *B* for possession of property, *A* might demand a hearing to present her evidence, *B* might do likewise, and the court might invoke due process to ensure that the proceedings fairly incorporate the accuracy and participation interests of both sides; but neither *A* nor *B* could raise a constitutional objection to a hearing for the other,

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120. See HOLT, *supra* note 119, at 106-08, 149-53, 164-65.

121. 3 BLACKSTONE, *supra* note 64, at \*274.

122. Letters from the Federal Farmer No. 16 (Jan. 20, 1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 323, 328 (Herbert J. Storing ed., 1981) (listing "law of the land" language separately).

123. See Amendments Proposed by the Virginia Convention (June 27, 1788), *reprinted in* EDWARD DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 181, 184 (1957). Virginia called for speed in habeas corpus, too. See *id.* at 184; see also Amendments Proposed by the New York Convention (July 26, 1788), *reprinted in* DUMBAULD, *supra*, at 189, 190 (similar).

124. See Amendments Proposed by the North Carolina Convention (Aug. 1, 1788), *reprinted in* DUMBAULD, *supra* note 123, at 200; FARBER & SHERRY, *supra* note 113, at 308 tbl.7.1.

nor could the court use due process norms to limit overall decision costs stemming from such procedural protections. Similar logic applies when a single party requests a license or other benefit from a government official. On this interpretation, moreover, the central notion of due process might track the distinction between decision costs and error costs: the relevant deprivations appear to be consequences of a government decision, not the process leading up to it. The Magna Carta and state constitutions are written differently. They point to right and justice, and they promise to reach that outcome without purchase or delay. The disjuncture of state and federal constitutional text does not seem to have an accepted historical explanation, but the anti-undue process interpretation could fit with the context of the founding era and even Reconstruction. Perhaps the population of 1791 was more comfortable endorsing guarantees of swift and inexpensive action at the state level, a kind of guarantee that might have clashed with remaining skepticism about a major expansion of central government activity.<sup>125</sup> Analogous skepticism about state-level action accompanied the post-Civil War Amendments.

There remain serious complications in the argument, however. It is still possible to extract undue process restraints from the Due Process Clauses. The possibility arises in part because of the incorporation doctrine, by which the Supreme Court has applied concepts from the Bill of Rights against the states. Some of the imported concepts have undue process attributes, like the right to a speedy trial<sup>126</sup> and the prohibition of double jeopardy.<sup>127</sup> If the idea of “due process” cannot include restrictions on decision costs of any sort, then the application of these guarantees against the states would be foreclosed. The Court has held otherwise, even though it creates an arguable redundancy between the Fifth Amendment’s Due Process Clause and other provisions in the Bill of Rights. These holdings open the possibility of a broader undue process norm, which could find support, rather than defeat, in the tradition of the Magna Carta and state constitutional law.<sup>128</sup> More generally, the judicial history of the Due Process Clauses is marked by flexibility. Those provisions have been cited to legitimize court theories of vested rights, opposition to retroactive lawmaking, limits on “taking from *A* and giving to *B*,” requirements of decisionmaker impartiality, and restrictions on personal jurisdiction over out-of-state defendants<sup>129</sup>—not to mention the most controversial instances of substantive due process.<sup>130</sup> The demand for notice and an opportunity to be

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125. Cf. Linde, *supra* note 118, at 138 n.38 (discussing right-to-remedy clauses).

126. See *Klopper v. North Carolina*, 386 U.S. 213, 222-26 (1967).

127. See *Benton v. Maryland*, 395 U.S. 784, 794-96 (1969).

128. Cf. *Klopper*, 386 U.S. at 223 (linking speedy criminal trial rights to the Magna Carta). Using a more flexible textual hook, like the Privileges or Immunities Clause, might strengthen the argument.

129. See, e.g., JOHN V. ORTH, *DUE PROCESS OF LAW: A BRIEF HISTORY* chs. 1-2 (2003).

130. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 849 (1992) (joint opinion).

heard might now be the most orthodox type of due process claim.<sup>131</sup> But courts have moved the doctrine elsewhere.

There is no complete answer to these theories, but they are hard to accept at this stage. The incorporation argument is undercut by a realistic understanding of the compromise worked out by members of the Court over the years. An element of that compromise was to draw from within the boundaries of the Bill of Rights without obviously exceeding them.<sup>132</sup> Court majorities picked and chose from an essentially closed menu defined by the first eight amendments. This helped confine judicial creativity and, therefore, decision costs. A freestanding undue process principle cuts against this grain. The general observation regarding due process flexibility offers greater hope for a broad undue process claim. But that outcome likely requires a more specific investigation into judicial practice. The sources covered so far weigh against generic undue process claims, and only a more particularized inquiry can ascertain just how novel these arguments are.

## 2. *Localized norms*

A general message favoring process restraint is difficult to identify, and yet federal constitutional law is peppered with localized undue process norms. Not every bit of constitutional law with a potentially dampening effect on decision costs can be itemized here; that would necessitate, among other efforts, listing every clause and judicial opinion articulating a constitutional rule instead of a standard. But several plausible undue process provisions and decisions can be fruitfully explained. These strands of law are largely isolated, partisan, or parasitic in character—with one potential exception. Some lower courts have experimented with *Mathews v. Eldridge*<sup>133</sup> in ways that could substantially extend undue process norms. These cases might reach essentially all of the territory now covered by due process doctrine. The discussion begins, however, in more settled areas.

### a. Positive lawmaking

Perhaps the constitutional law most effectively minimizing decision costs receives no attention in litigation. Much constitutional text outlines institutions (bicameral legislature, one chief executive, one supreme court) and ground rules for their memberships and relationships (elections, appointments, the veto, scattered voting rules). Parties with conflicting interests can produce innumerable debates at the margins of these provisions, but key parts of their

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131. See *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

132. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 147-48 (1968); *id.* at 171 (Black, J., concurring) (accepting selective incorporation as second-best to total incorporation).

133. 424 U.S. 319 (1976).

content have never been in dispute. This is consistent with the popular notion that the U.S. Constitution sets out a “framework” for the federal government. That label sometimes prefaces a claim that constitutional text fails to settle an important question against innovation, yet even these arguments aim to work within the given framework.<sup>134</sup> Although we cannot be certain of the degree to which conscious fidelity to text constrains institutional character at the moment, we can be sure of the response to a suggestion that the Senate be abolished by ordinary federal statute. These institutional basics set the stage for positive lawmaking in a relatively predictable and stable fashion.

The *content* of positive law produced through these institutions is obviously more fluid. As a formal matter, decisions about the regulation of primary conduct are not particularly resilient. Such decisions must navigate the Article I procedure for statute-making, for example, and the restraints of other constitutional restrictions such as the *ex post facto* clauses. But unlike relatively frozen Article III judgments,<sup>135</sup> there is no special constitutional hurdle to revisiting most regulatory decisions. The nation is free to rack up decision costs for decades considering and reconsidering the desirability of national health insurance, progressive income taxation, and the regulation of abortion or greenhouse gas emissions.

Yet efforts have been made to specify precisely when new positive law is generated. One is the enrolled bill doctrine, which instructs courts to not look beyond the signatures of the presiding officers of Congress to determine whether a bill was actually passed by both chambers.<sup>136</sup> Much of the rule’s benefit is enhanced public certainty, but it can also reduce decision costs in litigation. There are analogous decisions in the Article V amendment context, as well.<sup>137</sup> More significantly, courts have occasionally chosen the less demanding interpretation of the Constitution’s lawmaking processes. A powerful example is one of the earliest and least advertised constitutional decisions of the Supreme Court. In *Hollingsworth v. Virginia*,<sup>138</sup> an out-of-state creditor asked the Court to ignore what is now accepted as the Eleventh Amendment. Hollingsworth argued, in part, that the plain text of Article I,

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134. See, e.g., Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 247 (2002).

135. See *infra* Part II.B.2.c.

136. See *Marshall Field & Co. v. Clark*, 143 U.S. 649, 669-73 (1892) (involving a bill signed by the President and delivered to the Secretary of State); Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 VA. L. REV. 1105, 1172-81 (2003); cf. *United States v. Ballin*, 144 U.S. 1, 4 (1892) (stating that “if reference may be had” to the House Journal to check for a quorum, “it must be assumed to speak the truth”). *But cf.* *United States v. Munoz-Flores*, 495 U.S. 385, 391 n.4 (1990) (refusing to apply the doctrine to an origination clause challenge).

137. See, e.g., *Leser v. Garnett*, 258 U.S. 130, 137 (1922) (using a state legislature’s ratification notice and the Secretary of State’s proclamation to foreclose a claim that the legislature’s rules were violated).

138. 3 U.S. (3 Dall.) 378 (1798).

Section 7 gives the President an opportunity to veto constitutional amendments proposed by Congress.<sup>139</sup> The purported Eleventh Amendment had been sent straight to the states for ratification. Hollingsworth's objection was not without force, though it was perhaps weakened by the identical voting rules for veto overrides and congressionally proposed amendments.<sup>140</sup> In any event, the Court was in a poor position to repudiate an amendment restricting federal jurisdiction following the backlash to *Chisholm v. Georgia*,<sup>141</sup> and a presentment requirement would have jeopardized the Bill of Rights as well. The creditor's theory was rejected within a day of oral argument, with Justice Chase suggesting that the President has no formal role in the Article V process.<sup>142</sup> The Court's position accords with the practice ever since, excepting two attempts at a Thirteenth Amendment.<sup>143</sup> Despite the absence of a stated rationale, *Hollingsworth* helped eliminate a veto gate for amendments, which should limit decision costs per amendment attempt.<sup>144</sup>

Process-capping case law is tougher to identify when we turn to statute making, but constitutional text does indicate such limits.<sup>145</sup> Consider the prospects for tricameralism. They seem dim. Article I, Section 1 tells us that "[a]ll legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." An indeterminacy-loving provocateur might suggest otherwise, perhaps arguing

139. See U.S. CONST. art. I, § 7, cl. 3 ("Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President . . ."); *Hollingsworth*, 3 U.S. at 378-79; see also U.S. CONST. art. V ("The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments . . ."); cf. THE FEDERALIST NO. 51, at 322-23 (James Madison) (Clinton Rossiter ed., 1961) (discussing executive vetoes and the threat of legislative power).

140. See Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189, 208-09 (1972) (raising but rejecting the redundancy argument).

141. 2 U.S. (2 Dall.) 419 (1793).

142. See *Hollingsworth*, 3 U.S. at 381 n.\* (recording a statement by Justice Chase during oral argument that "[t]he negative of the President applies only to the ordinary cases of legislation: He has nothing to do with the proposition, or adoption, of amendments to the Constitution").

143. See RICHARD B. BERNSTEIN & JEROME AGEL, *AMENDING AMERICA: IF WE LOVE THE CONSTITUTION SO MUCH, WHY DO WE KEEP TRYING TO CHANGE IT?* 87, 91, 100 (1993) (stating that outgoing President Buchanan signed a proposed amendment to entrench slavery against any subsequent amendment authorizing Congress to abolish it and that President Lincoln signed what became the Thirteenth Amendment).

144. See also *Rhode Island v. Palmer*, 253 U.S. 350, 386 (1920) (holding that each House of Congress may approve proposed amendments by a two-thirds vote of those present in the chambers); *Hawke v. Smith*, 253 U.S. 221, 230-31 (1920) (holding that states cannot fetter ratification with nondeliberative popular referenda, without explicitly forbidding that option to Congress); cf. *Dillon v. Gloss*, 256 U.S. 368, 375-76 (1921) (holding that Congress may set a reasonable time limit for ratification of amendments). The long-run effect on amendment attempts is, however, hard to estimate. See *supra* Part I.C.2.

145. See, e.g., U.S. CONST. art. I, § 7, cl. 2 (imposing a time limit on the President's veto decision).

that Congress could use the Article I, Section 7 statute-making process to authorize a third House and a method for populating it. But no conventional lawyer would accept the argument, which is a good proxy for adherence to the dispute-minimizing function of constitutional text. To be sure, a factor in this reaction might be status quo bias or preferences unhitched to constitutional law in any conventional sense. But the same outcome is easily reached with standard interpretive material. Tricameralism is out.

Still, much of what makes the federal legislative process difficult to complete is not dictated by conventional interpretation. Congressional committees are not mentioned in the Constitution but their workings are essential to understanding the legislative process. The committee system is legitimized by the internal rulemaking grant in Article I, Section 5, which suggests discretion within each House. It is this discretion, however, that would authorize the two chambers to fabricate evermore elaborate decision structures.<sup>146</sup> There is no obvious stopping point, making safety from tricameralism seem almost insignificant. The most important safeguard from decision costs in the positive lawmaking process, therefore, might be nonconstitutional.

One final stab in this field can be made with *INS v. Chadha*,<sup>147</sup> which invalidated one-House legislative vetoes. A simple view of the case is that Congress, at  $t_1$ , satisfied the requirements of Article I, Section 7 lawmaking while simultaneously extending its lawmaking role into  $t_2$ , when an agency might depart from the preferences of either House. The Court eliminated these veto gates in  $t_2$ . This rendering of *Chadha* is acceptable as far as it goes, but it neglects plausible congressional alternatives that might tally even higher decision costs. Absent any legislative veto, Congress could engage in more detailed statutory drafting to cabin executive discretion, or expend greater resources on agency monitoring through committee oversight, or systematically stall agency rulemaking.<sup>148</sup> All of these options are consistent with *Chadha*. The case has an undue process complexion, then, only if judged in a static fashion or on debatable empirical assumptions.

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146. This is not to suggest that congressional committees will necessarily increase overall decision costs. One of their functions is to specialize, which can increase productivity, and delegation of authority to a smaller unit might avert cycling and other wasteful process.

147. 462 U.S. 919 (1983).

148. See 5 U.S.C. §§ 801(a)(3), 802, 804 (2006) (delaying the effective date of any new "major rule" to give Congress an opportunity to reject it, but following bicameralism and presentment); see also LOUIS FISHER, CONSTITUTION DIALOGUES: INTERPRETATION AS POLITICAL PROCESS 225 (1988) (asserting that Congress engaged in "open defiance and subtle evasion" of *Chadha*).

## b. Criminal procedure and rights parasites

The best known process ceilings appear in the criminal procedure clauses of the Bill of Rights. Criminal defendants must receive speedy trials, they need not testify against themselves, and they are immunized from double jeopardy. These restraints are now applied against state as well as federal officials.<sup>149</sup> Yet even if aggressively enforced, they add little to the foundations of a generic undue process claim. These provisions are elements in a package of guarantees designed to promote the interests of the criminally accused (who often face serious losses with limited means) at the expense of the prosecution (which might have been especially feared when these clauses were adopted). Criminal defendants may take advantage of both process ceilings and floors.<sup>150</sup> To take one stark comparison, consider information-sharing duties. The Fifth Amendment grants criminal defendants immunity from compelled self-incrimination, while due process doctrine mandates disclosure of exculpatory evidence from the state to the defendant.<sup>151</sup> Preoccupation with the undue process elements of criminal procedure is thus unwarranted. They are components in a partisan set of clauses that cannot deliver a larger message about decision costs.<sup>152</sup>

Outside of criminal procedure, the most secure undue process claim is parasitic. That is, other constitutional norms can be threatened by process, even if process is not their specific concern. One of these norms condemns “invidious” or “arbitrary” government action. Courts must be able to see something better than animosity before they will legitimate burdens imposed by

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149. See *supra* text accompanying notes 126-27.

150. Judge-made habeas rules regularly cut against applicants, and these rules might be inspired by constitutional ideas. See, e.g., *Coleman v. Thompson*, 501 U.S. 722, 726 (1991) (“This is a case about federalism.”); *Teague v. Lane*, 489 U.S. 288, 308-10 (1989) (plurality opinion) (noting comity concerns and restricting retroactive application of new rules of criminal procedure on federal habeas). But on habeas, ordinary principles of finality have already been relaxed.

151. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

152. One idea that has migrated beyond the criminal context is indigent access to the judicial process. Compare *Griffin v. Illinois*, 351 U.S. 12, 16-20 (1956) (plurality opinion) (quoting the Magna Carta and requiring free transcripts for indigent criminal defendants when needed for an effective appeal, even if the state may eliminate all appeals), and *id.* at 24-25 (Frankfurter, J., concurring) (“If [a state] has a general policy of allowing criminal appeals, it cannot make lack of means an effective bar to the exercise of this opportunity.”), with *M.L.B. v. S.L.J.*, 519 U.S. 102, 106-07 (1996) (holding that the state could not condition appeals from parental rights termination decisions on the affected parent’s ability to prepay record preparation fees), and *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971) (holding that divorce cannot be denied to a couple simply because they could not afford the court costs). These cases have well-known limits, logical or not. See, e.g., *United States v. Kras*, 409 U.S. 434, 444-45 (1973) (adjudging the interest in bankruptcy discharge less fundamental than divorce and refusing to require an indigency exemption from filing fees); *Ortwein v. Schwab*, 410 U.S. 656, 659-60 (1973) (per curiam) (refusing to require fee waivers for appeals from agency reduction of welfare benefits).



the state,<sup>153</sup> and excessive decision costs can violate this principle. Now, judicial inability to see legitimate objectives might be grounded in a contestable, value-based selection of conduct or classes as worthy of constitutional protection. But this would reinforce the point: the case outcomes would then be deeply parasitic, recognizing process burdens as mechanisms for undermining (controverted) constitutional values without intimating anything further about excessive decision costs.

Much the same can be said for more specific constitutional values. No court would permit a legislature to impose heightened evidentiary requirements on free exercise claims or Latino plaintiffs, simply for the purpose of disadvantaging that conduct and that class. Some actual free speech cases fit this model. When a bureaucracy seeks to review the content of private expression before licensing its dissemination, courts impose—and accept—an obligation to resolve the matter swiftly.<sup>154</sup> Quick response times might actually increase the overall cost of licensing, of course, but these court decisions are at least sensitive to regulatory burdens on valued conduct. Equal protection cases are similar. Courts episodically invalidate attempts by one segment of the population to elevate the procedural hurdles that another segment must clear in order to make legal change. Leading examples involve entrenching opposition to antidiscrimination laws in state constitutions or city charters.<sup>155</sup> In any event, the presence of additional process is not doing much work here. Process is just a type of cost made troubling by its effect on independently valued conduct or parties.

### c. Final judgments and litigation burdens

The examples just mentioned might be partisan or parasitic, but the insulation of final federal judicial judgments looks downright parochial. Article IV compels interstate respect for state court judgments without mentioning their federal counterparts.<sup>156</sup> Yet federal courts have determined that any gap in the Constitution regarding the finality of their judgments is intolerable. First, in the absence of legislation, the federal judiciary developed a common law of

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153. See, e.g., *Romer v. Evans*, 517 U.S. 620, 632 (1996).

154. See, e.g., *Freedman v. Maryland*, 380 U.S. 51, 58-60 (1965) (invalidating a motion picture censorship statute that lacked certain procedural safeguards for exhibitors, such as prompt judicial determination of whether a film was protected expression); Henry P. Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 522 (1970).

155. See *Hunter v. Erickson*, 393 U.S. 385 (1969); *Reitman v. Mulkey*, 387 U.S. 369 (1967); see also *Romer*, 517 U.S. at 631; *Citizens for Equal Prot., Inc. v. Bruning*, 368 F. Supp. 2d 980 (D. Neb. 2005) (striking down Nebraska's attempt to constitutionalize opposition to gay marriage but not finding a federal constitutional obligation to recognize it), *rev'd*, 455 F.3d 859 (8th Cir. 2006).

156. See U.S. CONST. art. IV, § 1 (authorizing general federal statutes prescribing the manner in which these judgments will be proved "and the [e]ffect thereof").

preclusion.<sup>157</sup> Second, the Supreme Court announced a constitutional barrier to reopening certain federal judgments. *Plaut v. Spendthrift Farm, Inc.*<sup>158</sup> invalidated a federal statute insofar as it required federal courts to reopen final federal judgments in civil lawsuits on grounds not established in the prejudgment law.<sup>159</sup>

*Plaut*'s holding is qualified, perhaps troublingly so. Congress may still prospectively dictate when a federal judgment becomes "final." In addition, the Court only demanded insulation for the home team: the federal judiciary. No protection was given to state court judgments,<sup>160</sup> plus territorial courts and federal agencies were distinguished into a category of non-Article III tribunals entitled to less respect.<sup>161</sup> The Court might not be unbendingly self-protective; a subsequent case made injunctions more vulnerable to legislative disruption than damages judgments.<sup>162</sup> Yet its constitutional policy in these matters is as conceptually isolated as criminal procedure and the rights-parasites cases. The latter two categories skew decisions toward a vulnerable class of litigants and favored private conduct, while the final judgment cases show judicial opposition to political judgments that might entail more work for the courts themselves. If there is a deep lesson in *Plaut*, it might concern a syndrome rather than a policy worth promoting.

Not all judicial creativity is baldly parochial. Constitutionally inspired litigation immunities shield a range of unwilling litigants from the burdens of judicial process. Within certain spheres of official conduct, courts grant absolute immunity from damages to legislators, judges, and high-ranking executive officials.<sup>163</sup> States and state agencies similarly enjoy damages immunity against private plaintiffs, although Congress may sometimes abrogate it or bargain for consent to suit.<sup>164</sup> Qualified immunity from damages for individual officials, which shields discretionary conduct when not clearly unconstitutional, is also a valuable defense. In fact, a justification for it is related to decision costs. The idea is that many officials are sensibly delegated

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157. See, e.g., *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 507-08 (2001).

158. 514 U.S. 211 (1995).

159. See *id.* at 218-23 (emphasizing founding-era examples of state legislatures granting new trials or otherwise judging particular cases).

160. The Court said it wished to avoid calling into question state *legislation*, see *id.* at 226-27, 234 (withholding judgment on due process objections), which leaves state court judgments exposed. *Accord* *Fleming v. Rhodes*, 331 U.S. 100, 102, 106-07 (1947) (allowing federal price controls to interfere with tenant evictions backed by state court judgments).

161. See *Plaut*, 514 U.S. at 232; cf. *Printz v. United States*, 521 U.S. 898, 928-29 (1997) (cabining federal authority to direct state officers, but distinguishing state courts).

162. See *Miller v. French*, 530 U.S. 327, 342-45 (2000) (addressing prison reform litigation).

163. See ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 516-28 (4th ed. 2003).

164. See *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 724-29 (2003); *Alden v. Maine*, 527 U.S. 706, 755-77 (1999) (noting limits to state sovereign immunity).

discretion to make judgments, sometimes quickly and in the face of serious danger, which can be unduly fettered with worries about litigation.<sup>165</sup> Finally, every out-of-state defendant in civil litigation is protected from certain assertions of personal jurisdiction. Relying on the Due Process Clauses, the Supreme Court demands some kind of connection with the forum state before its courts may reach a binding judgment.<sup>166</sup> Each of these doctrines is partial to some class of litigant, but each provides an effective objection to process burdens.

d. Quasi-*Mathews* and substantive due process

A smattering of other precedent intimates constitutional concern for excessive process. There is one standout, however: a judicial sensitivity to delay, at least when the decisions of nonjudicial officers are challenged, those officers are engaged in tasks akin to adjudication, the private need seems acute, and the justification for inaction underwhelms the courts. These decisions might protect either traditional real property rights or “new property,” and in that regard the intervention fits in more than one ideological slot. But while these cases present enormous opportunities for undue process claimants, they remain rare.

The two most important examples of judicial intervention run on slightly different doctrinal tracks. The first extends from—or perhaps contorts—*Mathews v. Eldridge*.<sup>167</sup> At first look, this is a strange platform on which to build an undue process claim. The case was initially taken as a path-marking reaction against procedural mandates in the administration of government benefits.<sup>168</sup> Perhaps the decision reflected emerging hostility to the benefits themselves, but even supporters of government assistance to disadvantaged populations can see risks associated with process-maximizing dictates. As a general matter, poor people do not want process; they want to be less poor. If we assume a fixed budget, then resources devoted to process “may in the end come out of the pockets of the deserving.”<sup>169</sup> Moreover, the doctrinal contribution of the case was essentially anti-process. Rather than selecting procedural mandates according to dignitary interests in participation or by historical analogy, the Court endorsed a flexible balancing test. That test does

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165. See *Harlow v. Fitzgerald*, 457 U.S. 800, 814-19 (1982).

166. See Kevin C. McMunigal, *Desert, Utility, and Minimum Contacts: Toward a Mixed Theory of Personal Jurisdiction*, 108 YALE L.J. 189, 233-34 (1998). The minimum contacts cases do not necessarily free defendants from all litigation burdens. The result might be only a more convenient forum.

167. 424 U.S. 319 (1976).

168. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970); Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 28-30 (1976).

169. *Mathews*, 424 U.S. at 348.

suggest high decision costs in its application (it is a classic standard), but it allows officials to combat demands for additional procedural safeguards by pointing out administrative cost. And these cost arguments were couched as “interests” that might justify good-faith agency decisions, not freestanding constitutional requirements.<sup>170</sup> The opinion looked like good news for legislative and agency discretion.

Innovation can have unforeseen consequences, however. On a second reading, the *Mathews* opinion may show a streak of undue process. Eldridge had demanded a hearing before the agency cut off his disability benefits; the agency offered a hearing only after the status quo had changed. The disagreement was therefore about timing, with the recipient requesting speed.<sup>171</sup> To be sure, Eldridge was not simply asking for a quick deadline on a final agency decision; the agency’s quick response had been to stop sending him checks. Eldridge wanted a process in which the status quo was more resilient—he would continue to receive benefits while the agency completed a more intensive review of his eligibility—which fits with orthodox conceptions of “due process as more process.” Even so, his case is a step closer to an undue process claim.

In addition, *Mathews*’s utilitarianism created intellectual space for undue process claims. Its balancing test placed governmental interests in decision costs on the same plane as private interests in process modifications.<sup>172</sup> At the time the case was handed down, the message might have been about leveling down the strength of private demands. Yet the decision can also be read to suggest a heightened judicial sensitivity to the mundane costs of process. When joined with the task of making something like an all-things-considered evaluation of administrative process, courts might then add ordinary decision cost concerns to the category of private interests, without sensing they are leaving constitutional law behind. Once constitutional judicial review is triggered by a cognizable interest in the benefit at hand (the possibility of which *Mathews* did nothing to diminish), applicants could be free to challenge

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170. See *id.* at 335 (listing “the Government’s interest, including . . . the fiscal and administrative burdens that the additional or substitute procedural requirement would entail”); *id.* at 349 (demanding that substantial weight be afforded to good-faith administrator judgments about what process is due).

171. See also *Fusari v. Steinberg*, 419 U.S. 379, 389 (1975) (“[T]he rapidity of administrative review is a significant factor in assessing the sufficiency of the entire process.”); *cf. Smith v. Ill. Bell Tel. Co.*, 270 U.S. 587, 591 (1926) (addressing federal equity jurisdiction and stating that “[p]roperty may be as effectively taken by long-continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmation of them”). *But cf. City of Los Angeles v. David*, 538 U.S. 715 (2003) (rejecting a delay claim as applied to recovery of a monetary penalty for allegedly illegal parking); *Bob Jones Univ. v. Simon*, 416 U.S. 725, 747-48 (1974) (upholding deferral of litigation opportunities in the post-collection tax context). On the timing issue generally, see LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 10-14 (2d ed. 1988).

172. See *Mathews*, 424 U.S. at 335.

agency process as either unduly dismissive of their interests or unduly laborious in reaching decisions.

Some lower federal courts made this transition. Faced with complaints about the burdens of administrative delay, they adapted *Mathews*'s utilitarian inquiry and accepted the viability of constitutional objections. Thus a landlord might get swifter relief from rent control,<sup>173</sup> an allegedly disabled child could receive an annuity without years of bureaucratic review,<sup>174</sup> and an immigrant could gain relief from deportation efforts.<sup>175</sup> Even courts less sympathetic to such complaints have employed *Mathews* to help resolve the question.<sup>176</sup> One persistent issue in the welfare setting is whether applicants have an interest at stake that can be protected as "life, liberty, or property" under the Due Process Clauses.<sup>177</sup> One might conclude that the constitutional interest of an initial applicant is somehow less potent than that of a recipient who was later cut off, like Eldridge. This distinction might not matter under the broadest versions of

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173. See *Kraebel v. N.Y. City Dep't of Hous. Pres. & Dev.*, 959 F.2d 395, 398-99, 403-06 (2d Cir. 1992) (reversing dismissal of a landlord's claim that a city agency violated due process by delaying reimbursement for certain lost rents from senior citizens, but indicating deference to agency resource allocation and stressing that the landlord alleged an indisputable right to money otherwise owed by lease), *cert. denied*, 506 U.S. 917 (1992).

174. See *Kelly v. R.R. Ret. Bd.*, 625 F.2d 486, 490-91 (3d Cir. 1980) (holding that a delay of almost four years in processing a disability benefits application through three layers of administrative review was a denial of due process, despite the agency's assertion of limited resources); see also *Walter v. City of Denver*, 983 P.2d 88, 91 (Colo. Ct. App. 1998).

175. See *Singh v. Reno*, 182 F.3d 504, 507, 510-11 (7th Cir. 1999) (finding a colorable due process claim, and permitting direct review in the court of appeals, where years of INS delay in holding a hearing resulted in a criminal alien being barred from seeking discretionary waiver of deportation under a statute enacted in the interim). *But cf.* *Elia v. Gonzales*, 431 F.3d 268, 275-76 (6th Cir. 2005) (rejecting a delay-based due process claim where a hearing was not held until after the alien had served five years in prison), *cert. denied*, 126 S. Ct. 2019 (2006).

176. See, e.g., *Isaacs v. Bowen*, 865 F.2d 468, 477 (2d Cir. 1989) (rejecting a claim involving additional hearings in Medicare Part B appeals, while acknowledging "delay can be so unreasonable as to deny due process"); *United States v. Batson*, 782 F.2d 1307, 1312 (5th Cir. 1986) (stating that a "delay in the administrative process can rise to the level of a denial of due process"); *Wright v. Califano*, 587 F.2d 345, 354-56 (7th Cir. 1978) (rejecting "unrealistic and arbitrary time limitations [for survivor's benefits appeals] on an agency which for good faith and unarbitrary reasons has amply demonstrated its present inability to comply"); *cf.* *Schroeder v. City of Chicago*, 927 F.2d 957, 960 (7th Cir. 1991) (Posner, J.) (rejecting a firefighter's attack on an eight-month delay in commencement of state disability payments, at which time he received retroactive benefits, but acknowledging that "at some point delay must ripen into deprivation"); *O'Keefe v. Murphy*, 345 N.E.2d 292, 294 (N.Y. 1976) ("[W]henver a delay in an administrative adjudication significantly or deliberately interferes with a party's capacity to prepare or to present his case, the right to due process has been violated.").

177. *Cf.* *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 60 (1999) (finding, in the alternative, no protected interest in contested "reasonable" and "necessary" medical benefits); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 426, 431-33 (1982) (finding a protected interest in a disability discrimination claim that was dismissed because of untimely agency action); *Barry v. Barchi*, 443 U.S. 55, 66 (1979) (finding the same for a racehorse trainer license that had been suspended).

undue process; the claim would arise from any sort of unjustifiable decision cost and need not serve the entitlement interests of any particular beneficiary.<sup>178</sup> It could target global decision costs even if error costs rise. But these lower court cases are tracking ordinary due process doctrine and, as such, they are building undue process claims with a scope similar to familiar due process law.

Several qualifications and concerns should be raised now. First, quasi-*Mathews* claims have limits. They might be premised on a constitutionally required hearing of some sort; without that, there is no obvious trigger for the timing question. This prerequisite would immunize a large amount of executive action because the Supreme Court has repudiated such participation requirements for generally applicable rulemaking.<sup>179</sup> It appears that only adjudicatory-like action is exposed. Even within this domain, the objections have not been especially successful.<sup>180</sup> One such claim was filed on behalf of Hurricane Katrina victims who demanded a more responsive FEMA. The district court refused to order processing deadlines, which confirms that sympathetic plaintiffs are insufficient for success.<sup>181</sup> Furthermore, quasi-*Mathews* claims animate objections from private parties, not government officials or a broader public interest. This might be because the Due Process Clauses are built that way and these claims must be in accord, or because the costs of government process are often spread to countless faceless individuals with whom judicial review is not much concerned. Either way, these cases serve a subset of all interests. Finally, there is a risk to validating these claims, explored below.<sup>182</sup> It involves expanding undue process norms without moderating due process dictates. There is a manic, five-finger fillet quality to constitutional doctrine when courts demand enhanced accuracy and participation at the same time they call for speedier decisions with lesser burdens on private parties. Without special care, process ceilings might crash into process floors.

The second set of lower court examples is similar, although they invoke “substantive due process.” An important success is the Stroud Township

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178. These interests can be served in ways other than orders to expedite hearings or decisions. Interest can be added to financial benefits claims if they are vindicated. *Cf. Mathews v. Eldridge*, 424 U.S. 319, 339 (1976) (noting availability of retroactive payments). This is not helpful to those in dire straits, but worth noting.

179. *See supra* note 109.

180. *See supra* note 176; *see also* *Rumford Pharmacy, Inc. v. City of E. Providence*, 970 F.2d 996, 999 (1st Cir. 1992) (requiring inquiry into adequacy of state remedies, like mandamus); Steven Goldman, *Administrative Delay and Judicial Relief*, 66 MICH. L. REV. 1423, 1434-35 (1968).

181. *See supra* Part I.A.2. The district court was willing to extend the hotel/motel program, *see* *McWaters v. FEMA*, 408 F. Supp. 2d 221, 233-37 (E.D. La. 2005), producing tension with concerns about agency resource allocation that supposedly justified its rejection of plaintiffs’ due process claim.

182. *See infra* Part III.C.2.

housing controversy. There the Third Circuit, reversing judgment awarded to township officials as a matter of law, concluded that the developer had a viable constitutional claim based on evidence of delay and procedural burden intended to thwart low-income housing construction without regard to local law.<sup>183</sup> On this theory, people have “the right to be free from harassment in their land development efforts,” and the objection does not depend on an unfavorable decision.<sup>184</sup> The process itself is the constitutional problem. These cases are therefore tightly linked, conceptually speaking, with the quasi-*Mathews* decisions. Both depend on a constitutionally cognizable interest but neither can associate the interest at issue with a set of rights that are overtly and doctrinally favored in the modern era.<sup>185</sup> These courts are protecting rather pedestrian interests with undue as well as due process.

The substantive due process tack has not been especially successful, and its label does not help matters. The doctrine has been tainted with unease over appropriate judicial standards and value choices. With housing development in particular, some observers might worry that seemingly procedural objections are rhetorical techniques for skirting the weakness of takings doctrine,<sup>186</sup> or even reviving judicial entrenchment of economic power structures in a pre-New Deal throwback.<sup>187</sup> It seems not to have been noticed that some of these claimants were asserting objections akin to those of beleaguered welfare applicants, and that an objection to process burdens in support of a supposed entitlement is no more “substantive” than a plea for respect through additional process. In any event, even the Third Circuit lost enthusiasm for these sorts of claims. It did not eliminate them, but it did hold that an “improper” motive was insufficient, the challenged official conduct must “shock the conscience,” and

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183. See *Woodwind Estates, Ltd. v. Gretkowski*, 205 F.3d 118, 120-22, 125 (3d Cir. 2000).

184. *Blanche Rd. Corp. v. Bensalem Twp.*, 57 F.3d 253, 268-69 & n.15 (3d Cir. 1995) (indicating that the key questions are whether officials ignored the merits or acted with “improper” motive); cf. *Esmail v. Macrane*, 53 F.3d 176, 180 (7th Cir. 1995) (allowing an equal protection claim to go forward against a mayor who, out of personal animosity, attempted to thwart renewal of a liquor store license); *Mitchell v. Kemp*, 575 N.Y.S.2d 337 (N.Y. App. Div. 1991) (invoking arbitrariness against a land-use moratorium and a delayed zoning ordinance).

185. See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

186. See, e.g., *San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323 (2005) (permitting takings claims to be channeled through and finally resolved in state courts); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002) (rejecting the argument that a temporary development moratorium to formulate a land-use plan was a per se taking). *But cf.* *Rapanos v. United States*, 126 S. Ct. 2208, 2214-15 (2006) (opening an opinion on the Clean Water Act with a discussion of cost and delay in obtaining permits from “enlightened despot[s]” in the Army Corps of Engineers).

187. Cf. *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 200 (2003) (Scalia, J., concurring) (asserting that “[f]reedom from delay in receiving a building permit is not among the[] ‘fundamental liberty interests’” covered by substantive due process, making irrelevant any official arbitrariness or caprice).

having no basis in state or local law is apparently not shocking enough.<sup>188</sup> If this attitude was not represented on the Supreme Court before, it is now. Then-Judge Samuel Alito wrote the opinion for a divided court of appeals.

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Nothing like a global directive to economize on decision costs in light of process benefits emerges from this review. The leading candidate for reducing decision costs is just the constitutional text plus some method of interpretation. Contemporary empirical work suggests that doing so jeopardizes little, while achieving some restraint on constitutional debate. To be sure, there are localized undue process norms. Some are uncontroversial even if partisan or parasitic, as with criminal procedure and the application of other constitutional values like speech, religion, and racial equality to process burdens. And more could be done through extensions of *Mathews* and other due process doctrine. But so far, undue process claims tend to protect relatively narrow classes of constitutionally favored individuals or behavior.

### III. UNDUE PROCESS IN THEORY

What is the proper role for undue process norms in federal constitutional law? If the Constitution could be redrafted without cost, what kind of undue process provisions ought to be inserted, if any? Should existing constitutional law be pushed in that direction, building on the quasi-*Mathews* cases? These are difficult questions. To address them sensibly, this Part takes four steps. First, some basic constitutional options are clarified and narrowed. Optimal process is rejected as an impractical goal for enforceable constitutional law. Second, the underlying justifications for undue process concerns are elaborated with guidance from existing process theory. Third, the question whether undue process ought to be supreme constitutional law is examined. That calls for an argument about political failure. Institutional and pragmatic questions also are worth raising, especially the character of judicial review. Fourth, the analysis is made more concrete by its application to particular disputes. The discussion accordingly ends by returning to the undue process controversies described in Part I.

#### A. *Constitutional Options*

The ultimate question is whether a general concern for decision costs ought to be the kind of law often associated with the Constitution: supreme over other

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188. See *United Artists Theatre Circuit, Inc. v. Twp. of Warrington*, 316 F.3d 392, 399-400 (3d Cir. 2003) (applying the test found in *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998)); accord *Torrromeo v. Town of Fremont*, 438 F.3d 113, 114-15, 118 (1st Cir. 2006) (housing developer); *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, 1371-75, 1386 (11th Cir. 1993) (warehouse developer).



forms of law, revocable only by Article V amendment, and enforced with some type of judicial review. This raises the stakes. And we can make the inquiry more challenging by accepting up front the rights-parasites cases and other outcomes fairly dictated by existing constitutional text, conventional interpretive methods, and judicial judgments. These conventional sources cover irrational or totally senseless process, akin to compulsive hand-washing or an addiction to snap judgments. Consider such process already forbidden by a generic constitutional prohibition on arbitrary government practices.<sup>189</sup> For reasons suggested above, these circumstances—however rare—present a strong basis for invalidating process burdens.<sup>190</sup> Our focus should be on more controversial objections.

Progress can be made with a few initial distinctions among choices. If we assume constitutional law will include some sort of general process norm, then there are roughly four options:

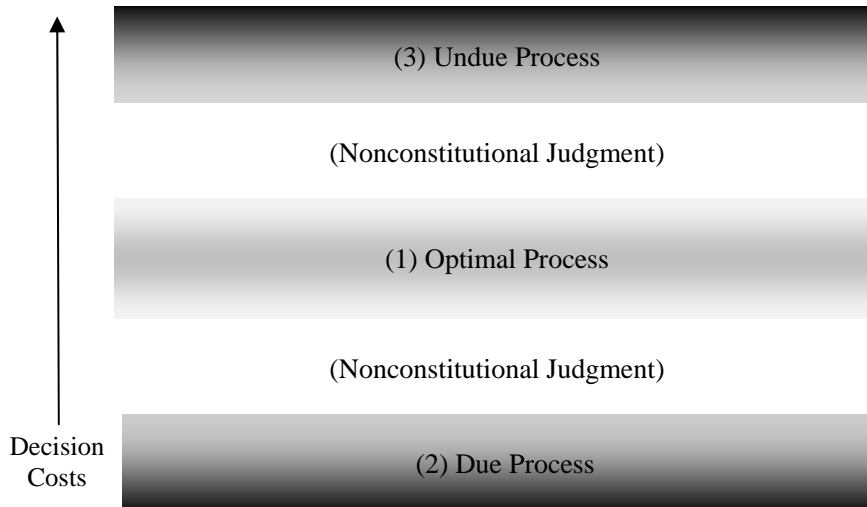
- (1) a demand for optimal process of law,
- (2) a demand for due process of law,
- (3) a prohibition on undue process of law,
- (4) a combination of due and undue process guarantees.

Selecting option 1 would make the others irrelevant, as all government process would be tested against some measure of optimality. Option 2 is part of current federal constitutional law, while option 3 represents an alternative world in which the Constitution and its doctrine are only concerned with excessive process or unjustifiably high decision costs. In fact, the demands of due and undue process can be moderated to points well below and above any estimated sacrifice dictated by optimal process, such that space is left for nonconstitutional judgment. It might be odd if this moderation did not occur. Otherwise due process norms could produce, as a matter of constitutional mandate, decision costs up to or even in excess of the optimal level but then permit additional burdens as a matter of discretion; undue process might have the same character but drive in the opposite direction. No good reason for these outcomes is apparent. Given space between due and undue process, option 4 is different from option 1. The former calls for sensitivity to both excessively burdensome and inadequate process, yet it stops short of blanketing the field with constitutional law.

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189. See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-33 (1982) (vindicating a due process claim); see also *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564-65 (2000) (per curiam) (focusing on allegations of intentionally different treatment plus arbitrariness to validate an equal protection claim involving a couple's delayed connection to the municipal water supply).

190. See *supra* Part II.A.

**Figure 1. Some Constitutional Options**

It is worth emphasizing, however, that these stylized norms are not mirror images. Undue process involves complaints about excessive decision costs. Those complaints may rest on burdens suffered by any number of victims—whether private parties to a dispute, government regulators, faceless taxpayers, or nameless alternative beneficiaries—and they might be addressed with more than one kind of remedy. A successful objection may or may not entail the removal of a specific process element.<sup>191</sup> But the essential feature is an argument that someone (or everyone) is suffering excessive costs from government decision making. In contrast, a sensible *due* process claim is obviously not framed as a demand for additional decision costs. In its orthodox procedural aspect, the claim is for an added process safeguard, such as more effective notice and an opportunity to participate in legal proceedings.<sup>192</sup> When successful, these claims tend to escalate decision costs without asking for them. Decision costs are usually just the price for some process benefit, such as accuracy or legitimacy in the ultimate decision. The connection between these versions of due and undue process, then, is that both include constitutional objections tied to process and both directly influence decision costs. This leaves four related, if not perfectly symmetrical, choices.

Option 1 should be eliminated at the outset. Current constitutional text surely does not mandate a generalized inquiry into government process for the purpose of achieving its objectives at the dream-level of cost. The closest existing doctrine comes to this idea is in the quasi-*Mathews* cases, where some courts demand expedited administrative action without explicitly tempering

191. See *supra* Part I.C.2.

192. See, e.g., *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985).

process mandates that survive *Mathews* itself.<sup>193</sup> But these cases did not clearly eliminate room for policy judgment (not knowingly, anyway). And we have no assurance that the judiciary aimed for, much less hit, the optimal form of process under the circumstances. With so many moving parts, less than predictable dynamic reactions, imperfect information, and limited court competence,<sup>194</sup> optimal process of law is a poor fit with supreme judicial review. Add to these concerns the doctrinal creativity involved in fabricating optimal process norms, and it becomes an extremely unlikely addition to judicially enforced federal constitutional law. Multi-institution collaboration and experimentation is a superior course. Optimal process is a fine aspiration, and no harm would be done if it were a hortatory clause in the Constitution, but more than that is impractical.

### B. Process Theories and Undue Process Policy

The live options are combinations of due and undue process, and a resort to general theory can help. A handful of process theories have become standard guides to the objectives of procedure. Normally they are used to shape judgments on the minimum level of process to which a private party is entitled, but parts of their logic may comfortably extend into undue process norms. The first set of theories discussed is an offshoot of fundamental rights and dignity arguments. The second set encompasses a wider group of objectives and can be labeled utilitarian.

#### 1. Rights retrofitted

One theme in process theory concentrates on the relatively intrinsic importance of individual participation.<sup>195</sup> Before government officials reach a decision affecting private interests, the argument goes, they ought to provide an opportunity for affected parties to voice their opinions. Whatever additional consequential benefits might come from this participation, it shows a respect for the individual that human dignity requires. Limited resources and other competing interests can qualify or override this dignity-based argument for participation; they must, practically speaking, in the modern state. But for some

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193. Recognizing *Lackey* claims would lead to a similar complication. See *infra* Part III.D.1.

194. See *infra* Part III.C.2.

195. See, e.g., JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 81-100 (1985); TRIBE, *supra* note 171, at 666-67; Mashaw, *supra* note 168, at 49; Richard B. Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 117-18 (1978); cf. *Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972) (referring to both fair play and minimization of mistaken deprivations); *Goldberg v. Kelly*, 397 U.S. 254, 264-65 (1970) ("From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders.").

theorists, this is the central justification for process. A related and less developed theory draws on notions of fundamental rights. Using a given analytical resource, like contemporary moral reasoning or natural law or heritage, certain rights may be privileged with exceptional legal protection. Perhaps a right to some level of participation in at least some government decisions qualifies for fundamental status.<sup>196</sup>

But if the law of process should revolve around individual dignity or fundamental human rights, it will be difficult to make room for undue process objections. These theories might be specified in several different ways, making it difficult to reach a firm conclusion, but undue process seems to be a poor fit regardless. None of these theories directly concern net social welfare. They vindicate an intrinsically valued conception of dignity, or shield vulnerable individuals or high-priority conduct. The capacious versions of undue process are in no way this limited. In fact, they would energize opposition to dignity-based process demands, perhaps even overriding official decisions that grant extensive opportunities for voice to all interested parties. Even from a standpoint internal to dignity and fundamental rights theories, these ideas probably cannot support a vigorous undue process norm. The mismatch occurs because of the type of injury with which the latter is concerned. This version of undue process is reflected in the quasi-*Mathews* cases and our working definition of decision costs.<sup>197</sup> That definition is inclusive. It incorporates any cost associated with decision making: money, time, uncertainty, and so on. Many of these burdens are ubiquitous and, partly for that reason, perfectly ordinary.<sup>198</sup> Dignity and rights theories are attuned to the extraordinary.

Ronald Dworkin's *Principle, Policy, Procedure* is in accord. Dworkin understands the significance of process in achieving rights that trump ordinary utilitarian calculations. Their principled recognition can be undermined unless accompanied by a process that identifies rights violations with some degree of accuracy.<sup>199</sup> This attention to accuracy is revealing, however. Dworkin is not enthralled with process per se, at least in adjudication, which he largely treats as an instrument for respecting rights. He argues that no one has a right to the most accurate procedure regardless of cost, even though rights are otherwise at stake and there is a distinct moral wrong inflicted when the innocent are convicted or held liable.<sup>200</sup> Instead, individuals have a basic procedural right with two elements: (1) those who issue procedural rules must "correctly assess the risk and importance of moral harm" from rights violations (for example, they cannot ignore the special problem of rights deprivation by deciding to flip coins to determine guilt), and (2) the risks imposed in one class of cases must

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196. See DWORKIN, *supra* note 13, at 72-73 (connecting process to meaningful rights).

197. See *supra* Parts I.C.2, II.B.2.d.

198. See *Fuentes*, 407 U.S. at 90 n.22 (downgrading "rather ordinary costs" of process compared to a right to a hearing before a property deprivation takes place).

199. See DWORKIN, *supra* note 13, at 72-73, 77 (focusing on adjudication).

200. See *id.* at 72-74, 81, 92.

be consistent with our best theory of moral harm suggested by practices in the other classes.<sup>201</sup> Little seems to change if there is a converse right to defeat unfounded claims of right.<sup>202</sup> This right indicates *additive* claims to process in the service of accuracy, but it need not produce rights in one party to a dispute (much less third parties) to minimize the procedures demanded by another party. Thus Dworkin writes with respect to civil litigation, “neither party has any right *against* procedures *more* accurate than the accuracy required by” his basic procedural right.<sup>203</sup> Nothing in this analysis indicates even a narrow version of undue process as a right, fundamental or otherwise.

That said, dignity and rights theories can be extended to a subcategory of undue process problems. Obviously constitutional rights like the freedom of speech or the free exercise of religion, and the opposition to racial caste, can be undermined by strategic use of burdensome process. This is a rerun of the rights-parasites cases described above, and it should probably be a point of consensus. These accepted constitutional norms insulate conduct or parties from (indefensible) burdens, and process can be no less burdensome than a tax or fine. In addition, the concept of human dignity might be implicated by oppressive procedure. Part of that concept demands that people be treated with the respect owed to human agents, that when their personal interests are at stake they should be “personally *talked to* about the decision rather than simply . . . *dealt with*.”<sup>204</sup> Delayed decisions entail costs within the concern of undue process and, under certain circumstances, could implicate this dignity-based interest in not being ignored.<sup>205</sup> Less realistic scenarios might be problematic in this dual fashion. Requiring only the poor to personally participate in hearings involving their debts would not only impose ordinary costs on that class, it might also carry an intolerable suggestion of untrustworthiness from a dignity theorist’s perspective.

Yet all of this is fairly modest. The examples are derivative: an independent commitment with a high, possibly lexical, priority is threatened by process but only coincidentally. The essential problem is humiliation, or free speech, or some other value. Process is just one vehicle for the injury. On the

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201. See *id.* at 88-93, 96; see also *id.* at 85 (“[N]o decision may deliberately impose on any citizen a much greater risk of moral harm than it imposes on any other.”); *id.* at 95-96 (stating that these are not rights to a particular level of accuracy in adjudication).

202. See *id.* at 96 (“When issues of *substance* are at stake, the defendant’s rights begin where the plaintiff’s leave off . . .”) (emphasis added).

203. *Id.* Dworkin does go on to assert that no residual utilitarian *policy* question about admission of additional evidence is left over once the parties’ basic procedural rights are respected. See *id.* at 97. This suggests he believes that optimal process is achieved by his framework. But the framework does not capture the broad versions of undue process.

204. TRIBE, *supra* note 171, at 667; see also *id.* at 666.

205. Cf. *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972) (“For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented.”).

other hand, demands for additional process might be more easily associated with “fundamental” human values. For instance, promoting opportunities for voice, such as a public hearing in which a person or her advocate can explain her position, seems to be a theme in the work of dignity-oriented process scholars.<sup>206</sup> Preventing someone from enjoying such participation, for the purpose of saving cash or avoiding hassle, cannot enjoy the same priority within such theories, especially insofar as costs are shouldered by officials and taxpayers. Otherwise, every fundamental right might have an anti-right shoving in the opposite direction. The very idea of fundamentality would then lose meaning. Granted, a theory of rights cannot easily dictate maximum accuracy in the adjudication of rights regardless of cost. But at least the motivation for enhanced decision-making procedures is tightly connected to arguably imperative concerns.

## 2. *Utilitarianism and rule of law*

The theories just discussed can support a few undue process arguments but not many. A more utilitarian theory promises to encompass a larger set of objections.

Utilitarian cost/benefit analysis certainly fits with sensitivity to the pedestrian burdens of government decision making, and it provides no obvious reason for partisanship.<sup>207</sup> Costs imposed on private parties are no different in principle from costs borne by government officials, their employers, or taxpayers. Moreover, utilitarianism can be sensitive to all sorts of decision costs: money, time, consternation, despair, and opportunity costs. And cost/benefit analysis can be applied regardless of the goals chosen for a given process: accurate information about existing law and historical fact, or better application of law to individual cases, or creation of socially beneficial new law, or peaceful acceptance of government decisions, or even moral legitimacy.<sup>208</sup> These goals all come at a price, which will sometimes be intolerable compared to the decisional objectives. Indeed in some cases, decision costs are imposed for nothing recognizable as a benefit—such as when process is irrational or a tool for defeating valid rights claims. In a more challenging set of cases, decisionmakers acting in good faith accept decision costs in exchange for enhanced accuracy or some other legitimate objective.

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206. See *supra* note 195 (collecting sources).

207. See, e.g., BUCHANAN & TULLOCK, *supra* note 65, ch. 6 (addressing voting rules); POSNER, *supra* note 13, ch. 21; Robert E. Scott, *Constitutional Regulation of Provisional Creditor Remedies: The Cost of Procedural Due Process*, 61 VA. L. REV. 807, 809-10 (1975) (focusing on accuracy in adjudication).

208. See, e.g., E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 66-83 (1988) (connecting perceived procedural “fairness” to satisfaction and compliance); Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 IOWA L. REV. 1297, 1313 (1986) (collecting objectives for administrative process).

These situations can raise difficult questions about the wisdom of the exchange and the appropriate strategy to prevent poor choices. Either way, utilitarian inquiry may provide a framework for the answers.<sup>209</sup>

A case also can be made for a broad undue process policy to protect democratic outcomes and the rule of law. First, in some situations government officials (or private parties) take advantage of process burdens to cloak their opposition to the directives of positive law. The rights-parasite cases are examples, and the Stroud Township development fight might be as well. In these cases process is imposed as a technique for evading substantive policy judgments ordinarily entitled to respect. Regardless of the implications for fundamental rights or dignity, utilitarians can see the advantages of undue process norms for confirming the illegality of such circumvention. Second, unchecked procedural burdens might prompt undesirable responses from those who are injured. In extreme cases the response might be violence or disregard for official authority. In other cases the threat is corruption—specifically, bribes offered to achieve quick, less expensive, and favorable results. The Magna Carta was partly intended as a remedy to corruption-encouraging undue process.<sup>210</sup> And a recent study of corruption in Peru delivers a similar message with modern statistical support. Economist Jennifer Hunt concludes that the frequency and amount of bribes offered is partly related to the speed with which government decisions are otherwise made, not simply the type of client served.<sup>211</sup>

An important caution involves indeterminacy. Designing efficient and just process for government decision making is challenging and requires attention to contextual detail. It is unclear just how law-like the principles of design can be. Extremes can be ruled out, but this only forecloses relatively clear dictates within a large field of discretion. More specifically, no one wants a government

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209. The usual objections to utilitarianism apply, of course. The conflicting values might be difficult to reduce to a common metric without sacrificing something or misdirecting the assessment; in addition, certain injuries might count as particularly severe or lexically prior to others in order to satisfy a sense of morality. *See generally* JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 112-17 (1980). But these objections do not seem any more serious here.

210. *See supra* text accompanying note 119.

211. Between 2002 and 2004, thousands of Peruvians responded to government-sponsored surveys on their bribing habits and other matters. Hunt used this data to run regressions, controlling for variables such as client characteristics (including employment) and for the frequency of contact with different types of officials. The judiciary, which has a poor record of concluding matters within a year, comes out particularly badly in terms of both bribe rate and amount. *See* Jennifer Hunt, *Why Are Some Public Officials More Corrupt than Others?*, in *HANDBOOK OF ECONOMIC CORRUPTION* (Susan Rose-Ackerman ed., forthcoming 2006) (manuscript at 2-6, 22-25), available at <http://ssrn.com/abstract=904330> (conceding, however, that client characteristics largely explain variance in bribe rates across official types, and also singling out the poor bribery record of the police who have a higher completion rate). Data do not seem to be available on whether both sides to a judicial case pay off judges for speed, or whether a bribe always purchases a particular result.

that maximizes decision costs, at least no one who wants a functioning government. Nor should anyone crave a government operating on the lowest decision costs possible. That goal is senseless even if feasible. A government that adjudicated every dispute through a random number-generating algorithm would not last long or do much business.

The appropriate level of decision cost can only be selected in conjunction with several other choices. First, objectives of the process must be identified to understand the trade-offs. Some goals are simply more important than others, so they might justifiably come with greater decision costs insofar as the added process helps reach the goal. Second, the designer needs a sense of the consequences that follow one process over another. Even if the goal is clearly defined, more than one process will likely be available to produce the desired decision. In resolving this issue and insofar as it is cost-justified, process design should also account for relevant patterns of cognitive bias and group dynamics that are reliably identified by social science.<sup>212</sup> There is little sense in using a simple rational-actor model if it is unlikely to hold in practice and if process designers can reasonably know how decisionmakers are likely to diverge from those assumptions. Third, attention must be paid to the area of decisions generated by the process options under consideration, along with the duration and resilience of those decisions.<sup>213</sup> Finally, thought should be given to the ways in which different process choices interact over time, considering all elements of process with significant effects on decision costs. This means participation norms, information-gathering efforts, voting rules and veto gates, rules/standards options, and so forth.

At least part of the information relevant to these choices will not be available when they are made. Surely there are defensible rules to guide some fraction of process design. Even so, the uncertainty and risk accompanying these choices make it difficult or impossible to fully optimize process, and this is true even if every conflicting value is commensurable. The best achievable law of process, therefore, might include undue process norms without expecting a perfect accommodation of process and non-process goals. This thought will be further developed below. For now the basic idea is that optimal process is often unlikely, even if excessive decision costs sometimes can be identified without dispute.

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212. See, e.g., JONATHAN BARON, THINKING AND DECIDING 134-47, 288-302 (3d ed. 2000); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 3 (Daniel Kahneman et al. eds., 1982); Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 74-75 (2000). Judges may fall victim to these same syndromes, of course.

213. See *supra* Part I.C.1.



*C. Undue Process as Constitutional Law*

Both sets of process theories, whether rights-based or more utilitarian, can accommodate undue process norms. But the latter is suited to a larger vision of undue process that captures all sorts of decision costs. Arguments from fundamental rights or individual human dignity come more easily when the objection involves government process that is exclusionary, or rushed, or running on educated guesses. Still, the standard process theories all point toward some kind of undue process norm. The hard choices involve scope and specifics. The foregoing discussion does not say much about federal constitutional law, however. It speaks to policy and moral reasoning without bearing down on precisely how undue process considerations should be integrated with a supreme, entrenched, fundamental law.

*1. Stories of systematic failure*

To be convinced that undue process is a valuable addition to federal constitutional law, an account of political failure is useful. There might be no advantage to using constitutional law if ordinary law and politics are trustworthy. This idea folds into a second line of thought, concerning institutional choice and design. Undue process, like any other norm with controversial applications, requires an enforcement strategy. That means undue process might be a sound policy or even a constitutional value without becoming attached to the most assertive forms of judicial review. These considerations are connected, but they can be elaborated sequentially.

The reasons for the existence of the original Due Process Clause are drenched with history.<sup>214</sup> A similar norm was said to bind the English monarchy, at least as a matter of tradition. As noted above, that norm was partly a response to royal judicial corruption and heavy-handed assertions of executive power against elite property rights. The first Due Process Clause was similarly a component of a new bargain regarding the exercise of centralized authority. It was one of the assurances given to skeptics of a new federal government structured and empowered in a way that raised concerns in the existing states. We have already seen why undue process norms are more difficult to ground in this history; text and other evidence present hurdles.<sup>215</sup> But neither can due process proponents rely on two-hundred-year-old compromises as a substitute for a vibrant theory of political failure. Is there reason to believe that government officials, acting without the threat of constitutional violation or judicial review, will systematically underproduce or overproduce process and decision costs?

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214. See generally HOWARD, *supra* note 117, at 298-301; ORTH, *supra* note 129, ch. 1.

215. See *supra* Part II.B.1.

This raises debatable empirical queries. There is no simple consensus model of real-world official behavior; certainly different officials attempt to maximize and compromise different values to different degrees in given institutional settings. But the necessary assumptions can be spelled out and tested for facial plausibility. For example, one might suppose that a substantial number of people gaining positions of official authority, reinforced when necessary with coercive force, will be tempted to abuse that power. They might use official authority to achieve personal financial gain or to shirk responsibilities. Or they might strive to entrench their position, relying on the relative difficulty outsiders will have in assessing claims of official effort and progress. Or they might come to trust their own judgment to the exclusion of others, despite a lack of information or a widespread normative disagreement that ought to soften any predisposition to insularity.<sup>216</sup> Working from a widely accepted theory of democracy, these officials are agents of the public and the feared behavior constitutes abuse of that relationship.<sup>217</sup> Monitoring and responding to such misconduct (through elections, for example) might be a challenge for the general public.<sup>218</sup> Members of Congress, perhaps alerted by organized interests or others, can help check large-scale misconduct in other institutions and perhaps remedy a few individualized cases. But Congress cannot always be trusted, especially during periods of unified government and partisan solidarity outmatching institutional competition.<sup>219</sup> There are a multitude of unconfirmed assumptions in this familiar line of reasoning, yet it is entirely rational and standard to conclude that ordinary politics leaves space for official misconduct or illegitimate refusals to act. A constitutional law of process insulated from ordinary democratic change would then be in play, perhaps enforced with some kind of judicial review.

If we can expect principal-agent and other problems in official conduct, these abuses may take the form of process manipulation. Overconfidence,

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216. See, e.g., Colin F. Camerer & Eric J. Johnson, *The Process-Performance Paradox in Expert Judgment: How Can Experts Know So Much and Predict So Badly?*, in RESEARCH ON JUDGMENT AND DECISION MAKING: CURRENTS, CONNECTIONS, AND CONTROVERSIES 342, 347-49 (William M. Goldstein & Robin M. Hogarth eds., 1997) (distinguishing training from experience and reviewing studies).

217. See 4 ANNALS OF CONG. 934 (1794) (statement of Rep. Madison) (“[T]he censorial power is in the people over the Government, and not in the Government over the people.”); Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. REV. 909, 916-20 (2006) (discussing democracy, agency problems, and secrecy).

218. See John Ferejohn, *Accountability and Authority: Toward a Theory of Political Accountability*, in DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 131, 137 (Adam Przeworski et al. eds., 1999); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 356 (2000) (claiming that mechanisms of control over government officials by voters are probably less forceful than those used to discipline corporate management).

219. See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2315 (2006).

shirking, and desires to entrench and abuse authority might lead to suboptimally low procedural safeguards. For example, the insular and heavy-handed official might not see value in information gathering or private party participation before decisions are made. The extreme position on this line is simply dictatorship, and we can see facets of the due process norm as insulation from this result. There are also more subtle uses of process that will be attractive to the wayward agent, including some that implicate undue process concerns. By gaining distance from substantive outcomes, procedural manipulation might be somewhat insulated from charges of misconduct. Delay can be used in this fashion, along with heavy demands for information, participation, or extended deliberation that have an ostensible connection to a facially appropriate process goal.

The more relevant issue for present purposes is about asymmetric threats: whether there is sound reason to fear indefensible process denials any more than indefensible process burdens. The arguments thus far are too generic to make that distinction. If officials are highly prone to misconduct, process designers should not be preoccupied with subtle distinctions between the techniques of faithlessness. So consider two possibilities for distinguishing due from undue process threats.

First, if there were no general process clause of any kind, perhaps the expected magnitude of harm from due process violations would be greater than from undue process violations. For example, one might believe that the unjustified denial of a hearing right is more cause for alarm than the unjustified grant of a hearing demand. The problem is that this judgment requires not only educated guesses about the specific violations likely to occur, but also a normative evaluation of harm. Some types of harm might be viewed as worse than others, as indicated by the rights and dignity discussion above,<sup>220</sup> but delay and inexcusably burdensome process can inflict similar injuries. Being ignored or rolled in official deliberations is not categorically more damaging than being put off through inordinate delay or “given the runaround” within an exhausting bureaucratic maze. Plus, erroneous process mandates can disrupt fragile compromises or cause unanticipated harm. Perhaps policymakers are working within a restricted budget and expect a certain number of disadvantaged people to qualify for assistance, who can be timely reached only by no-frills process that tolerates regular error.<sup>221</sup> Hearing rights might increase voice and accuracy for those who get to use them, while diminishing the overall scope and effectiveness of the program. An adequate comparison of harm magnitude is thus complex, and unlikely to yield a reliable categorical advantage for either due or undue process norms.

Alternatively, it could be that the frequency of due process violations would be higher than undue process violations. This possibility is attractive

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220. *See supra* Part III.B.1.

221. FEMA assistance to Hurricane Katrina victims might fit here.

although hard to test. Albeit with complaints, the country has survived with an explicit due process guarantee that appears not to have been vigorously used for undue process purposes until recently. Our sense of the matter might be affected by the evolution of government character and missions, however. In a situation like that during the early years of the nation, when the federal government's functions were unsettled and contentious, perhaps resource constraints were likely to conflict with the regulatory ambitions of central government officials. Even if those ambitions were public regarding, there might have been worry that officials would all-too-readily jettison rudimentary procedural hindrances. On the other hand, the frequencies of due and undue process violations might shift in a mature bureaucracy with an established turf to defend.<sup>222</sup> Comparatively speaking, today's federal government is a behemoth that could not have been foreseen during the founding era. It now administers a vast set of regulatory programs and entitlements.<sup>223</sup> The defense or expansion of this turf might involve red tape rather than overly aggressive action. Perhaps some government officials generate additional process in a way that inflates their importance. Regardless, modern observers have to be concerned that bloated protocols will too often obstruct or delay warranted

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222. See, e.g., WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 38-41 (1971). To be clear, turf-building claims are contested. See Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 923-34 (2005) (highlighting subsequent scholarship).

223. Exactly what effect constitutionally optional entitlements should have on the constitutional law of procedure is a long-standing academic debate, which started to bloom with the post-*Goldberg* "due process revolution." Part of the dispute was whether certain social welfare entitlements were themselves constitutionally required, independent of any lapse in political commitment to them. That idea was more or less rejected by the Supreme Court in the 1970s, see, e.g., *Dandridge v. Williams*, 397 U.S. 471, 487 (1970) (upholding caps on welfare payments to families), although moderated versions of social welfare rights emerged in some foreign constitutions of the 1990s and through state constitutional litigation involving public education funding. See *supra* note 99 (citing sources); see also *Town of Castle Rock v. Gonzales*, 545 U.S. 748, (2005) (rejecting for lack of entitlement a "due process" claim to more serious police consideration of pleas to enforce a restraining order); *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 195-96 (1989).

There is overlap—functional if not conceptual—between some undue process claims and pure social welfare or service delivery claims. An individual who demands immediate delivery of income support from a bureaucracy or shorter response times from the local police department is not very different from the individual who argues that these services are per se mandated by constitutional law. And those who want to achieve the latter objective probably favor the former as well. There is a meaningful distinction between the two claims, however. This type of undue process claim is parasitic on a democratic choice to make the entitlement, and it might even deter or confine new entitlements by increasing their associated decision costs. The pure claim for social welfare rights lacks these features. Moreover, there is no heavy ideological valence for undue process claims under current conditions. They may assist the real estate developer or people with disabilities, the pharmaceutical innovator or the food stamps applicant. Supporters of the undue process concept might have to accept a relatively efficient government, however, and reject the strategy of limiting the state by increasing the cost of its process. In addition, one strand of undue process tends to favor executive action, and this might trigger ideological divides.

decisions, frustrating some citizens and encouraging others to engage in destructive forms of self-help or corruption.

Furthermore, one type of undue process problem might be insidious. It is the syndrome of nonsalient injury and it can affect our estimates of both frequency and magnitude of harm. Recall that the most ambitious versions of undue process move beyond officials burdening one party or another with indefensible decision costs. The concept includes threats to nonparties, such as taxpayers who finance government decision making as well as others who have an interest in speed or a streamlined protocol.<sup>224</sup> When process is awarded to *A* and/or *B*, often *C* suffers or is put at risk. These threats might not be salient—cognitively or politically—to officials who are otherwise free to design their own decision-making process. To the extent that administrative costs of procedural safeguards are spread to nameless and faceless taxpayers or potential alternative beneficiaries of government programs, these costs seem less likely to generate intense political backlash<sup>225</sup> or vivid losses that will be immediately available to the process arbiter.<sup>226</sup> We might plausibly reach a different conclusion about the hoped-for gains associated with decision costs, such as accuracy and legitimacy in the minds of participants. Conventional due process doctrine probably feeds this asymmetric salience, as it presents the threat of judicial rebuke for low-decision-cost process but not the reverse.<sup>227</sup> At the very least, salience problems shake any a priori conclusion that due process violations swamp undue process risks in the modern state.

There is reason to support the inclusion of a process clause in the Constitution, but the content of that provision is easily contested. Indeed, the case for a due process clause enforced by supreme judicial review is not indisputable. One might at least conclude that the case for an undue process clause is not dramatically weaker than for the clause we actually have.

## 2. *Institutional choice and design*

If the analysis thus far is correct, a process law of some kind is easily defended, and the desirability of constitutionalizing part of that law is at least

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224. See *supra* Parts I.B, I.C.2, III.A.

225. See, e.g., MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION* ch. 2 (1971); William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 291 (1988) (suggesting that “procedural obstacles do little to impede consensual demand patterns (where laws bring concentrated benefits and dispersed costs)”).

226. See, e.g., BARON, *supra* note 212, at 141-43 (discussing the availability heuristic, which can confound accurate estimation of probability); Cass R. Sunstein, *Probability Neglect*, 112 YALE L.J. 61, 81-82 (2002) (identifying outright probability neglect as distinct from availability heuristics).

227. To the extent officials are spooked by due process doctrine, however, the solution might be relaxation of those constitutional norms rather than introduction of a new one. *Mathews* suggests this response is possible.

plausible. Ordinary politics, administrative behavior, and judicial practices will not always generate process that optimally serves the public interest or majority preferences. Although an enforced constitutional demand for optimal process of law seems impractical, generalized due and undue process guarantees might both be attractive if they are well-crafted. As a theoretical matter, the arguments do not seem clearly better for one over the other. Members of the public should be, and probably are, concerned about both kinds of error. A central element of the analysis is still missing, however. This Subpart explores whether judicial review is a sensible addition to an undue process norm. Perhaps this inquiry into institutional choice will tip the arguments against undue process, or at least reveal practical differences between due and undue process that have been elusive so far.<sup>228</sup>

A fundamental trade-off posed by judicial review is between competence and independent judgment. That exchange is grounded in two ideas about official behavior.<sup>229</sup> The first is probably self-evident. It is the thought that familiarity with a situation builds practical knowledge. Trained officials who repeatedly perform similar tasks in similar settings, or who have operated within an organization for a substantial term, are more likely to correctly assess the consequences of one process over another. All else equal, insider knowledge beats outsider guesses. But all else is not equal. The second idea about official behavior is that self-judgment can threaten the public good. Like anyone else, government officials might be selfish and irresponsible or myopic and overconfident about their own abilities.<sup>230</sup> Outsiders, in contrast, might offer a more accurate assessment of work performed by others—if they possess sufficient skill to perform the observation. But this shifts the inquiry back to knowledge asymmetries and makes the issue of external oversight look like a tragic dilemma. The two ideas seem to present a maddening zero-sum trade: competence with bias, or dispassion with naiveté. Court judgments are subject to this exchange. Judges might be honest yet error-prone brokers, or parochial yet expert players. And under certain versions of judicial review, their constitutional opinions are supreme. In addition, there is a decision cost to this type of oversight. Constitutional judicial review adds a veto gate to process decisions, so *judicial review can itself* increase net decision costs. These costs can be minimized: if judicial preferences are made clear and articulated in large-area decisions announcing comprehensive rules, then speculation and

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228. On institutional choice and design theories generally, see, for example, David L. Weimer, *Institutional Design: An Overview*, in *INSTITUTIONAL DESIGN* 1, 12 (David L. Weimer ed., 1995). See also NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 5 (1994); Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 *DUKE L.J.* 1277, 1280 (2001) (distinguishing choice from design).

229. I have made this observation elsewhere. See Samaha, *supra* note 23, at 525-26.

230. See *supra* text accompanying notes 216-19.

litigation costs should fall for everyone else. But by now the vulnerabilities of this approach should be easy to discern.<sup>231</sup>

There are several responses short of eliminating external oversight. Some government process is simple enough for judges to become educated in a short time. Incompetence is then an easily corrected condition. In addition, we might retain constitutional judicial review but hope to sculpt it such that error costs are reduced without intolerable decision costs. For those who support fundamental rights or individual dignity theories, we might expect judges to be more capable of understanding and respecting these values than certain other government officials. The scope of judicial review could be restricted to situations in which those values are in jeopardy. In a related vein, the judiciary might commit itself to small-area decisions. This can leave more room for experimentation, adaptation, and course reversals, albeit with a new set of decision costs that follow the shadow of litigation. Regardless of the scope of judicial review, its intensity might be moderated. Thus in cases where outsider education is costly and valuable rights are not at stake, the judiciary might normally defer to expert judgment of other officials. This has actually happened in landmark due process cases like *Mathews v. Eldridge*<sup>232</sup> and perhaps *Hamdi v. Rumsfeld*.<sup>233</sup> There are even ways to moderate the resilience and supremacy of judicial review, although federal courts seem to deploy these options sparingly and they threaten to hike up decision costs over the long run. In evaluating constitutional claims, the force of stare decisis is said to be weaker, anyway.<sup>234</sup> Perhaps it could leave even more room for judicial reconsideration in the class of undue process claims. Or courts might leave final judgments to another institution such as Congress, thereby testing hopefully more efficient process without foreclosing error correction by others.<sup>235</sup>

Finally, oversight need not come from judges. Congress sometimes aggressively monitors agency practices, for instance, or legislates to achieve efficient administration. A model is the Office of Inspector General (OIG).<sup>236</sup> OIGs are embedded within certain agencies and charged with identifying waste, fraud, and abuse of executive power, yet they have some insulation from

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231. Note, too, justiciability norms and litigation strategy that can skew court dockets.

232. 424 U.S. 319, 349 (1976) (demanding that substantial weight be afforded good-faith administrator judgment about what process is due under the circumstances).

233. 542 U.S. 507, 528-39 (2004) (following the *Mathews* framework and stopping well short of dictating Article III criminal process, but rejecting the executive's position on the process due U.S. citizens detained on U.S. soil after capture on a foreign battlefield); see also *Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988) (concluding that Congress did not fail to provide "meaningful safeguards or remedies").

234. See, e.g., *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989).

235. See Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreward: Constitutional Common Law*, 89 HARV. L. REV. 1, 2-3, 15-17, 20-21, 29, 34 (1975) (discussing, in part, the dormant commerce clause and *Miranda* warnings).

236. See generally PAUL C. LIGHT, *MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY* (1993).

pressure by agency management.<sup>237</sup> The OIG track record might not be perfect, but the basic idea was an innovative response to the old trade-off between competence and impartiality. Given the OIGs' mission, moreover, their existence should somewhat curb any enthusiasm for judicial supremacy over undue process objections, at least with respect to the federal executive.<sup>238</sup>

So if the question is whether judicial review of undue process claims is likely to do more good than harm, there is no easy answer. The choices are not binary; both judicial review and undue process objections come in multiple forms. One way forward is to consider reasons to be comfortable without judicial review of a generic undue process norm, then attempt to specify conditions under which judicial review is most likely to succeed.

Leaving the issue to ordinary law and politics would probably not be, and has not been, disastrous. Without generic and judicially enforced undue process claims, the system would function roughly the way it does now. Congress might legislate to add, subtract, or otherwise modify the decision-making procedures for the executive branch and for the federal judiciary.<sup>239</sup> Insofar as it has not, the executive and judiciary might draft their own rules for their own purposes, as well as consider pleas for reform.<sup>240</sup> If the system errs and manufactures excessive protocols for decision, pressure for change may come from officers within those institutions or from outsiders. In addition, the mechanism for reform could be either internal (institutions altering their own processes) or external (legislation or even constitutional amendment). Certainly there are limits to this structure. Congress tends to run its own shop, and state process is often unchecked by federal statute or regulation. But typically the process for creating process already involves consent from more than one institution.

And the existing avenues for reform have yielded meaningful results. Putting aside monitoring and deterrence from OIG investigations and reports, the Administrative Procedure Act (APA) authorizes courts to order action in the face of unreasonable delay.<sup>241</sup> In 1996, the Antiterrorism and Effective

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237. See *NASA v. FLRA*, 527 U.S. 229, 240 (1999) (noting, however, that “[t]here is no ‘OIG-OIG’”).

238. Judicial intervention need not be entirely foreclosed. On the concept of constitutionally optional platforms that support judicial intervention for constitutional objectives, see Samaha, *supra* note 217, at 960-69 (demanding an existing constitutional norm, however).

239. See U.S. CONST. art. I, § 8, cl. 18 (granting Congress power “[t]o make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution”).

240. See, e.g., 28 U.S.C. § 2071(a) (2006) (granting federal courts authority to “prescribe rules for the conduct of their business,” if consistent with statutes); *Dep’t of Navy v. Egan*, 484 U.S. 518, 527 (1988) (recognizing inherent executive authority to restrict access to sensitive information).

241. See 5 U.S.C. § 706 (2006) (“The reviewing court shall—(1) compel agency action unlawfully withheld or unreasonably delayed . . .”). It seems this provision is rarely invoked successfully in litigation. For a partial exception, see *Biodiversity Legal Foundation*



Death Penalty Act codified judicial practice and added new restrictions on federal habeas corpus, including a one-year limitations period and strict requirements for second and successive applications.<sup>242</sup> And the Tax Injunction Act forbids federal district court injunctions only if “a plain, speedy and efficient remedy may be had in the courts of such State.”<sup>243</sup> Each of these efforts authorizes judicial action that can limit decision costs in a *subconstitutional* way. The net benefit of these efforts is not always clear,<sup>244</sup> but neither is any dominance of pro-process forces over anti-process interests in ordinary politics.

For some categories of cases, this hands-off approach is too sanguine. And if those categories are readily apparent, judicial review for undue process is probably just as desirable as for due process. The leading candidate is administrative adjudication.

Courts not only deal in procedure constantly, but agency adjudication is probably the nonjudicial process most recognizable to judges. Concerns about incompetence are therefore reduced, while the judiciary might be detached in a healthy fashion. In addition, because judicial process is often more elaborate than agency adjudication, there could be an internal check on judicial insensitivity to agency needs. Courts are likely accustomed to the sort of extended procedure on which an undue process complaint would typically rest. This would not always be true, of course. Demands for agency speed might enjoy too much sympathy since the courts will not bear the costs of haste. But low intensity judicial review is a possible cure, with deference to reasonable administrative judgment. Conveniently, *Mathews* already made this adjustment for due process objections that an administrative process is insufficiently attentive to an applicant’s claim to benefits. As the quasi-*Mathews* cases indicate,<sup>245</sup> it is a short step in familiar terrain for courts to treat administrative decision costs as a matter of constitutional concern. Assuming the same level of deference, the judiciary is no less competent running *Mathews*’s all-told cost/benefit test in the opposite direction. If judicial review for undue process can be supported in any context, ordinary administrative adjudication is it.

In fact, undue process advocates should probably forfeit all claims involving the generation of prospective and generally applicable rules,

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*v. Norton*, 285 F. Supp. 2d 1, 12-17 (D.D.C. 2003). But even if agencies are violating the statutory standard, it is not clear that a constitutional norm would look much different or be more effective.

242. See 28 U.S.C. § 2244 (2006); see also FED. R. CIV. P. 11(b)(1).

243. 28 U.S.C. § 1341 (2006).

244. Habeas rules have generated enough litigation to forestall any snap judgment that they reduce decision costs. To take another example, the time limits for agency response in the Freedom of Information Act, 5 U.S.C. § 552(a)(6) (2006), are commonly thought to be ineffective. *But cf.* *ACLU v. Dep’t of Def.*, 339 F. Supp. 2d 501, 504-05 (S.D.N.Y. 2004) (ordering certain executive agencies to respond to eleven-month-old FOIA requests for documents regarding post-9/11 detainees).

245. See *supra* Part II.B.2.d.

legislation, and doctrine. Once again, a similar line already operates in orthodox due process territory although on a distinct rationale.<sup>246</sup> Compared to most adjudication, it is categorically more difficult to demonstrate excessive decision costs in these fields. One reason is that courts would be forced to compare decision costs to the social value of such rules, which is controversial for the regulation of primary human conduct. When is it evident that the political process has grappled with stem cell research subsidies long enough, in light of the issue's significance and the diminishing value of debate?

Even if such questions have answers other than "never," there remains a crucial distinction from ordinary adjudication. It is the disparate comfort with decisional resilience. If we think of adjudication as the interpretation and application of otherwise revisable policy to the decisionmaker's rendition of historical fact, tolerance for reconsideration often should be low. Adjudication of this type ought to be resilient because the historical facts will not often be worth revisiting by government officials and the policy in question will not be fully set in this process. If we think of rulemaking as the process by which these policies are created and revised, resilience and unlimited duration are out of place. This is especially so when substantial shifts in preferences are likely over time.<sup>247</sup> It is for this reason hard to fathom a law of *res judicata* for statutes, whether or not enforced by the judiciary. Society is probably better off with freedom to revisit questions like the desirability of national health insurance, income taxes over consumption taxes, and the death penalty—even though reconsideration means decision costs. There is no guarantee the adjudication/rulemaking line is adequately nuanced; retroactive legislation, for instance, might be an easier target for decision cost caps than many acts of adjudication. But the distinction seems to hold as a general matter.

For different reasons, supreme judicial review of process imposed on the judiciary itself is also problematic. Obviously courts are informed about the operations of their own institution, but here they are most likely to assume parochial stances. This threat is acute when the upshot of the objection calls for reduction in judicial effort. Then one must worry that a court will invoke constitutional law to manage its own workload without adequate sympathy for

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246. See *supra* note 109 (citing cases relying on impracticality and political safeguards, along with judicial competence concerns); see also Kenneth C. Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402-10 (1942) (developing a related distinction between "adjudicative" and "legislative" facts); Ann Woolhandler, *Rethinking the Judicial Reception of Legislative Facts*, 41 VAND. L. REV. 111, 114 (1988) (emphasizing overlap in the categories). Judicial competence questions fit with the analysis in text. But the feasibility and political safeguards rationales are controversial even for due process claims. The possibility of mass public input is now perfectly conceivable with the development of notice-and-comment rulemaking and modern communications technology. And strong strands of contemporary public choice theory deny that widely dispersed burdens systematically trigger widespread political backlash. See *supra* note 225.

247. Cf. Posner, *supra* note 65, at 445 (distinguishing litigation from advertising).

other interests. And the ubiquity of decision costs makes public-spirited rhetoric easier to deploy. Process imposes costs on a large class of people and, like other officials, judges can use that fact to appear sympathetic while serving lower-minded interests in docket clearing. An independent judiciary can have clear advantages over other actors, but judging whether a case is too much work is probably not one of them. This makes highly questionable, from an institutional design perspective, the Court's protection of its own civil judgments in *Plaut*.<sup>248</sup>

There is no need to exhaust the possibilities for undue process in this space. It is appropriate, however, to close with a suggested tiebreaker: when in doubt, reject undue process as a judicially enforceable federal constitutional norm. This position is supported by two arguments. The first involves the role of constitutional text in reducing decision costs. Those who are especially sensitive to decision costs—even those who view government institutions as consistently weighted down with routines and habitually foisting process burdens on those they serve and on third parties—ought to pause before endorsing supreme constitutional law as a palliative. The government has a patent obligation to refrain from significant injury to private parties without minimum procedural safeguards. Traditionally these safeguards have been understood as process floors. Adding to that understanding entails a measure of creativity, which undercuts the focal point function of constitutional text and conventional interpretation.

The textual objection is reinforced by the multiplicity of choices that would follow. The issue of constitutionalizing undue process is hardly an either/or proposition. Any such claim requires boundaries and qualifications, so endorsing the claim's initiation must come with a tolerance for new constitutional law developed over time. Because government decision making always imposes costs, familiar practices are bound to be left in doubt as the details are worked out. If the experience with due process is instructive, judicial investigation can settle into a standard framework with more specific doctrinal tributaries; in time, undue process litigation would surely follow a similar course. But there is serious doubt whether officials should be forced to respond at all to the predilections of the federal judiciary on questions of "excessive" decision costs, and no perfect assurance that courts will engineer a constitutional law of undue process ideally matched to their institutional limits.<sup>249</sup>

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248. See *supra* Part II.B.2.c. While there is no evidence of bad faith, federal judicial unwillingness to entertain relitigation in the Schiavo controversy is in the same category. See Schiavo *ex rel.* Schindler v. Schiavo, 404 F.3d 1270, 1274-75 & n.5 (11th Cir. 2005) (Birch, J., concurring) (unconvincingly challenging the validity of the Schiavo Act); Samaha, *supra* note 23, at 510-16, 528.

249. Whether courts actually will be sensitive to such concerns in addressing undue process objections is a different matter.

*D. Nightmares Relived*

The lessons from the foregoing analysis can be synthesized into three more specific ideas. First, those concerned with decision costs have every reason to respect constitutional text and conventional interpretive method. This produces tension between unbridled normative aspirations and the capacity of federal constitutional law, but in exchange for sensible results. Second, and similarly, undue process protection ought to accompany existing constitutional commitments to nonarbitrary government decision making, private conduct such as political speech and religious liberty, and equality norms. This is part of current practice even if not so recognized. Third, any generic undue process norm backed with judicial review must have serious limits. It could borrow the *Mathews* test, but the objection should probably be (1) restricted to agency adjudication and fenced off from generally applicable rulemaking, (2) moderated with deference to expert judgment, (3) cognizant of subconstitutional alternatives, and (4) reconciled with surviving due process mandates. These ideas now can be illustrated by application to the process nightmares with which this Article opened. The following remarks are provisional; relevant information is missing and future developments might shift the analysis. The more plausible undue process violations nevertheless can be separated from the less likely.

*1. Plausible objections*

The Senate filibuster is one of those rare processes vulnerable to a straightforward textual constitutional objection. Although Article I, Section 5 gives the Senate authority to make rules for its proceedings,<sup>250</sup> that grant cannot supersede other constitutional requirements.<sup>251</sup> The issue is whether today's practice conflicts with the best reading of the Constitution on voting rules, and it certainly might. In sections addressing both legislation and appointments, the text specifies a supermajority voting rule for certain situations (veto overrides and treaty ratification) and is silent for others (passing bills and consenting to appointments).<sup>252</sup> Filibuster and cloture practices function quite like a supermajority rule, especially now when filibustering senators no longer must take the floor and debate anything. The exercise bears little relation to information gathering or deliberation. In addition, the vice president cannot vote in the Senate "unless they [the senators] be equally divided."<sup>253</sup> This suggests majority voting rules were expected, at least sometimes, and obviously majority rule was a familiar idea at the

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250. U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings . . .").

251. *See id.* art. V (requiring, in plain text, a two-thirds vote).

252. *See id.* art. I, § 7; *id.* art. II, § 2, cl. 2.

253. *Id.* art. I, § 3, cl. 4. Credit goes to Adam Cox for pointing this out.

founding. Of course there are arguments on the other side. These voting rules might be left for each house to determine, perhaps because the Constitution's drafters and ratifiers never thought about the question. And occasionally the text specifies a *majority* voting rule.<sup>254</sup> Hesitance about the constitutional claim stems from immediate political concerns, which counts for little, but also from the uncertain effects of revising a complex institution with a substantial tradition and a web of external relationships. In addition, the issue might not be justiciable. But these complications should not obscure the conventional elegance of the objection: it relies on text and simple interpretive tools, it does not seem contradicted by originalist history, and its success would have a fair chance of reducing decision costs for both appointments and legislation. One can embrace the position that the Constitution generally elevates rather than caps decision costs, and still believe that current filibuster practice is a forbidden innovation of senatorial clubbishness.

Death row delay and anti-development efforts have less constitutional text to survey yet they present opportunities for undue process victories. *Lackey* claims are attached to the Eighth Amendment's ban on the infliction of "cruel and unusual punishment." Incarceration pending execution is undoubtedly a component of punishment and, for some inmates, the psychological stress might be unnecessarily cruel and atypical. For parts of our country's history, capital punishment was often carried out expeditiously.<sup>255</sup> More recently, there are instances of inmates spending a decade or two on death row, perhaps careening between stays of execution and impending execution dates. And there is the possibility that courts are ignoring even less salient costs associated with an elaborate and slow-moving system. Hopes of deterrence, for instance, fade further under these circumstances. Powerful counterarguments are available, to be sure. Staying on the dimension of decision costs, the judiciary requires a test for indefensible delay unless these claims can be tolerably litigated on a fact-bound basis. Providing that guidance will be challenging, although not impossible. Speedy trial cases help, since they separate delay attributable to the defendant from that for which the state is responsible.<sup>256</sup> The more profound objection concerns capital punishment as a system. A successful *Lackey* claimant would presumably receive immunity from the relevant death

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254. See *id.* art. II, § 1, cl. 3 (presidential and vice presidential elections); *id.* amend. XII (same); *id.* amend. XXV, § 2 (filling vice presidential vacancies); *id.* amend. XXV, § 4 (presidential succession); *cf.* *id.* art. I, § 5, cl. 1 (quorum rule). However, in perhaps none of these situations is a sitting vice president able to vote per the Senate tie-breaking authority, so these majority rules are not reaching that territory in a way that directly undercuts the possibility of an implicit majority voting rule for ordinary legislation and appointments.

255. See *Knight v. Florida*, 528 U.S. 990, 993 (1999) (Breyer, J., dissenting from denial of certiorari); Robert M. Bohm, *The Economic Costs of Capital Punishment: Past, Present, and Future*, in *AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION* 573, 574 (James R. Acker et al. eds., 2d ed. 2003).

256. See, e.g., *Doggett v. United States*, 505 U.S. 647, 657-58 (1992).

sentence.<sup>257</sup> But government officials would not lose their ongoing interest in capital punishment, and we can expect them to avoid the problem by expediting pending and subsequent cases. Courts might do likewise. Now we are faced with the problem of rising error costs which, in this context, can be life-threatening. Unless due process-like mandates are rolled back—which seems unlikely given the stakes for the defendant and a mountain of text, doctrine, and tradition—recognizing *Lackey* claims produces a constitutional pincer. The system must be extraordinarily accurate and incomparably participatory yet substantially quicker to judgment. Even ignoring those who might support endless process in capital cases as second-best to abolition, intensely difficult trade-offs make this sort of undue process claim controversial even if understandable.

Cases like the Stroud Township development are simpler. The claim is that local officials purposefully ignored established procedure to delay and defeat a low-income housing development. On this account, officials evaded standard operating procedures to achieve an objective that they were embarrassed or afraid to accomplish by formal legal amendment. Claims such as this often turn on disputes of historical fact and official purpose, and they challenge process with features of adjudication. Granted, officials will present legitimate reasons for inaction or paperwork, including budget constraints and accuracy in assessing neighborhood impact. But these issues are pedestrian and manageable. The claims need not threaten land use regulation per se, at least when limited to as-applied allegations of lawless attempts to evade those very practices. Nevertheless, there is reason to be cautious. Claimants might underestimate the value of state law remedies. And while they may point to the Fourteenth Amendment's Due Process Clause, we have seen the weakness of that connection.<sup>258</sup> Furthermore, there is no apparent principle confining these arguments to land-use matters. Courts might have to recognize an undue process objection applicable to a large area of process, even if the claim's elements are easily restricted to arbitrary, irrational, or purposefully lawless conduct.

## 2. Implausible objections

The other three “nightmares”—FEMA processing, ossified rulemaking, and Yucca Mountain—are similar to the Stroud Township affair in that they lack objections grounded in straightforward textual interpretation. They require additional ingenuity. But there are deeper reasons why these examples are unappealing cases for constitutional objection.

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257. Usually inmates who want their executions to go forward (eerily labeled “volunteers”) may simply cease litigation and clemency efforts. Conceivably execution might be indefensibly delayed even though the inmate volunteers; in those situations, a *Lackey* claim might be vindicated by an injunction that the execution take place shortly.

258. See *supra* Part II.B.2.

Consider FEMA's tardy processing of applications for assistance after Hurricane Katrina. One distinction is scale. Tens of thousands of people were eligible for assistance, and FEMA had obligations beyond processing these requests. Apart from resources issues, the situation was sufficiently complex that a court might understandably pause before intervening with constitutional law. Judicial competence is at issue here, although some of FEMA's paper-pushing duties resemble familiar court activity. But this is not the best reason for denying undue process claims; the *Mathews* balancing test already forces the judiciary to investigate complex administrative systems. The fundamental problem is that constitutional law is not plainly needed. The APA obligates courts that have properly acquired jurisdiction to "compel agency action unlawfully withheld or unreasonably delayed."<sup>259</sup> It is difficult to believe constitutional law requires more, or that a constitutional label will trigger more invasive judicial oversight. This might be true even if process rights should be inspired by dignity theories; such offenses can be labeled "unreasonable." Lawyers understandably add constitutional claims in an effort to reinforce statutory arguments, but the district court in the FEMA litigation had no strong reason to address plaintiffs' constitutional demands.<sup>260</sup>

Agency rulemaking might be subject to the same analysis, along with additional hurdles and twists. With the peanut butter content order fiasco, shocking decision costs were a product of congressional mandate, an order that was apparently low on the agency's priority list, and organized economic interests taking advantage of the resulting process opportunities.<sup>261</sup> Perhaps FDA should have given up in view of the possible benefits of the order, or moved more aggressively if it was convinced of the public health benefits. But remember that Congress opened the door to staggering decision costs by explicitly permitting affected industries in a certain class of cases to demand

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259. 5 U.S.C. § 706 (2006); *see supra* note 241.

260. *See* *McWaters v. FEMA*, 408 F. Supp. 2d 221, 232-33 (E.D. La. 2005) (briefly addressing and denying the APA and constitutional claims together, leaving open the possibility of subsequent relief). To be fair, a recognized constitutional norm might prompt more vigorous judicial use of the APA provision. The district court might have been too shy in tolerating FEMA processing delays, considering the victims' dire need—and yet the court was discordantly comfortable ordering the temporary continuation of a hotel/motel housing program that FEMA wanted to phase out. *See id.* at 233-37 (relying on statutory interpretation and victim need). Ordinarily, however, fiscal considerations will legitimately militate against delay-based undue process claims. They might matter even in a situation like Katrina. A recent investigation of FEMA's Individuals and Households Program estimated that \$1 billion were improperly awarded out of \$6 billion in outlays for Katrina and Rita. *See Waste, Fraud and Abuse in Katrina Aftermath: Hearing Before the Subcomm. on Investigations of the H. Comm. on Homeland Security*, 109th Cong. (2006) (statement of Gregory D. Kutz & John J. Ryan, U.S. Gov't Accountability Office) (GAO report 06-844T, available at <http://www.gao.gov/new.items/d06844t.pdf>).

261. *Cf.* Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 533 & n.32 (1997) (asserting that "in most rulemaking contexts, regulatees have an interest in slowing down the process of writing rules").

trial-type hearings on their objections. It is at least possible that FDA would not have received statutory authority to issue such orders affecting millions of consumers and sales without this gold-plated process. The coalition responsible for the statute might have intentionally and even reasonably decided that any order in this field should come with a process-driven price tag. In some contrast, the ossification literature often identifies a different syndrome: the judiciary over-reading congressional mandates and agencies possibly overreacting to insulate themselves from remand.<sup>262</sup> Here the question is, again, the need for constitutional law. If courts are misinterpreting statutes and ignoring practical agency needs, constitutional arguments are not obviously needed or effectual where the judiciary has the final word. Finally, whether or not a statute requires the decision costs under challenge, these cases involve prospective generally applicable rules. For reasons given, this is not the most stable area for judicial intervention.<sup>263</sup>

Undue process complaints about the Yucca Mountain repository share many of these weaknesses. In some ways, this controversy is among the most frustrating. The political process was responding to the real-world problem of nuclear waste storage, based on scientific opinion of the NAS. While political leaders determined a facility should be built, however, the location decision has consumed decades of process. This is not to say that the scientific debate is over, or that controversial normative judgments are not involved, or that the nuclear power industry has not exerted in some sense disproportionate influence on the issue. Yet there is cause for dismay. The ordinary political process is already costly, and it concocted an additional layer of procedure that is extraordinary. Practically every government institution we have is involved, some at multiple decision points.

At the same time, a constitutional objection is disturbing. First, there is no apparent conflict with the text or existing judicial judgment. Second, even if the quasi-*Mathews* idea could reach this situation, it probably should not. The decision about a repository in general and Yucca in particular is an extremely important, large-area decision with a path dependence indicating resilience. The future of nuclear power could be at stake. Building and stocking the

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262. See, e.g., Pierce, *supra* note 40, at 83-84; Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 65 (1995); see also Kagan, *supra* note 7, at 2266-67; McGarity, *supra* note 40, at 1400-01, 1410-20, 1426, 1444. But cf. Cary Coglianese, *Empirical Analysis and Administrative Law*, 2002 U. ILL. L. REV. 1111, 1125-31 (reviewing empirical studies and their skepticism about ossification); Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 489-90 (1997). The findings of a deossification critic even suggest that years of delay are at stake. See William S. Jordan III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 440-41 (2000) (studying agency action after remand by the D.C. Circuit and finding agencies are usually able to accomplish their policies after about two years).

263. See *supra* Part III.C.2.



facility is a difficult-to-reverse, multigenerational policy judgment affecting human health, the environment, energy resources, the economy, and perhaps national security.<sup>264</sup> Finally, one reason for extensive process is to legitimize decisions. Few can deny the relative inclusiveness of the veto gates erected here, and few can believe that a federal court has a better sense of when the debate needs to end. For all of these reasons, one can effectively defend the siting process from constitutional attack.

#### CONCLUSION

A concern about decision costs is part of federal constitutional law, and rightly so. The text itself is used to reduce decision costs. Part of that text, perhaps most of it, accomplishes nothing else. Some courts have gone further. They have experimented with a generic undue process claim that could reach as much government conduct as contemporary due process doctrine. The intention of these cases seems honorable, and they help expose another dimension to process-oriented constitutional law. They suggest that a crippled or intransigent government is no better than an autocratic one. Moreover, a generalized undue process norm can be sensibly designed for judicial use by concentrating on agency adjudication instead of prospective rulemaking, incorporating deference to expert official judgment, and remaining mindful of nonconstitutional remedies and surviving due process floors.

Still, there are strong reasons for caution. The ideal claim is not necessarily what the judiciary would produce. In addition, the urge to deploy constitutional law in these circumstances must be implemented with a kind of creativity that conflicts with its motivating force. Decision costs are often ordinary costs, and they can be generated by judicial review no less than nonjudicial decision making. That said, undue process claims are defensible in particular contexts. For example, they should be used in service of established constitutional values, and they already are. It is possible for the judiciary to do somewhat more without serious risk. But precisely because decision costs matter, the federal constitutional law of undue process should be like the procedure it tends to favor: clear-cut, moderate, and usually absent.

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264. Compare Fred Dilger & Robert J. Halstead, Integrating Hazards Assessment and Impact Assessment: The Case of the Caliente Rail Corridor to Yucca Mountain (2005) (unpublished manuscript), available at [http://www.state.nv.us/nucwaste/news2005/wm/caliente\\_rail.pdf](http://www.state.nv.us/nucwaste/news2005/wm/caliente_rail.pdf) (stressing the danger of transporting waste from over one hundred sites), with John C. Yoo & Jennifer L. Koester, *Judicial Safeguards of Federalism and the Environment: Yucca Mountain from a Constitutional Perspective*, 75 U. COLO. L. REV. 1317, 1336 (2004) (stressing the danger of attack on those existing sites).