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A Community of Interest in the Due Process Calculus

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HOUSTON LAW REVIEW

ARTICLE

A COMMUNITY OF INTEREST IN THE DUE PROCESS CALCULUS

*Charles H. Koch, Jr.**

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New vitality in procedural due process requires a fresh attitude and this article offers such an alternative.¹ Procedural development has evolved as far as possible with the current balancing approach whereby the "state's" interest is traded against that of its individual citizens. This new attitude starts with the recognition that the state is a reflection of the community it serves. In our society, the community has an overarching interest in the way it treats its individual members. The process whereby decisions are made reflects the community's commitment to fundamental principles as surely as do the substantive outcomes of those decisions. Procedural due process is thus a community imperative, and to approach it as a trade off

1. Frequently cited authorities:

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 (1976).

T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987).

Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential But Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917 (1988).

CHARLES KOCH, *ADMINISTRATIVE LAW AND PRACTICE* (2d ed. 1997).

between the community and the community's individual members misconstrues the task.

The first step is to move beyond "balancing" as the dominant strategy for procedural design. Balancing's instinct for trading important interests against each other starts procedural due process down the wrong analytical path. Moreover, balancing tends towards ad hoc decisionmaking in which prior learning is not easily applied to new tasks. In lieu of balancing, this article recommends a broader system of principles, whereby prior experience can be combined with empirical analysis and decisionmaking theory to guide a creative and dynamic evolution of general and specific procedural design principles.

Unlike balancing, this system will be founded on an instinct to coordinate important values. It will be based on the fundamental common interests of the community and its individual members. It will search for procedural designs that optimize service to both the community's interests and those of the community's individual members. Coordination rather than adverseness must be the driving force.

To guide the development of this coordinating system, various procedural design factors are interpreted to reflect the commonality between the community and its members. The costs and the potential effectiveness of a procedural design are of interest to both community and individual, and hence these basic factors are explored as they are fundamental to developing procedural designs that serve all interests. Both the community and its members are concerned about the substantive impact of such procedural designs, and that concern is reflected in the design so as to incorporate both categories of interests. Maintenance of the community itself is a fundamental goal behind procedural design, and this design must recognize that the individual members, particularly those directly affected by the relevant community program, are intimately concerned with the vitality of the community that serves them. The community depends on individual members' acceptance of its process for decisions, particularly the acceptance of those directly affected. Thus, the design must rest on values such as satisfaction, cultural imperatives and tradition, dignity, equality, and consistency.

These factors offer points of sensitivity to be applied in actual procedural design. In application, as in concept, the goal remains to coordinate in procedural design the community's interests with those of its individual members. These factors then provide a context for the coordination of these major categories of interests. Thus, this article suggests three

application levels. At the most basic level, these factors determine the relative weight of the procedural design issues within the bundle of issues, both procedural and substantive, before the decisionmaker. Secondly, it suggests how these factors might be captured in categories of similar procedural tasks so that future procedural designs can take advantage of prior experience and study. Lastly, this article concedes that in application some interests may demand priority over others, but suggests that consideration of all the points of sensitivity will assure that concession to special demands will still optimize all interests.

Because design will necessarily be affected by the designers' perspective, the design's application must include consideration of how those perspectives might manifest themselves and perhaps be adjusted by this approach. Here, it is recognized that while much of procedural-design thinking revolves around constitutional principles, learning is and should be applied to statutory and administrative procedural design efforts. Thus, the system of principles must guide designers primarily concerned with broad community interests, such as legislators or administrators, as well as those evaluating the procedural design in the context of an individual application—the courts. Here, the points of sensitivity should assure that both categories of designers understand the full range of values embedded in the procedural design and strive to optimize all of the interests at stake.

Our culture demands that government, as the executor of community goals, treat its citizens fairly. This cultural imperative should drive procedural due-process analysis. The search is for a system that treats procedural fairness as an overarching community demand from government. Only through fair process can government serve community desires. Hence, the "state's interest" must reflect the individual interests of all community members. This article hopes to establish a system of principles that realizes this goal.

I. THE SEARCH FOR COHERENCE IN THE DUE PROCESS CALCULUS

A. *Context*

The due process clauses of the Fifth and Fourteenth amendments to the Constitution provide the fundamental source whereby judicial interpretation has evolved, especially in the last quarter of the twentieth century, into a sophisticated procedural

jurisprudence. An explosion in procedural innovation began with the 1970 Supreme Court opinion in *Goldberg v. Kelly*.² *Goldberg* created a new sense of property from which grew a "considerable progeny."³ Quickly, a "new" liberty interest was added to this "new" property interest.⁴ Still, the principles for defining these new categories of due process interests needed development, and over the years the Court has engaged itself in the task of evolving a body of law defining the categories of interests protected by the due process clauses.⁵

2. 397 U.S. 254, 261, 264 (1970) (holding that welfare recipients had a right to a full evidentiary hearing prior to a termination of benefits). The majority found that the benefits constituted "statutory entitlement[s,]" and that the termination decisions adjudicated "important rights." See *id.* at 262. The Court relied on two law review articles written by Charles Reich. See *id.* at 262 n.8 (approving of Reich's analysis). The first article cited by the Court was Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965) (arguing that all classes of citizens, save the poor, have their entitlements enforced in forms such as franchises, professional licenses, union membership, employment contracts, pension programs, and stock options). The second was Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 787 (1964) (proposing that those receiving government entitlements should have a complete ownership right in the receipts). Thus, the property interest protected by the due process clauses was made to cover any entitlement or benefit provided by the government.

3. See Henry J. Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267, 1273 (1975). A new cycle of interest in the procedures used by governments seems underway. See Richard J. Pierce, Jr., *The Due Process Counterrevolution of the 1990s?*, 96 COLUM. L. REV. 1973, 1973, 1988, 1989, 1991 (1996) (suggesting that a counterrevolution is upon us, in which due process coverage in the areas of prisoners' rights, welfare benefits, and social security benefits will be severely cut). But see Cynthia R. Farina, *On Misusing "Revolution" and "Reform": Procedural Due Process and the New Welfare Act*, 50 ADMIN. L. REV. 591, 592 (1998) (rejecting Pierce's prediction). Comprehensive legislative consideration of administrative procedure also increased in the recent congresses with a variety of bills introduced to revise federal administrative procedure. See *id.* at 597-99, 618-20 (discussing the Personal Responsibility & Work Opportunity Reconciliation Act).

4. See *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) ("Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."). Although the broader sense of the liberty interest has become firmly established, the Court has constrained the most generous versions. See also *Sandin v. Conner*, 515 U.S. 472, 483-84 (1995) (declaring that due process is violated when a state "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life"); *Paul v. Davis*, 424 U.S. 693, 711 (1976) (observing that an interest is protected only where "a right or status previously recognized by state law was distinctly altered or extinguished").

5. See *Perry v. Sindermann*, 408 U.S. 593, 601-03 (1972) (holding that notwithstanding the lack of an express contractual right to renew a contract, an employee may be entitled to a hearing if the rules and practices of the institution provide a legitimate claim to contract renewal); *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (finding that property rights "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law"). A new property interest depends on whether a standard must be applied before the action may be taken. To give the source of the interest its broadest possible connotation, it has ultimately come to be called a "substantive

The *Goldberg* expansion precipitated a second, and in many ways more challenging, inquiry into procedural design. As the Court observed immediately after *Goldberg*: "Once it is determined that due process applies, the question remains what process is due."⁶ That question presents a court with a wide range of alternatives.⁷ In the bedrock turn-of-the-century case of *Londoner v. City of Denver*, setting the foundation for the right to a hearing, the Court concluded: "Many requirements essential in strictly judicial proceedings may be dispensed with . . . [A] hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal."⁸ In another classic due process opinion, the Court observed: "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."⁹ The decision in *Goldberg v. Kelly* was criticized as retreating from this notion of flexibility and substituting trial-like procedures as a due-process norm.¹⁰ Soon after *Goldberg*, however, the Court reaffirmed its commitment to procedural flexibility in *Goss v. Lopez*.¹¹

Given the wide spectrum of legitimate procedural moves, a strategy was needed for determining what or how much procedure would be necessary for any given process. That

predicate." See 1 KOCH, *supra* note 1, at 79. This approach is not so uniformly applied in the search for new liberty. In *Sandin v. Conner*, 515 U.S. 472 (1995), Chief Justice Rehnquist rejected the "substantive predicate" approach. See *id.* at 483-84, 486 (limiting the liberty interest protected by the Due Process Clause in a prison setting to circumstances that "impose[] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life"). Justice Breyer, however, preferred to continue the approach unless the interest was so fundamental as to carry its own protection or so ordinary as to warrant no constitutional protection. See *id.* at 493 (Breyer, J., dissenting) (observing that a state must comply with due process if the state effectuates a severe change in condition, or if the state acts outside of its power).

6. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

7. See *id.* ("It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands.").

8. 210 U.S. 373, 386 (1908).

9. *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 895 (1961); see also *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162-63 (1951) (Frankfurter, J., concurring) (opining that due process is a flexible concept based upon history, reason, and democratic ideals).

10. See Friendly, *supra* note 3, at 1299-1301 (arguing that Justice Brennan, after first noting that the required hearing need not be judicial or quasi-judicial in nature, "demand[ed] almost all the elements of [a trial]").

11. 419 U.S. 565, 577-78, 581, 583 (1975) (declaring that although due process requires a student facing a suspension from school to be given notice of the charges against him and an opportunity to present his side, due process does not guarantee such a student access to a judicial-like proceeding, whereby the student may have counsel, or call or cross-examine witnesses).

mechanism was provided by Justice Powell's opinion in *Mathews v. Eldridge*.¹² The Court was asked to measure the adequacy of the Social Security Administration's procedures for disability decisions.¹³ However, the applicability of the Due Process Clause was not contested.¹⁴ The Court faced only the question of whether the process was adequate.¹⁵ In answering this question, Justice Powell established a test¹⁶ that has dominated procedural design ever since.¹⁷ He focused on three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.¹⁸

The Court intended this test to be "intensely practical,"¹⁹ and it spawned a workable body of law.²⁰ The *Mathews* test

12. 424 U.S. 319 (1976).

13. See *id.* at 323, 335.

14. See *id.* at 332.

15. See *id.* at 334-35.

16. See *id.*

17. See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 554 (5th ed. 1995) (observing that all courts must use the *Mathews* balancing test to determine if a government action violates due process).

18. *Mathews*, 424 U.S. at 335.

19. See *McCarthy v. Madigan*, 503 U.S. 140, 146 (1992) ("Application of this balancing principle is 'intensely practical[]' because attention is directed to both the nature of the claim presented and the characteristics of the particular administrative procedure provided.") (citations omitted).

20. A recent example of a pure *Mathews* approach is *Gilbert v. Homar*, 520 U.S. 924 (1997). A campus police officer at a state university was suspended after a drug charge. See *id.* at 926-27. The charges were dismissed but the suspension remained in effect and the employee was demoted to groundskeeper. See *id.* at 927. The only administrative process afforded to the officer was the opportunity to tell his side of the story to university officials. See *id.* The Court balanced the employee's interest against the State's. See *id.* at 931-32. The Court found that the severity, length, and finality of the deprivation should all be considered. See *id.* at 932. Here, the Court found that the loss of income and benefits constituted a "relatively insubstantial" loss. See *id.* In contrast, it found that "the State has a significant interest in immediately suspending, when felony charges are filed against them, employees who occupy positions of great public trust and high public visibility, such as police officers." *Id.* As to what it termed the "last factor in the *Mathews* balancing," the Court concluded that pre-suspension process was not necessary because the arrest and filing of charges against the respondent provided a reasonable basis for the suspension: "[T]he purpose of any pre-suspension hearing would be to assure that there are reasonable grounds to support the suspension without pay." *Id.* at 933-34. The Court, however, remanded the case so that the lower courts could consider whether the post-suspension process was adequate. See *id.* at 935-36.

implemented emerging perceptions of the legal process.²¹ Further, it added considerable rationality and structure to procedural design development, but still, it never quite "felt" complete or satisfactory.

Mathews committed procedural design to balancing analysis.²² Although it lists three factors, the *Mathews* test rests on two sets of balancing maneuvers. One undertakes a cost/benefit analysis of additional and/or alternative procedures.²³ The other trades the "government's interest" against the "private interest."²⁴ As Mashaw observed a number of years ago, the *Mathews* analysis is "implicitly utilitarian."²⁵ It creates a type of

The Supreme Court has also used the three-part *Mathews* test to determine whether procedures comply with due process in private disputes. See, e.g., *Connecticut v. Doe*, 501 U.S. 1, 4 (1991) (holding that absent a showing of extraordinary circumstances and a bond requirement, states are prohibited from authorizing an *ex parte*, prejudgment attachment of real estate). The plaintiff's interests are substituted in the third factor and balanced against the defendant's interest with "due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections." *Id.* at 11.

The Court has also applied the three factor *Mathews* test in criminal due process cases. See, e.g., *Ake v. Oklahoma*, 470 U.S. 68, 77, 83 (1985) (requiring the state to supply a psychiatrist). The criminal process, however, is quite consciously unbalanced in favor of the individual interest even though community interests are quite compelling and do, of course, prevail in many cases. See, e.g., *United States v. Leon*, 468 U.S. 897, 922 (1984) ("We conclude that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial cost of exclusion."). Therefore, the following critique of the *Mathews* balancing approach may not apply in the criminal context. Although criminal procedure questions may benefit from the following analysis, this discussion is not focused on criminal procedures.

Of course, lower courts rationally apply the *Mathews* test. Some actually go through the three factors. See, e.g., *Stuart v. United States*, 109 F.3d 1380, 1385 (9th Cir. 1997) (declaring that neither the land use regulation nor the statute violates due process simply by permitting cancellation of a real estate contract without a hearing).

21. Henry Hart had a tremendous influence on several generations' thinking about the "legal process." Eskridge and Frickey reported: "Hart . . . pressed his students to think in cost-benefit terms: What is the objective, and is it socially acceptable? What means will fairly and efficiently achieve the objective? Is the cost reasonable given the value of the objective and the alternative means available?" William N. Eskridge, Jr. & Philip P. Frickey, *The Making of the Legal Process*, 107 HARV. L. REV. 2031, 2037 (1994). Can it be doubted that these teachings formed the *Mathews* mentality?

22. See Aleinikoff, *supra* note 1, at 994 (noting that *Mathews* is the foundation for modern due process analysis).

23. See Mashaw, *supra* note 1, at 39-40 (examining the Court's analysis of existing and additional procedural safeguards).

24. See Aleinikoff, *supra* note 1, at 981 ("Balancing opinions typically pit individual against governmental interests.").

25. See Mashaw, *supra* note 1, at 46-48 (arguing that *Mathews* is a utilitarian-based approach that finds a due process violation "only when alternative procedures

social welfare function: "That function first takes into account the social value at stake in a legitimate private claim; it discounts that value by the probability that it will be preserved through the available administrative procedures, and it then subtracts from that discounted value the social cost of introducing additional procedures."²⁶ This utilitarian balancing itself is one source of the unsatisfactory feel of the body of law that has evolved from *Mathews*.

The cost/benefit approach promised a scientific foundation for procedural design, but it has never really delivered on that promise. To a large extent, the implementation of the cost/benefit analysis is unsatisfactory because there is little reliable information about the practical value of procedural elements. For this reason, this *Mathews* operation leads to a shallow analysis with judges making systemic procedural decisions based on personal experience, tradition or mere bias. While effectiveness must be part of the procedural design, and an attempt to guide its use is offered below, scientific foundation is not sufficiently developed to support conclusions about how various procedural designs serve one category of interest or another. Thus, the seemingly scientific measure becomes solely a matter of judicial guesswork.²⁷ Absent the necessary support, these judgments may as easily do harm as good. This balancing maneuver is thus unsatisfactory because of the lack of solid information about the costs and the benefits of a procedure. This defect awaits the development of that information. Here, the analysis attempts nothing more than to incorporate the effectiveness question into the overall system.²⁸

The deeper source of disquiet is the tendency of *Mathews* analysis to set state interests against those of the individual.²⁹ The perceived juxtaposition of these two categories of interests has long been a part of due process jurisprudence.³⁰ In the famous

would so substantially increase social welfare that their rejection seems irrational").

26. See *id.* at 47-48.

27. See, e.g., *Stuart v. United States*, 109 F.3d 1380, 1385 (9th Cir. 1997) ("On balance, the value of such a hearing in insuring accuracy is low, while the cost of such a procedure is high.") (citing *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976)).

28. See *Morrissey v. Brewer*, 408 U.S. 471, 484-85 (1972) ("We now turn to the nature of the process that is due, bearing in mind that the interest of both State and parolee will be furthered by an effective but informal hearing.").

29. See NOWAK & ROTUNDA, *supra* note 17, at 554 (noting that the *Mathews* balancing test requires a balancing between the individual interests at stake and the government interests in avoiding burdens stemming from increased procedural requirements).

30. See Aleinikoff, *supra* note 1, at 981 (explaining that the interests of the individual and the government are often in opposition).

1961 *Cafeteria & Restaurant Workers* opinion, the Court expressed: "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."³¹ Mashaw found this "calculus" inadequate because it ignores or undervalues some relevant and important individual values.³² The utilitarian approach, however, fails in more than completeness. As applied, this utilitarian balancing invariably pits the benefit to the individual against the cost to the community. Yet process has costs as well as benefits for the individual and benefits as well as costs for the overall system.³³

Because of these shortcomings, the *Mathews* calculus must be reconfigured so as to coordinate important interests. The "government's interest" in this calculus is important only in service to the community's interests and these interests of the community's members cannot be seen as adverse. The "government's interest" and the individual's interest should be considered in tandem rather than set against each other. Accordingly, this coordinating operation begins with recognizing that the *Mathews* "government interest" embodies the entire community's interests. This interest involves individuals' rights and hence incorporates into the *Mathews* calculus a responsiveness to all the interests bound up in a procedural design. Thus, whatever affects the community's interests necessarily affects the interests of the community's individuals.

B. *Breaking Out of Balancing*

Balancing is a flawed strategy for procedural design. Aleinikoff concluded the following from a sample case applying *Mathews*: "The opinion reflects both the dominance of balancing in the contemporary judicial mind and its emptiness as a methodology."³⁴ *Mathews* balancing is not generally empty in

31. *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 895 (1961).

32. See Mashaw, *supra* note 1, at 48 ("The *Eldridge* Court conceives of the values of procedure too narrowly: it views the sole purpose of procedural protections as enhancing accuracy, and thus limits its calculus to the benefits or costs that flow from correct or incorrect decisions.").

33. See *id.* (arguing that utilitarian balancing neglects both the value to society inuring from proceedings and the costs to individuals for participating in the proceedings).

34. Aleinikoff, *supra* note 1, at 983 (referring to Justice Stewart's opinion in *Lassiter v. Department of Soc. Servs.*, 452 U.S. 18 (1981)).

actual application, but it can lead to dangerously insensitive analysis. In the procedural design context, the balancing strategy exacerbates the tendency to set important interests against each other. These interests, however, are intertwined. Thus, a first step in enhancing the framework for procedural design begins with the realization that due process analysis must move beyond balancing and towards a system that coordinates valuable interests.

Balancing involves a decisional process whereby interests or values are identified, evaluated, and ultimately measured in relation to each other.³⁵ Balancing, properly employed, gives weight to all values. Generally, balancing may take two forms.³⁶ In one form, some interests are found to outweigh other interests.³⁷ In the other form, each interest survives and is given some relative weight.³⁸ Even though some values are ultimately dominated by others in the first form, neither form denies values entirely.³⁹

Still, balancing suffers from its instinct for setting important values against each other.⁴⁰ Although all interests should be represented when balancing is done correctly, the mental process of balancing ultimately leads to some sense of the relative importance of the competing interests. This attitude conflicts with the neutrality goal of procedural design.⁴¹ Procedural

35. See *id.* at 945.

36. See *id.* at 946.

37. See *id.* ("Under this view, the Court places the interests on a set of scales and rules the way the scales tip.")

38. See *id.* ("The image [under the second view] is one of balanced scales with constitutional doctrine calibrated according to the relative weights of the interests.")

39. See *id.* at 945-46 (explaining that every interest implicated in a balancing approach is recognized, notwithstanding that in the first form one interest may outweigh other interests, and in the second form each interest is measured against all the other interests).

40. See Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 24, 59 (1992) ("Balancing weighs competing rights or interests.")

41. Administrative law mantra decrees that unconstrained judicial imposition of procedure does significant harm. Compare *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 546, 548 (1978) (declaring that unless a regulatory agency fails to follow its statutory procedural guidelines, courts should not examine the perceived procedural defects because such intrusion would undermine the policy prescribed by Congress), with *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n*, 547 F.2d 633, 645-46 (D.C. Cir. 1976) (directing that, when reviewing an agency decision, the reviewing court must look at the record to determine if "the decision was based 'on a consideration of the relevant factors'", *rev'd sub nom.* *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978)). Here, it is sufficient to suggest that thoughtful judicial concern for procedure, perhaps guided by some of the observations below, can be expected to make a positive contribution to the law. This is true because, unlike many substantive areas, judges

designers are led to net the individual's interest against the community's.⁴² Instead, they should recognize the commonality of community interests and those of its members. Procedural design should then coordinate those interests.

The leading alternative to balancing has been "categorization."⁴³ Categorization is an ordering whereby a large number of actual events are brought within a manageable system.⁴⁴ In application, an individual case is decided by classifying it according to these categories and applying the preset legal rules.⁴⁵ This approach leads a court to reason from differences of kind rather than degree.⁴⁶ In judicial reasoning throughout our history, categorization has been an important, and often dominant, strategy.⁴⁷ Balancing was not prevalent in Supreme Court opinions until the second quarter of the twentieth century.⁴⁸ Before balancing became dominant, the Court resolved clashes of interest in a categorical fashion.⁴⁹ Today, however, categorization is seen as doctrinaire and stifling; hence, balancing has come to dominate modern legal decisionmaking theory, if not often actual practice.⁵⁰

have substantial understanding of procedural design subtleties.

42. See Sullivan, *supra* note 40, at 61 ("Balancing requires the explicit articulation and comparison of rights or structural provisions, modes of infringement, and government interests.").

43. See *id.* at 60 (arguing that strict scrutiny review for fundamental liberties and rational review for socioeconomic legislation are examples of categorical approaches).

44. See Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 RES. L. & SOC. 3 (1980). Kennedy's "classical legal thought" seems the equivalent of what is termed here "categorization": "Classical legal thought was an *ordering*, in the sense that it took a very large number of actual processes and events and asserted that they could be reduced to a much smaller number with a definite pattern." *Id.* at 8.

45. See Sullivan, *supra* note 40, at 59 (noting that a categorical approach is "rule-like" in that it identifies classes into which factual scenarios fall).

46. See, e.g., Aleinikoff, *supra* note 1, at 949 ("The power to tax was the power to destroy; states could exercise police power but could not regulate commerce; legislatures could impair contractual remedies but not obligations.").

47. See *id.* ("The great constitutional opinions of the nineteenth century and early twentieth century did not employ balancing as a method of constitutional argument or justification.").

48. See *id.* (noting that Justices Marshall, Story, and Taney resolved cases with a categorical, rather than a balancing, approach).

49. See *id.* "Classical legal thought" of this long period engaged in "an objective task of drawing lines or categorizing actions." Kennedy, *supra* note 44, at 12. Although this decisional strategy of categorization may also be identified as "formalism," see *id.* at 5, categorization is not necessarily grounded in formalistic analysis.

50. See Aleinikoff, *supra* note 1, at 965-66 (arguing that because of its flexibility, balancing has become the "central metaphor for procedural due process

Although the modern legal mind seems most comfortable with justifications based on balancing, judges are as apt to rely on categorization.⁵¹ As Sheppard observed: "The Court balances, and the Court categorizes. Not only are both methods compatible, but both are now sufficiently entrenched as judicial tools of adjudication that the Court is unlikely to rewrite so much precedent merely because of a mode of interpretation."⁵²

A recent example is *County of Sacramento v. Lewis*.⁵³ The parents of a motorcycle passenger killed in a high speed chase with the police brought a § 1983 claim alleging a deprivation of the passenger's substantive due process right to life.⁵⁴ The Court referred to a half century of cases identifying government conduct that "shocks the conscience."⁵⁵ From these cases, it discerned "that the substantive component of the Due Process Clause is violated by executive action only when it 'can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.'"⁵⁶ Explaining this test's application, the Court stated that "the constitutional concept of conscience shocking duplicates no traditional category of common-law fault, but rather points clearly away from liability, or clearly toward it, only at the ends of the tort law's spectrum of culpability."⁵⁷ The Court therefore went on to describe the content of the "conscience shocking" category and its foundation on governmental needs.⁵⁸ The Court then held: "Regardless whether [the sheriff's deputy's] behavior offended the reasonableness held up by tort law or the balance struck in law enforcement's own codes of sound practice, it does not shock the conscience, and petitioners are not called upon to answer for it under § 1983."⁵⁹

More to the point, procedural due process analysis involves categorization in the first instance before it makes a move to *Mathews* balancing. The "new" due process analysis, recognizing

analysis").

51. See, e.g., Sullivan, *supra* note 40, at 69 (observing that the Supreme Court Justices divided over the choice between "rules"—a categorization-based approach—and "standards"—a balancing-based approach—in the 1991 term).

52. Steve Sheppard, *The State Interest in the Good Citizen: Constitutional Balance Between the Citizen and the Perfectionist State*, 45 HASTINGS L.J. 969, 975 (1994).

53. 523 U.S. 833 (1998).

54. See *id.* at 837.

55. See *id.* at 846-47.

56. *Id.* at 847 (quoting *Collins v. Harker Heights*, 503 U.S. 115, 128 (1992)).

57. *Id.* at 848.

58. See *id.* at 849 (noting that unjustifiable, injurious conduct by a governmental actor is the epitome of "conscience-shocking" behavior).

59. *Id.* at 855.

"new property" and "new liberty" interests, utilizes categorizations whereby the existence of a procedural due process right is determined by whether the interest involved is one protected by the due process clauses. These interests are protected because they are classified with those the Constitution designates for protection, not because a judicial balance has been struck in their favor. *Goldberg* did not change the well-established reliance on categorization. Indeed, *Goldberg* itself is based on categorization: trial-like procedures were required because the "entitlement" met the definition of "property."⁶⁰ Interests within these categories have been defined by the Constitution as sufficiently weighty to justify procedural protection without balancing them against some other value in the individual case.⁶¹

Still, *Mathews* has committed procedural *design* to balancing.⁶² Balancing is seen as a strategy for the objective or scientific development of the law.⁶³ Yet practical difficulties in developing a principled measure of the relative worth of important values often overwhelm balancing efforts.⁶⁴ Therefore, implementing a balancing strategy requires a scale of values external to judges, but such fundamental information is not available. A scientific or objective view of balancing surpasses reality.

Actually, both the justification and criticism of the balancing strategy stem from its emotional, rather than scientific, appeal.

60. See 3 KOCH, *supra* note 1, at 69. The debate over the definition of liberty interest in *Sandin v. Connor*, 515 U.S. 472 (1995) provides an example. Each of the Justices adopted categorization. See *id.* at 486 (holding that prison discipline via solitary confinement did not "present the type of atypical, significant deprivation in which a State might conceivably create a liberty interest"); *id.* at 488 (Ginsburg, J., dissenting) (arguing that solitary confinement was such "a severe alteration in the conditions of [] incarceration" that due process was violated); *id.* at 493 (Breyer, J., dissenting) (finding that prison discipline that produces a severe change in circumstances must comply with due process). Chief Justice Rehnquist, for the Court, distinguished the "intricate balancing . . . in determining the amount of process due" from the definition of liberty interest itself. See *id.* at 478. The majority held that the prison disciplinary decision at issue fell outside the definition of liberty interest because the decision "did not present the type of atypical, significant deprivation in which a State might conceivably create a liberty interest." *Id.* at 486-87. Justice Ginsburg, however, would have looked to the Due Process Clause itself for a definition. See *id.* at 489 (Ginsburg, J., dissenting). Justice Breyer also relied on a liberty-defining analysis. See *id.* at 493-94 (Breyer, J., dissenting) (propounding that solitary confinement deprives an inmate of liberty).

61. U.S. CONST. amend. V.

62. See Aleinikoff, *supra* note 1, at 994 (noting that *Mathews* is the foundation for modern due process analysis).

63. See *id.* at 960-62 (noting the parallel development of social sciences and balancing approaches).

64. See *id.* at 973 (observing that one problem with a balancing approach is the absence of an analytic method for weighing competing interests).

On one hand, balancing presents some methodological opportunities that have suggested its utility to the modern legal mind. Balancing offers an opportunity for a judge to tailor the law for a particular litigation;⁶⁵ it seems less abstract and more sensitive to individual circumstances.⁶⁶ On the other hand, balancing has been criticized as allowing judicial law-making based on personal prejudice and preference.⁶⁷ A corrupt resort to the balancing strategy can be a tool for deceit and special interest promotion just as an honest employment of the strategy can illuminate sensitive comparisons of accepted values.⁶⁸ While ideally, the freedom won through balancing assists the decisionmaker in achieving individual justice, this freedom also carries the opportunity for abuse.⁶⁹

Balancing's adaptability to judicial policymaking is another aspect that fits the modern instinct for judicial activism.⁷⁰ Balancing permits judges to justify policymaking on the circumstances of the individual case before them. For broad policymaking, however, the very focus on the individual case recommends against balancing. Through balancing, judicial policymaking may be opportunistic in disregarding and modifying past approaches, but judges are also limited in their policy choices by the context of the case presented. In short, balancing fails policymaking because of its tendency to narrow perspective and its weakness in incorporating past learning.

In contrast to balancing, categorization is seen as insensitive to changing circumstances and as a restraint on judicial activism.⁷¹ Yet categorization can be extremely creative. It does affect, or one might say discipline, the mental process by which

65. See *id.* at 961 (arguing that balancing approaches mimic common law approaches, thereby permitting flexibility and providing for gradual change in the law).

66. See *id.* (explaining that balancing approaches usually involve an in-depth analysis of the particular factual situation facing the court).

67. See *id.* (arguing that balancing approaches are susceptible to "unprincipled adjudication"); Sullivan, *supra* note 40, at 62 (noting that categorization reduces the potential of the decisionmaker to "factor[] the parties' particular attractive or unattractive qualities into the decisionmaking calculus").

68. See Sheppard, *supra* note 52, at 970 (asserting that a balancing method can be employed for honest or dishonest purposes, depending on the intent of the person employing the method).

69. Refer to note 68 *supra* and accompanying text.

70. Refer to notes 66-67 *supra* and accompanying text (discussing balancing's flexibility). See Sullivan, *supra* note 40, at 66 (noting that balancing methods permit treating cases that are substantively alike similarly).

71. See Sullivan, *supra* note 40, at 66 (proposing that rules are non-adaptive and thus sometimes become obsolete, whereas the flexible nature of standards permits adaptation to changing circumstances).

one evaluates or evolves ideas and this mental discipline has a natural tendency towards ordering. Still, this ordering generates its own creativity.⁷² Accordingly, this form of bounded creativity is a valuable strategy for procedural design.

Categorization is dynamic as well as creative. It is quite useful for adapting to new circumstances and new social problems. Duncan Kennedy described the reciprocal nature of its developmental strategy whereby practice influences the system of premises and the system of premises influences practice.⁷³ As to categorization's operational strategy, he observed: "The basic mode of this influence of theory on results is that the ordering of myriad practices into a systematization occurs through simplifying and generalizing categories, abstractions that become the tools available when the practitioner (judge or advocate) approaches a *new* problem."⁷⁴ Categorization is a decisional tool that can incorporate all relevant values in the face of new circumstances without, as in balancing, setting the values against each other. The dynamic and adaptive, yet necessarily applied, aspects of categorization can serve procedural design.

For this purpose, categorization must be distinguished from a strategy based on rules. Some see categorization as "rule-like" in that "[i]t defines bright-line boundaries and then classifies fact situations as falling on one side or the other."⁷⁵ Rules are indeed applied in this fashion, but categorization decisions, as easily as balancing ones, "explicitly consider[] all relevant factors with an eye to the underlying purposes or background principles or policies at stake."⁷⁶ Categorization may, often better than balancing, "collapse decisionmaking back into the direct application of the background principle or policy to a fact situation."⁷⁷ Thus, categorization can result in what some would call a "standard"-directed decisionmaking,⁷⁸ but it is still a process that does not foreclose judicial discretion in making adjustments to fit individual cases.

72. See, e.g., STEVEN JAY GOULD, *WONDERFUL LIFE: THE BURGESS SHALE AND THE NATURE OF HISTORY* 98 (1989) (referring to taxonomy—the science of classification—as a "fundamental and dynamic science").

73. See Kennedy, *supra* note 44, at 8 ("[Classical legal thought] is designed to tell us about the theoretical atmosphere within which practices occurred, and to tell us about the manner in which the theoretical atmosphere influenced particular results.").

74. *Id.* (emphasis added).

75. Sullivan, *supra* note 40, at 59.

76. *Id.* at 60.

77. *Id.* at 58.

78. See *id.* at 61-62 (opining that a rule is "simply the crystalline precipitate of prior fluid balancing that has repeatedly come out the same way").

Nor should categorization, at least the categorization referenced here, be confused with "formalism." Categorization may be seen as a kind of applied formalism.⁷⁹ But unlike an extreme formalism that ultimately generates strict rules, this categorization disciplines, but does not inhibit, development. Indeed, this categorization, by demanding a continuing reworking of classification with each new "sample" dispute resolution, compels change and adaptation of general principles as well as adjustments related to the specific case. Categorization recognizes that theory without application is empty *and* that application without order creates systemic chaos.⁸⁰ Experience and theory are necessary partners in any progressive evolution of both practice and ideas.⁸¹ This categorization is not slowly withdrawn from reality as the rules become more wooden with use, as might be seen in formalism.⁸² Rather, categorization orders a creative and dynamic decisionmaking process.

Categorization broadens the perspective of the procedural design. In balancing, courts focus on the parties' rights and ignore or undervalue the interests of nonparties.⁸³ Balancing leads a court to evaluate the various interests of rights holders without focusing attention on a complete set of interests.⁸⁴ In conducting balancing, courts do not list all the interests potentially affected. To the point, for example, Aleinikoff observed that the Court in *Goldberg* made no effort to inventory the wide range of interests involved, nor did the Court disclose the basis on which it restricted its balance.⁸⁵ As a generalization, Aleinikoff offered: "Taking balancing seriously would seem to demand the kind of investigation of the world that courts are unable or unwilling to undertake."⁸⁶ Similarly, courts fail to

79. "Formalism" describes legal theories that stress the importance of rationally uncontroversial reasoning in legal decision, whether from highly particular rules or quite abstract principles." Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 9 (1983).

80. See, e.g., GOULD, *supra* note 72, at 27-45 (discussing how early forms of biological categories or taxonomies were often based on a theory, such as creationism or the systematic increase in the diversity of life forms, but overlooked or contradicted actual data collected from the fossil record).

81. See *id.* at 98-100.

82. See Aleinikoff, *supra* note 1, at 1001 ("A nonbalancing approach . . . does not require a court to be blind to the consequences of constitutional rules or the social context in which constitutional questions arise.").

83. See *id.* at 978 ("In many balancing cases, . . . courts make no serious effort to place the interests of non-parties on the scale.").

84. See, e.g., *id.* at 977 (observing that the Court does not give weight to all possible relevant interests when performing its balancing approach).

85. See *id.* at 977-78.

86. *Id.* at 978.

justify in any objective sense the weight given to relevant interests or even to disclose the sources used in deriving those weights.⁸⁷ Thus, the law created by balancing does not adequately develop transferable principles.

Here, categorization has a clear advantage. It naturally searches for commonality. By ordering interests, it can provide solutions to similar problems. Through experience, categorical solutions are fine-tuned. Unlike balancing, then, categorization is progressive in that it is a continuous process of incorporating new learning and experience. Some of that learning might result from balancing, but it is still better captured as general principles by categorization.

Furthermore, some observers doubt that values are sufficiently commensurate to validate balancing in many cases.⁸⁸ It may be deceptive to attempt to denominate rights in a single currency and weigh their relative worth.⁸⁹ The often subconscious realization that the interests involved are not actually comparable leads courts to camouflage the "intuitive" nature of their decisions with balancing justifications.⁹⁰ Although procedural rights may involve a more manageable set of values, the commensurability of all those values remains in doubt.⁹¹ Even if Schauer is correct that rights decisions based on imperfect commensurability may still be preferable, the impediments to

87. See *id.* at 976 (noting that, in its opinions, the Court sometimes fails to enumerate the analytical weights used to arrive at its conclusion).

88. See, e.g., Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 796, 798 (1994) (arguing that incommensurability, which is an important part of law and society, occurs when "relevant goods cannot be aligned along a single metric without doing violence to our considered judgments about how those goods are best characterized") (emphasis omitted). The incommensurability debate is informative but generally beyond the scope of this article. See, e.g., Mathew Adler, *Law and Incommensurability: Introduction*, 146 U. PA. L. REV. 1169-70 (1998) (defining incommensurability as the lack of a means of comparison among options or choices).

89. See Aleinikoff, *supra* note 1, at 973 ("The problem for constitutional balancing is the derivation of the scale needed to translate the value of interests into a common currency for comparison.").

90. See *id.* at 975-76 (arguing that when courts attempt "to strike the unstrikeable balance," they resort to techniques such as using a vocabulary that creates the appearance of comparison, depreciating of one of the interests, and stating the problem in balancing terms, but actually deciding the case otherwise).

91. See *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 896-97 (1988) (Scalia, J., concurring in the judgment) (contending that the burden on interstate commerce of submitting to state court jurisdiction was not commensurate with the value of the local interests in reaching a defendant corporation that was beyond the personal jurisdiction of the state court). Justice Scalia urged that where rights are not commensurate, decisions should be left to the political authorities. See *id.* at 897 (Scalia, J., concurring in the judgment).

comparison devalue the balancing enterprise in procedural design as in many others.⁹²

Balancing conflates the procedural and substantive questions to the disadvantage of both. By pitting interests against each other, balancing tends to convert substantive questions into procedural answers.⁹³ *Goldberg* was obviously really about cutting off welfare benefits; the more elaborate the procedures, the fewer denials or reconsiderations will be made.⁹⁴ The real motivation can be clearly seen under the procedural surface of Justice Brennan's opinion.⁹⁵ Indeed, Justice Black's dissent challenges Justice Brennan's opinion, in that Justice Black believes that more procedures will ultimately mean fewer benefits.⁹⁶ If the debate is about the most effective procedures in a given context, then balancing tends to misdirect the inquiry. In addition, if the debate revolves around the resolution of certain substantive social policy issues, then balancing interests to answer procedural questions is, at best, artificial. Categorization necessarily involves classification and, hence, better focuses procedural design tasks.

The substantive policy implication of the choice of balancing over categorization is ambiguous. Many assert that categorization is biased towards social policy conservatism,⁹⁷ whereas balancing unleashes the courts to further liberal social

92. See Frederick Schauer, *Commensurability and Its Constitutional Consequences*, 45 HASTINGS L.J. 785, 806 (1994) (arguing that decisionmaking that holds rights commensurable to the greatest extent possible may still be valuable). Schauer propounds a kind of second-best argument whereby shutting down the analysis in the absence of perfect commensurability is inferior to founding a decision on even imperfect commensurability. See *id.* at 799.

93. See Friendly, *supra* note 3, at 1313-15 (discussing the courts' difficulty in defining the parameters of "some kind of hearing," which an administrative agency must provide parties in order to satisfy due process); *Philip Morris, Inc. v. Block*, 755 F.2d 368, 370 (4th Cir. 1985) ("[W]e cannot tamper with the administrative process simply because we do not like what is being done.").

94. See *Goldberg v. Kelly*, 397 U.S. 254, 265 (1970) (declaring that pre-termination proceedings are essential to ensure that welfare recipients will continue to receive their benefits).

95. See *id.* at 267 (noting that welfare benefit recipients are protected from "erroneous termination of . . . benefits" if a hearing occurs before the benefits are terminated). Cf. *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599-600 (1950) (deferring to Congress's decision that no hearing was required in an "administrative determination to make multiple seizures" of "misbranded articles").

96. See *Goldberg*, 397 U.S. at 279 (Black, J., dissenting) (predicting that the government will be forced to perform a thorough review of a welfare claimant's eligibility, and thereby delay or prevent some claimants from obtaining welfare benefits).

97. See Robert F. Nagel, *Liberals and Balancing*, 63 U. COLO. L. REV. 319, 320-22 (1992) (opining that the categorical approach tends to produce conservative adjudication).

policies.⁹⁸ While balancing facilitates change, it does not direct such change in any particular policy direction.⁹⁹ Categorization is conservative in the sense that once a category has been established, the status quo is protected because the revision of a category, given its generalized application, requires careful justification.¹⁰⁰ Nonetheless, the established order may as easily be liberal social policy as not.¹⁰¹ Balancing may precipitate change but, as we see today, this decisionmaking freedom may move in any public policy direction.¹⁰² Hence, in the procedural design context, a court so disposed can easily weigh the balance to further either "conservative" or "liberal" social policy goals.¹⁰³

In sum, procedural design must break free from balancing analysis and seek to coordinate the various interests through the evolution of workable categories. These categories will permit continual development and ready communication of

98. See *id.* at 321 ("[A] rich consideration of all the relevant factors [through balancing] will naturally tend to lead to the expansion of individual rights because such an expansion is simply the moral thing to do.").

99. See Aleinikoff, *supra* note 1, at 960 (arguing that although "balancing facilitate[s] doctrinal change" by focusing on real world concerns, balancing itself does not necessarily determine a "liberal or conservative agenda").

100. See generally GOULD, *supra* note 72, at 98 (explaining that the science of taxonomy provides more than simple descriptions of categories; classification systems include the rationale or principle underlying the category structure). Any subsequent change to a category must therefore satisfy the requirements of that underlying rationale or principle.

101. In the procedural design context, social policy choices are particularly confusing. Social policy liberals would be expected to support processes that enable government, and social policy conservatives would be expected to support processes that inhibit government. Yet the procedural choices of social policy liberals and conservatives have furthered substantive interests exactly the opposite of what might be expected. Social policy liberals have been strong advocates of a formalism that handicaps active government whereas social policy conservatives seem protective of active government. Liberal procedural choices, for example, Justice Brennan's view in *Goldberg*, see *Goldberg*, 397 U.S. at 264 (declaring that a pre-termination hearing is required before welfare benefits are cut off), inhibits social programs, as pointed out by Justice Black, see *id.* at 279 (Black, J., dissenting) (predicting that the requirement of a pre-determination hearing before welfare benefits are cut off will result in fewer people obtaining welfare benefits), and conservative procedural choices, for example, Justice Scalia's view in *Sandin*, see *Sandin v. Conner*, 515 U.S. 472, 486 (1995) (holding that a state may prescribe solitary confinement without violating due process so long as the state does not create an atypical or significant deprivation of liberty), promote active government.

102. Refer to note 60 *supra* and accompanying text.

103. See *Valot v. Southeast Local Sch. Dist. Bd. of Educ.*, 107 F.3d 1220, 1227 (6th Cir. 1997) ("In our view, Defendants' interest in promoting the efficiency of the public service that the Board performs outweighs Plaintiffs' interests in petitioning for unemployment benefits."); *Lange-Kessler v. Department of Educ.*, 109 F.3d 137, 142 (2d Cir. 1997) (concluding that a statute regulating midwives was "rationally related to the state's legitimate interest in protecting the health and welfare of mothers and infants").

learning about both specific and general procedural choices. Further, this strategy will neither mandate wooden decisions nor a particular social policy commitment. Rather, it will support a more broadly sensitive and progressive approach to procedural design.

C. *A New Attitude for Procedural Design*

The attitude generated by categorization best serves to evolve a coordinated procedural design system. A categorization-type strategy has the advantage, consistent with the theme of this article, of supporting a system of principles that values the various interests involved in procedural design without trading them off against each other. While denying balancing's dominance, the system of principles sought here does not reject it. Procedural design must seek the advantages of alternative strategies, and the task is to find coherence in these alternative strategies. The search is for a system of principles, derived from the fertile caselaw and commentary, uninhibited by a commitment to balancing.

Procedural design has been and was intended to be a dynamic process,¹⁰⁴ continually evolving in accordance with new experience and empirical data.¹⁰⁵ The principles driving procedural design must remain flexible and eclectic.¹⁰⁶ Moreover, the derivation of this system of principles must adopt Fuller's insight that "goals and means interact."¹⁰⁷ Establishing principles is a dynamic process in which the principles are developing along with the innovations in procedures. Of course, while these principles cannot be asked to do too much, that they are not absolute does not mean they lack force.¹⁰⁸ When the range of application is so broad and the alternatives are so global, the

104. See *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring) ("'[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.").

105. See *id.* at 162-63.

106. See *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands.").

107. Robert S. Summers, *Professor Fuller's Jurisprudence and America's Dominant Philosophy of Law*, 92 HARV. L. REV. 433, 438 (1978).

108. Frederick Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899, 903 (1979) ("[A]bsolute in force is not the same as unlimited in range or scope. A principle or a right can be absolute when applied without being applicable to every situation.").

system of principles provides the pillars. Upon these pillars can be built the necessary body of law.

This system of principles can be made to take advantage of both categorization and balancing. The system creates coherence by merging these apparently conflicting strategies into a unified decisional mechanism.¹⁰⁹ This process begins by seeking the advantages offered by both methods.¹¹⁰ The drive to coherence finds force in one outstanding commonality: both systems value and evaluate interests.¹¹¹ The difference, as Sullivan observed, is that, "[f]or the categorizer, legal questions turn on differences in kind; for the balancer, they are matters of degree."¹¹² Procedural design often needs to approach the question in terms of both kind and degree, or, at least, consider whether the question is best approached through analysis based on one or the other. Balancing contributes as a method of individual decision, and these individual decisions contribute to the body of experience that helps to develop procedural-design categories.¹¹³ Therefore, application of existing categories in particular cases will continually modify the categories so that they may adjust to new experience and future procedural requirements.

In fact, balancing often evolves, especially in application, into categories.¹¹⁴ Categories are in some sense established, justified, and adjusted through "global balancing."¹¹⁵ "Categoric balancing" may, in reality, be seen as either balancing or categorization; the balance, once struck, is applied as categories. Indeed, exposition on or derivation of principles may look to balancing as well as classification.¹¹⁶ Even ad hoc balancing

109. See Stephen E. Gottlieb, *The Paradox of Balancing Significant Interests*, 45 HASTINGS L.J. 825, 838 (1994) ("The dispute over categorization and balancing is miscast for three reasons. First, the methods are not often determinative. Second, the methods can often be translated into one another. Third, . . . the dispute is miscast because the decision between balancing and not balancing is illusory.") (footnotes omitted).

110. See Sheppard, *supra* note 52, at 973 ("[T]he discussion about whether the balancing or the categorical approach is better . . . reflects a false dichotomy.").

111. See Gottlieb, *supra* note 109, at 860 ("As it turns out, interests occupy an inescapable logical place in both [balancing and rules] systems."); Aleinikoff, *supra* note 1, at 1002 ("[T]here is no basis for the notion that non-balancing approaches are necessarily formalistic or unconcerned with the social context of legal rules.").

112. Sullivan, *supra* note 40, at 59.

113. See Aleinikoff, *supra* note 1, at 1000 ("[T]o recognize a role for balancing in the extreme and rare case is not to demonstrate its validity as a mode of interpretation for the vast majority of constitutional cases.").

114. See Sullivan, *supra* note 40, at 61 (observing that any differences between categorizing and balancing are differences of degree).

115. See Aleinikoff, *supra* note 1, at 978 (stating that "the Court usually appears to adopt a global balance, examining the interests on some classwide basis").

116. See Jeremy Waldron, *Fake Incommensurability: A Response to Professor*

would be too burdensome to decisionmakers without certain standards or limits on the range of issues for which balancing actually is to be employed.¹¹⁷ Sullivan concluded: "These distinctions between rules and standards, categorization and balancing, mark a continuum, not a divide."¹¹⁸

Categorization, however, as the foundational framework for procedural design, shifts the inquiry's nature from an attitude of adverseness to an attitude of coordination and furthers the ultimate goal of optimizing all relevant values. It moves forward seeking a more sophisticated understanding of general procedural design principles as it guides application. Categorization also enhances the predictability of the procedural design system so that individuals and litigants will be informed as to the combination of procedural elements expected in a given set of circumstances.¹¹⁹ In short, procedural design will work toward objective guidance for procedural designers in specific contexts and in continuing to improve general principles.

An attitude adjustment from adverseness to coordination will recast the due process factors discussed below as points of sensitivity. Attention to these points of sensitivity will optimize *both* community interests and those of the community's individual members. Thus, we come back to *Mathews* jurisprudence. Rather than merely approaching this body of thinking as balancing, we can see it as a mass of experience and thinking constantly evolving into a better understanding of procedural design.

II. THE SEARCH FOR COHERENCE IN THE *MATHEWS* FACTORS

Mathews tells us that there are three types of considerations: the efficacy of the procedures, the interest of those directly affected by the decisions, and the "state's" interest.¹²⁰ As suggested, this opinion has created two balancing exercises: a cost/benefit analysis of additional or alternative

Schauer, 45 HASTINGS L.J. 813, 819-20 (1994) (arguing that weighing or balancing a value means "any form of reasoning or argumentation about the values in question").

117. See Gottlieb, *supra* note 109, at 855-56 ("The difficulties of balancing or 'optimization' have also led scholars to define forms of 'bounded rationality' in which various rules of thumb substitute for fully comparative weighing of alternatives.") (footnote omitted).

118. Sullivan, *supra* note 40, at 61.

119. See *id.* at 62 (arguing that rules are fairer than standards because they prevent courts from arbitrarily factoring a party's particular "attractive or unattractive qualities" into a decision).

120. See *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976).

procedures and a trade-off between the state's interests and those of individual citizens. The first flounders on the absence of sufficient information about the various procedures' effectiveness, but is nonetheless a useful exercise. The second distorts, or at least oversimplifies, consideration of the values served by procedural design. Accordingly, a coherent and coordinating strategy will better serve procedural design. The search for coherence rests on the commonality between the procedural interests of the community and those of its individual members. Thus, the *Mathews* factors must be reinterpreted to maximize both interests simultaneously.

A. *The "Government's Interest" Redefined as the Community's Interest*

A closer look at *Mathews* supports a reading of the factors in tandem, rather than trading them against each other. Other foundational opinions such as the 1961 *Cafeteria & Restaurant Workers* opinion might be reconsidered in the same way. In *Cafeteria*, the Court may not have been asserting that the interests were adverse when it said: "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."¹²¹ As with the *Mathews* language, it is at least as easy to say that the *Cafeteria* Court contemplated consideration of these interests without trading them against each other. The task, then, is to demonstrate commonality between the interests of the "state" and those of its individual citizens.

"Government interest" is, of course, used frequently in substantive constitutional law questions and procedural design should be able to seek guidance from that body of jurisprudence.¹²² Government interest analysis, however, is so underdeveloped, sophomoric, and unsophisticated that there is no reason to consider transferring that learning to procedural design.¹²³ Gottlieb concluded: "[T]he Court's treatment of governmental interests has become largely intuitive...."¹²⁴

121. *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 895 (1961).

122. See Gottlieb, *supra* note 1, at 924 ("Regardless of terminology, most constitutional jurisprudence involves some overt or covert comparison between individual rights and governmental interests.") (footnote omitted).

123. See *id.* at 932-35.

124. *Id.* at 937.

Procedural designers must then develop their own sense of that interest.

The first step is to reinterpret the term "government interest" as representing the interests of the entire community, and not just the interests of government institutions. The community exists for the individual. Community interests cannot be separated from the interests of individual members; nor can the interests of members be separated from the interests of their community. On closer consideration, the logic of setting the state against the individual breaks down. The community establishes programs to serve its individual members and charges the government with the responsibility to effect these programs fairly and effectively.¹²⁵ When government fails, it fails both the community and its individual members, usually the former more than the latter.

In the procedural context discussed here, the two interests, even if distinguishable, usually move in the same direction. The community interest is best served by processes that serve individual community members. Indeed, they gain strength from each other in most procedural contexts and, hence, the due process analysis should sum the community interests and those of its members rather than subtract one from the other.¹²⁶ In simplistic quantitative terms, a judge who evaluates the individual interest as 8 and the community interest as 2 should find that the procedural question has a value of 10, not 6. The task, then, is to set the foundation for a procedural design system that coordinates these interests.

Although the government's function is to carry forward the best interest of the greater society, its interests are distinct from the community's interests.¹²⁷ Governmental institutions often have interests bound up in procedural questions, and the community cares about these institutions because they form a

125. See Jeffrie G. Murphy, *Justifying Departures from Equal Treatment*, 81 J. OF PHIL. 587, 593 (1984) (stating that an interest envisioned by the rational individual as a compelling state interest is one the government has a duty to fairly and effectively achieve).

126. See Gottlieb, *supra* note 109, at 865 ("Instead of claims of right isolated from public purposes, the claims of right gain strength from those public purposes.").

127. Jeffrie G. Murphy stated the following:

Using Robert Nozick's metaphor, we might . . . consider the matter in this way: If we think of the state as an agency that we might *hire* (at a cost in both money and liberty) to do a certain job for us, how would we write the job description? . . . [A] state interest is to be viewed as compelling if and only if it is one of the interests or goals that one can properly imagine rational persons forming a government to achieve.

Murphy, *supra* note 125, at 593.

significant part of the machinery furthering the community's goals. But the two categories of interest are not coextensive. The instrumental interests of government should serve both interests. Indeed, if governmental institutions are serving only their own interests, the governmental system is defective. Supporting the interests of governmental institutions may further the community's interest, or that of its members or both simultaneously, but the governmental interests that are relevant in the context of these overarching interests do not hold a premier place in the analysis.

Setting the "state" against its citizens is not the Constitution's foundational perspective. Indeed, the founding society had quite a different vision of the relationship between the community and its members.¹²⁸ This vision is captured in the incorporation of "police power" into constitutional law jurisprudence. Novak observed:

"Police" in this sense stood for something much grander than a municipal security force. It referred to the growing sense that the state had an obligation not merely to maintain order and administer justice, but to aggressively foster "the productive energies of society and provid[e] the appropriate institutional framework for it."¹²⁹

In sum, government was envisioned by the founding society as serving the community and its members.

On the other hand, the Constitution read as a whole requires a due process analysis compatible with the entire constitutional structure. Even mindful of the fact that both due process clauses came after the original text, and hence, might be seen as limits on existing structure, those clauses still cannot substantially compromise the overall constitutional scheme. For this reason, the third *Mathews* factor could be seen as a constitutional minimum. A court undertaking due process review must consider the impact on the other constitutional functions. As a part of the whole, application of the due process clauses cannot unduly interfere with legislative and executive processes and

128. See William J. Novak, *Common Regulation: Legal Origins of State Power in America*, 45 HASTINGS L.J. 1061, 1070 (1994) ("[References in early Supreme Court opinions] suggest . . . a vision that distinctly refused to separate public powers and private rights in favor of an over-arching notion of 'well-ordered' and 'well-regulated' community, in which liberties and powers, rights and duties were mutually interwoven.").

129. *Id.* at 1084 (quoting Marc Raeff, *The Well-Ordered Police State and the Development of Modernity in Seventeenth-and Eighteenth-Century Europe: An Attempt at a Comparative Approach*, 80 AM. HIST. REV. 1221, 1226 (1975)).

responsibilities. It would seem to follow that a court that does not take this interest seriously slips its constitutional leash. Nonetheless, the sensitivity to governmental operations must, at base, become a sensitivity to the function of government in serving the community interest.

The third factor in *Mathews* expressly refers to the government's interests, "including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."¹³⁰ This third *Mathews* factor, however, is incomplete if confined to a concern for the governmental administration. In *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, the Court expressed the true intent of this consideration as the "nature of the government function."¹³¹ It is not just the fiscal and administrative burden, but the totality of the government function assigned by the community that must be served. The institutional interests of the government, as such, must be given weight not for themselves, but as they relate to their underlying mission.¹³² The governmental institutions themselves have interests that may be indirectly related to their societal function, but in fact exist independent of that function.¹³³ A maverick governmental operation may as likely—or more likely—be adverse to the community's interest as to the individual members' interests.¹³⁴ Procedural design that serves

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

131. 367 U.S. 886, 895 (1961) (emphasis added).

132. See *Mackey v. Montrym*, 443 U.S. 1, 17 (1979) ("Here, as in *Love*, the statute involved was enacted in aid of the Commonwealth's police function for the purpose of protecting the safety of its people."); *Dixon v. Love*, 431 U.S. 105, 114 (1977) ("Far more substantial than the administrative burden [in drivers' license suspension proceedings], however, is the important public interest in safety on the roads and highways, and in the prompt removal of a safety hazard.").

133. See, e.g., *Connecticut v. Doe*, 501 U.S. 1, 16 (1991) (criticizing a state's prejudgment attachment procedure that did not include notice). "[T]he State cannot seriously plead additional financial or administrative burdens involving predeprivation hearings when it already claims to provide an immediate post deprivation hearing." *Id.* at 16; see also *McCarthy v. Madigan*, 503 U.S. 140, 155 (1992) ("[T]he Bureau [of Prisons] has a substantial interest in encouraging internal resolution of grievances and in preventing the undermining of its authority by unnecessary resort by prisoners to the federal courts."). The Court found, however, that this interest did not outweigh the failure to render medical care. See *id.* at 149, 155. The process for driver's license suspension for failure to take a breath-analysis test was upheld because it assisted the state in criminal proceedings. See *Mackey*, 443 U.S. at 18; see also *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970) (holding that there is a greater interest in protecting the individual's right to assistance in criminal proceedings than in the protection of public funds and, therefore, due process requires that an individual be given an adequate hearing before any welfare benefits are terminated). See generally *Bell v. Burson*, 402 U.S. 535 (1971).

134. See *Sheppard*, *supra* note 52, at 987 (observing two overarching limits on

the institutional interests does not necessarily serve community interests.

United States v. James Daniel Good Real Property provides a good example of a situation in which the government's interest is not the same as the community's interest.¹³⁵ The case involved the need for pre-seizure process in a drug case.¹³⁶ The Court recognized that the enforcement authorities had an interest in *ex parte* seizure,¹³⁷ but concluded that those interests were not strong enough in the law enforcement context to justify such procedures for real property.¹³⁸ Clearly, drug law enforcement is very much in the community's interest. The community is, of course, also aligned with effective law enforcement. However, unlike the law enforcement officials, the community loses a good deal from having property tied up. The community interest, as well as the individual interest, supports great care in seizing property. Thus, both interests generally move the inquiry in the direction of greater attention to procedural integrity.

In *Lassiter v. Department of Social Services*, the Court had difficulty determining the difference between the community's interest and the "state" or governmental interest.¹³⁹ The Court recognized that care in taking a child from his or her mother was in the interest of the mother and the community,¹⁴⁰ but found the government's administrative costs and the "State's pecuniary interest . . . hardly significant enough to overcome" such important private interests.¹⁴¹ Yet the Court had not fully recognized the interests other than those of the individuals and the government.¹⁴² If it had, the "calculus" would have

assertions of governmental interest: "The interest may not impermissibly infringe on protected individual rights, and the interest asserted by one organ of government may not exceed the scope of that organ's authority.").

135. See *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53-56 (1993) (deciding that the individual's interest—his right to maintain control over his home and to be free from governmental interference—is at odds with the government's right to seizure of the individual's goods).

136. See *id.* at 46-47.

137. See *id.* at 52.

138. See *id.* at 57 (holding that personal property, unlike real property, could be removed to avoid seizure, and that prior seizure was unnecessary to preserve the court's jurisdiction over real property).

139. 452 U.S. 18, 24-25 (1981) ("Applying the Due Process Clause is . . . an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.").

140. See *id.* at 27.

141. See *id.* at 28.

142. See *id.* at 31 (balancing only the individual's and the parent's interests against those of the "State").

been much more complicated. Although the community has a strong interest in caring for children, it has a similar interest in protecting the family. Again, in a sense, although both the individual's and the community's interests were adverse to the administrative interest, the community interest also supported effective administration. Moreover, the community interest was aligned with both the child's individual interest and that of the mother. In short, a simplistic balance of the state's interests against the interests of selected individuals hardly captures the case's intricacies.

A major source of confusion is the fact that the governmental institutions are left to assert and implement the community's interests. In the wider sense, procedural design cannot be insensitive to the operation of government. Indeed, concern for governmental operation may be a constitutional imperative. This concern, however, is relevant to procedural design only to assure that government properly serves the community interest entrusted to the government and not as it serves the government institution as such.

B. Coordinating Community Interest and Individual Interest

The enterprise of building a procedural design system demands that what has been expressed as the "government's interest" encompasses the full extent of the interests of society. Hence, there has been a shift to the term "community interest."¹⁴³ From this step, the analysis moves to a rejection of the perception that individual interests and societal or community interests can best be treated as adverse.¹⁴⁴ This step rejects the instinct to set the community against the individual as required by the balancing strategy currently used in the application of *Mathews*.¹⁴⁵ These interests, as they affect the resolution of procedural questions, are interrelated. To set them against each other is artificial and ultimately endangers the full realization of both.

The Court often understands the commonality of community and individual interests in the procedural context. *Zinermon v. Burch* provides one prominent example of

143. See Aleinikoff, *supra* note 1, at 981 ("The individual interest in communicating one's ideas to others may also be stated as a societal interest in a diverse marketplace of ideas.").

144. See *id.* ("Balancing opinions typically pit individual against governmental interests.").

145. See *id.* at 982-83.

procedural evaluation promoting both categories of interests.¹⁴⁶ Burch was taken to a private mental hospital after he "was found wandering along a Florida highway, appearing to be hurt and disoriented."¹⁴⁷ The Court analyzed the problem without *Mathews* balancing. Instead, the Court looked to Burch's interests and the community's effort to help.¹⁴⁸ The community wanted to help citizens in conditions such as Burch's, and Burch himself truly needed help. Both had an overarching interest in protecting Burch's rights and assuring that Burch was correctly treated.¹⁴⁹ Indeed, ultimately, the Court needed to do no more than cause resort to procedures already available.¹⁵⁰ Although balancing seems strange in the context of this case, Justice O'Connor criticized the Court for undermining the *Mathews* analysis.¹⁵¹ At base, the individual's interests and the community's interests were not adverse. Balancing of these nonadverse interests simply could not advance the analysis of whether the process used carried forward either's interest.

146. 494 U.S. 113, 137 (1990) (suggesting it is necessary to consider the state and individual interests as common interests; the state and individual's interest here were not at odds with one another in that both wanted to limit the power to admit patients).

147. *Id.* at 118.

148. *See id.* To some extent, the Court arrived at this analytical method via a rather abstract discussion of the application of the *Parratt* line of cases, *see id.* at 128-29, in which the Court held that negligent or unauthorized acts cannot be subjected to the hearing requirements. *See Daniels v. Williams*, 474 U.S. 327, 328 (1986) (finding that the Due Process Clause is not implicated by a state official's negligence, which causes harm to or destruction of life, liberty or property); *Hudson v. Palmer*, 468 U.S. 517, 533 (1984) (holding that the rule in *Parratt* regarding an employee's negligent deprivation of property also applies to intentional deprivation of property); *Parratt v. Taylor*, 451 U.S. 527, 543-44 (1981) (concluding that the individual's loss could have been compensated by following state procedure and, therefore, the established state procedures did look to the individual's and the community's interests).

149. *See Burch*, 494 U.S. at 122-23, 125.

150. *See id.* at 137-38.

151. *See id.* at 144, 147-48 (O'Connor, J., dissenting) ("Each of the Court's distinctions abandons an essential element of the *Parratt* and *Hudson* doctrines, and together they disavow those cases' central insights and holdings."). Yet Justice Powell distinguished *Parratt*:

Thus, *Parratt* is not an exception to the *Mathews* balancing test, but rather an application of that test to the unusual case in which one of the variables in the *Mathews* equation—the value of predeprivation safeguards—is negligible in preventing the kind of deprivation at issue. Therefore, no matter how significant the private interest at stake and the risk of its erroneous deprivation, the State cannot be required constitutionally to do the impossible by providing predeprivation process.

Id. at 129 (citation omitted). Implicitly, at least, the Court differentiated the case before it in *Mathews* terms because it found that additional procedures were neither impossible nor valueless, *see id.* at 137-38, and that the individual and community interests were extremely compelling. *See id.* at 131.

In *Cruzan v. Director, Missouri Department of Health*, the Court again coordinated, rather than traded off, these two interest categories in upholding the clear and convincing evidence test.¹⁵² In *Cruzan*, the Missouri Supreme Court had ruled that life support could not be terminated without either a living will or clear and convincing evidence of the patient's wishes.¹⁵³ The stricter evidentiary standard was justified, the Court said, because of the decision's importance for both the individual and the community.¹⁵⁴ "We think it self-evident that the interests at stake in the instant proceedings are more substantial, both on an individual and societal level, than those involved in a run-of-the-mine civil dispute."¹⁵⁵ Thus, the community's interests and those of its individual members supported each other and increased the significance of the procedural design.

Procedural designers cannot proceed legitimately without careful attention to the interests of the whole community. In a developed society, the community cannot be said to gain other than through its individual members, and its individual members cannot be said to gain other than through the community. Nothing demonstrates this fact more clearly than the context in which most of the procedural due process cases arise—administration of programs the community establishes to benefit the very group of individuals served by the procedural design. In this context, a procedural design cannot logically favor the community at the expense of these individuals; such an assertion is a non sequitur.

There are, of course, conflicts among interests. For example, some individuals within the community are no doubt adverse to each other. The community interest equals the sum of the individual interests and thus, optimizing the community interest, necessarily involves the trade-off among the interests of individual community members. Distributions within the community raise society's most difficult and controversial questions. How process resources are distributed is a derivative of these questions. The community's procedures determine how it will mediate the conflicts among its members, but it is not truly

152. 497 U.S. 261, 286-87 (1990). The Court in *FDIC v. Mallen* found that both the community and the individual had an interest in assuring that the government does not act in haste. See *FDIC v. Mallen*, 486 U.S. 230, 243 (1988).

153. See *Cruzan*, 497 U.S. at 284.

154. See *id.* at 277-78, 280-81 (holding that an issue of "such magnitude and importance" justifies Missouri's requirement of showing clear and convincing evidence).

155. *Id.* at 283.

adverse to any of those members. The community, however, seeks resolutions that are best for it, and individuals seek resolutions that are best for them. From the community's perspective, the trade-offs among individuals are a zero sum game in which the community seeks the optimal solution among all its members.

Indeed, due process controversies are often explicitly between dueling individual interests.¹⁵⁶ One straightforward example of this reality can be found in *Brock v. Roadway Express, Inc.*¹⁵⁷ The Secretary of Labor's procedures under Section 405 of the Surface Transportation Assistance Act of 1982, forbidding retaliatory discharge of employees, were challenged by a trucking company as violating procedural due process.¹⁵⁸ The Company alleged that the employee had intentionally damaged a truck, but the employee contended that he was discharged in retaliation for having previously complained about safety violations.¹⁵⁹ The Court recognized the community's interest in "promoting highway safety and protecting employees from retaliatory discharge."¹⁶⁰ Both of these interests compel the correct decision and do not necessarily place the community on the side of the employer or the employee. The Court considered the private interests in tandem: "[T]he employee's substantial interest in retaining his job must be considered *along with* the employer's interest in determining the constitutional adequacy of the § 405 procedures."¹⁶¹ Like the community's interest, the

156. Properly characterized in this regard, due process controversies are often between competing individual interests in which the government's interest is in resolving the dispute. For example, in *Connecticut v. Doeher*, 501 U.S. 1 (1991), the Court applied the *Mathews* test in evaluating whether Connecticut's prejudgment attachment procedure complied with due process. The Court substituted the plaintiff's interest for the government's interest in the traditional *Mathews* test, but separated that consideration from "any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections." *Id.* at 11. The Court ultimately decided that the plaintiff's interests were minimal and that the government's interest did not affect the balance in favor of property owners. *See id.* at 16 ("Here the plaintiff's interest is *de minimis*. Moreover, the State cannot seriously plead additional financial or administrative burdens involving predeprivation hearings when it already claims to provide an immediate post deprivation hearing."). *But cf.* *Whisman v. Rinehart*, 119 F.3d 1303, 1310 (8th Cir. 1997) (finding that the facts did not support a conclusion that a mother had abused her child). In such a case, it is important to note that a court's so finding does not mean that a parent's rights are superior to the child's protection. As the *Whisman* court explained, "This does not appear to be a case of balancing the parent's liberty interest against the state's interest in protecting the child." *Id.*

157. 481 U.S. 252 (1987).

158. *See id.* at 255.

159. *See id.* at 255-56.

160. *Id.* at 262.

161. *Id.* at 263 (emphasis added).

individual's interests involved safety, employee rights, and adequate procedures. The community interest was on both sides, and the community had an interest in the optimum resolution of the conflict.

Focus on the community's interest avoids questions concerning which individual rights should be counted.¹⁶² For example, in *Heller v. Doe*, the patients challenged the procedures that allowed family and guardians to intervene in involuntary commitment proceedings.¹⁶³ Ironically, the patients wanted the system to rely on the state's own experts.¹⁶⁴ The Court found that accurate commitment decisions were in the individual's interest as well as the state's.¹⁶⁵ Assuming that more information is better than less, the Court found that intervention by family and guardians, though necessarily biased in favor of commitment, increased accuracy.¹⁶⁶ That is, the Court concluded that the community's interest in reaching the correct commitment decision incorporated, in the long run, the patient's and family's interests. This approach at least avoids a determination that either the patient's or the family's interest is more important. The community interest is thus an expression of the individual's interest.

Still, the community and its individual members do come in conflict at various points. In a procedural design context, even these conflicts do not move the inquiry in different directions, but rather affect the final "weight" of the procedural imperative. The weighing of the individual interests and community interests still creates a combined value rather than shifting the procedural design toward one or the other. In this regard, while the two are not in direct conflict, their different values force an adjustment in the procedural design commensurate with the sensitivity to the combined weight of the two interests. That is, the general community interests may differ from those of a particular individual member, but the conflict translates, in the procedural context, into more concern for a procedural design coordinated to serve those two major categories of interest.

162. See Aleinikoff, *supra* note 1, at 978 ("Even if a balancer has properly identified the relevant interests and has an objective scale for their valuation, there is still the problem of *which* holders of the relevant interests should be counted.").

163. *Heller v. Doe*, 509 U.S. 312, 315 (1993).

164. See *id.* at 330 (noting the patients' concern that allowing "guardians and immediate family members" to participate in the commitment decision would "skew[] the balance' against the retarded individual").

165. See *id.* at 332-33.

166. See *id.*

In coordinating the individual interest with the community interest, it must be understood that the individual's interests change in kind when the perspective changes from *ex ante* to *ex post*. Once an individual has made a special claim on the community, his or her interests and those of the community may be seen as adverse. *Ex post*, the community's interest may appear to conflict with those of a particular member;¹⁶⁷ whereas *ex ante* the community's interest had been the same as the individual's.¹⁶⁸ For example, when a potential grant applicant is interested in the efficient operation of the grant-giving process, a conflict is created only after the applicant has failed to qualify through that process. Indeed, it is often true that the particular individual's interest is intertwined with the particular community interest with which the individual is in conflict. An individual driver, for example, is more interested as a driver in preventing a DUI than is the community in general. Or, although the community has only a generalized desire to promote the arts, a potential grant recipient has a specific interest in the community's commitment to the arts. Although, *ex ante*, the particular individual's interest accords with the community's, the individual's interest in the program converts to adverseness *ex post*. Nonetheless, the community's interest continues to represent its individual members in both categories.

Even before the happening of the event supporting the individual's claim on the community, these specific adverse relationships cancel each other out through community dynamics.¹⁶⁹ The individual community member is in a

167. For example, pretrial detention under the Bail Reform Act significantly affects the liberty interest of arrestees, but "this right may, in circumstances where the government's interest [in preventing crime by arrestees] is sufficiently weighty, be subordinated to the greater needs of society." *United States v. Salerno*, 481 U.S. 739, 750-51 (1987).

168. In a law enforcement context, for example, the calculation involves other individuals. Expedited action against a bank officer was seen as "necessary to protect the interests of depositors and to maintain public confidence in our banking institutions." *FDIC v. Mallen*, 486 U.S. 230, 241 (1988). See also *Barry v. Barchi*, 443 U.S. 55, 64 (1979) (preserving the integrity of the sport of horse racing). The highway safety value recognized in *Dixon v. Love* accrues to all drivers, including the suspended. See *Dixon v. Love*, 431 U.S. 105, 114-15 (1977) (holding that the Illinois statute was designed to protect all drivers by keeping drivers off the roads "who are unable or unwilling to respect traffic rules and the safety of others"). Indeed, like the depositors in *Mallen*, the drivers in *Love* are the major focus of the protection afforded; the remainder of society has only an indirect interest.

169. Lawrence C. Becker, for example, observed:

In general, discussing disability issues in terms of equality is not helpful in this regard—whether it is equality of access, opportunity, life prospects, or capacities that we have in mind. Proposals to make people equal in some respect invite us to think in terms of conflict.

continuous "play" situation. Game theory provides the best objective demonstration of the value of cooperation in this situation.¹⁷⁰ It has demonstrated a natural instinct for cooperation.¹⁷¹ Indeed, this instinct for cooperation is the motivation behind community development in the first place; it is simply in the individual's interest generally to join a community, even if at the expense of some apparent individual prerogatives.¹⁷² Thus, in the larger sense, even the individual's ex post interests and the community's interests tend to dovetail as these interests are perceived in the larger context.

In *Goldberg*, Justice Brennan himself suggested an example. He offered the circumstances of a Mrs. Guzman as showing the value of formalized procedures in the Aid to Families with Dependent Children (AFDC) process.¹⁷³ Were Mrs. Guzman to leave the AFDC program, however, which is highly probable, and

....

Thinking about reciprocity, however, is helpful here. An effective norm of reciprocity resolves problems of pure conflict by seeing to it that people who are burdened by one aspect of a social relationship, policy, or transaction are benefited in return by another aspect of it. And when reciprocity is "full" or complete, meaning that the eventual return to the one who has been burdened is proportional to that person's sacrifice, then there is no net loss to anyone. . . . These coordination problems are far from simple ones, but full reciprocity takes many forms other than a direct tit-for-tat exchange.

Lawrence C. Becker, *Afterword: Disability, Strategic Action, and Reciprocity*, in ANITA SILVERS ET AL., *DISABILITY, DIFFERENCE, DISCRIMINATION: PERSPECTIVES ON JUSTICE IN BIOETHICS AND PUBLIC POLICY* 293, 298 (James P. Sterba & Rosemary Tong eds., 1998) (footnote omitted). This reciprocity strategy is both more practically operational than Pareto superiority, and more subtle, sensitive, and flexible than Kaldor-Hicks efficiency. See also JEFFRIE G. MURPHY & JULES L. COLEMAN, *THE PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE* 217 (1984) ("The difference between Pareto superiority and Kaldor-Hicks efficiency is just the difference between *actual* and *hypothetical* compensation.").

170. The "tit-for-tat" strategy is the simplest and most successful solution. See ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* at viii (1984) ("TIT FOR TAT is . . . the strategy of starting with cooperation, and thereafter doing what the other player did on the previous move."); Robert Axelrod, *The Evolution of Strategies in the Iterated Prisoner's Dilemma*, in *GENETIC ALGORITHMS AND SIMULATED ANNEALING* 32, 32-33 (Lawrence Davis ed., 1987) (stating that the highest score in a prisoner's dilemma tournament was achieved by the simplest of all the strategies employed, "TIT FOR TAT"); see also John H. Miller, *The Coevolution of Automata in the Repeated Prisoner's Dilemma*, 29 J. ECON. BEHAV. & ORG. 87, 88 (1989) (modifying the tit-for-tat experiment).

171. See Teck-Hua Ho, *Finite Automata Play Repeated Prisoner's Dilemma with Information Processing Costs*, 20 J. OF ECON. DYNAMICS AND CONTROL 173, 202 (1996) (demonstrating that even a hostile population prone to defects evolves towards cooperative behavior).

172. See Charles Koch, *Cooperative Surplus*, in *ENCYCLOPEDIA OF ETHICS* (Lawrence Becker & Charlotte Becker eds., forthcoming 2000).

173. See *Goldberg v. Kelly*, 397 U.S. 254, 256 n.2 (1970).

then attempt to return, also probable, she would face a formidable procedural apparatus not present when she first applied.¹⁷⁴ In the continuous procedural "game," which the particular societal member is most likely to play, individual interest in the procedural design tends to overlap with the interest of the community. Justice Black, in his dissent, focused on this ironic long run impact.¹⁷⁵

III. ENHANCEMENT OF THE PROCEDURAL DESIGN FACTORS

So, we return to *Mathews* and its progeny in search of coordination. From the two major interest categories, the community interests and those of its individual members, emerge several other categories of factors or "points of sensitivity." A procedural designer, judge, legislator, or official should consider each of these points of sensitivity in developing a particular procedural design. As these factors are more carefully considered, designers will be better informed as to the mix of procedural elements that best serve various procedural tasks. Experience, and whatever objective information that is, or becomes, available, might in this way be applied to particular procedural design questions.

A. Cost Factors

Cost may be seen as a factor included in the governmental program's overall "efficiency." Efficiency is the optimum allocation of scarce resources,¹⁷⁶ and procedural design should be efficient in the sense that it optimizes tangible and intangible resources, including substantive resources, rights, and societal responsibility.¹⁷⁷ Thus, the system of principles should maximize

174. Prior to *Goldberg*, the New York procedure made it easy to get on the AFDC rolls and employed nonformal procedural methods in any challenge. *See id.* at 257-59 (describing the procedures used). After *Goldberg*, more formalized procedures were required. *See id.* at 270-71 (mandating, for example, that "the decision maker should state the reasons for his determination and indicate the evidence he relied on").

175. "Since this process will usually entail a delay of several years, the inevitable result of such a constitutionally imposed burden will be that the government will not put a claimant on the rolls initially until it has made an exhaustive investigation to determine his eligibility." *Id.* at 279 (Black, J., dissenting).

176. Cf. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 725 (3d ed. 1993) (defining efficiency as the "capacity to produce desired results with a minimum expenditure of energy, time, money, or materials").

177. *See Mathews v. Eldridge*, 424 U.S. 319, 347-48 (1976) (stating that "experience with the constitutionalizing of government procedures suggests that the ultimate additional cost in terms of money and administrative burden would not be

the aggregate of all the values identified herein. But to say that due process must be efficient begs the question.

Procedures impose a variety of costs on both the individual and the community. A decision to impose procedures must take into account these costs. Unfortunately, *Mathews* focused attention on a very narrow range of costs—those associated with governmental process.¹⁷⁸ But procedures impose costs on the individuals enmeshed in them, often much more daunting to them than the government's burden is on the community.¹⁷⁹

Generally, courts are sensitive to the impact of program costs injected through procedural and administrative costs. For example, in considering the constitutionality of the fee limitation in Veteran Administration benefits proceedings, the Supreme Court concluded: "[T]his additional complexity will undoubtedly engender greater administrative costs, with the end result being that less Government money reaches its intended beneficiaries."¹⁸⁰ Justice Powell, in *Mathews*, was sensitive to these costs: "Significantly, the cost of protecting those whom the preliminary administrative process has identified as likely to be found undeserving may in the end come out of the pockets of the deserving since resources available for any particular program of social welfare are not unlimited."¹⁸¹ Thus, the Court is not only sensitive to costs, but also recognizes that costs are a concern both for the individuals directly interested in a program and the community that established the program.

Despite this sensitivity to the costs of procedural decisions, *Mathews* analysis is narrowed by its tendency to define costs in terms of "expense."¹⁸² In the three factors, Justice Powell recognized costs only in terms of "fiscal and administrative burdens."¹⁸³ Further, he asserted that "the Government's interest, and hence that of the public, in conserving scarce fiscal and

insubstantial").

178. See *id.* at 348 (stating that the need to conserve scarce fiscal and administrative resources is an important factor that may outweigh the need for additional safeguards for the individual).

179. See, e.g., *Parham v. J.R.*, 442 U.S. 584, 605 (1979) ("The *parens patriae* interest in helping parents care for the mental health of their children cannot be fulfilled if the parents are unwilling to take advantage of the opportunities because the admission process is too onerous, too embarrassing, or too contentious.").

180. *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 326 (1985). See also *Smith v. Organization of Foster Families for Equal. & Reform*, 431 U.S. 816, 851 (1977) ("[A]utomatic provision of hearings [for transfer of foster children] . . . would impose a substantial additional administrative burden on the State.").

181. *Mathews*, 424 U.S. at 348 (citation omitted).

182. See *id.* at 347.

183. See *id.* at 335.

administrative resources is a factor that must be weighed.¹⁸⁴ This formulation focuses on a much too narrow understanding of the costs of procedural moves. Perhaps for this reason, cost calculations have not been a very compelling reason to curtail individual process. For example, in *Goldberg*, Justice Brennan asserted: "While the problem of additional expense must be kept in mind, it does not justify denying a hearing meeting the ordinary standards of due process."¹⁸⁵

The cost factor cannot be limited to monetary allocations. Indeed, such costs are often the least important. For example, in *Smith v. Organization of Foster Families For Equality & Reform*, the lower court had required a hearing before a child could be removed from a foster home at either the request of the foster parent or over the foster parent's objection.¹⁸⁶ The cost here is that if foster parents must engage in extensive procedures to extricate themselves from the program, many fewer persons will agree to serve as foster parents, creating an even greater shortage. In short, the costs are both tangible and intangible and are of significant concern to both the community and the individual members directly affected by the governmental activity.

A proper cost factor must focus on "opportunity costs"—what is given up in order to make a particular procedural move.¹⁸⁷ Opportunity costs are imposed on both the community and its members. The opportunity costs of alternative procedures may be converted into substantive costs. Both the community and its members face compelling opportunity costs in terms of diverting energy and funds from the programs' objectives to bureaucrats and lawyers. Because the individuals directly affected by the program are in fact affected more directly than the community, procedural design must allocate resources so as to be particularly sensitive to both tangible and intangible costs as well as possible redistribution from a substantive goal of a program to procedural devices.

184. *Id.* at 348.

185. *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970) (quoting *Kelly v. Wyman*, 294 F. Supp. 893, 901 (S.D.N.Y. 1968), *aff'd sub nom. Goldberg v. Kelly*, 397 U.S. 254 (1970)). See also *Bell v. Burson*, 402 U.S. 535, 541 (1971) (holding that "the state may not, consistently with due process, eliminate consideration of . . . [liability] in its prior hearing").

186. 431 U.S. 816, 850-51 (1977) (holding that the District Court's requirement that there be an automatic hearing should not be upheld because it would "impose a substantial additional administrative burden on the State").

187. See ALLAN DESERPA, MICROECONOMIC THEORY: ISSUES AND APPLICATIONS 8 (1985) (defining opportunity cost "as the value of a foregone alternative, usually the 'next best' alternative").

Cost also includes the risk of error. Easterbrook, for example, asserted: "The goal of due process is to hold as low as possible the sum of two costs: the costs created by erroneous decisions, including false positives and false negatives, and the cost of administering the procedures."¹⁸⁸ The cost of error in procedural design itself is difficult for a thoughtful court. In lieu of objective information, the system tends to bias procedural design in favor of the most extensive procedure feasible, whether proven useful or not. Recognizing the problem, the Court often assures that this instinct for unsupportable formalism does not act to the detriment of the other factors.¹⁸⁹

In the absence of better information, the question is often handled as one of allocating the risk of error. For example, in a case involving commitment procedures for the mentally ill, the Court concluded: "The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state."¹⁹⁰ In order to properly express this cost redistribution, the Court required more than a preponderance of evidence to commit the mentally ill.¹⁹¹ In tempering its holding, the Court observed that an individual, as well as the community, may be harmed by the incorrect denial of institutionalization.¹⁹² Procedural designers must make careful judgments about allocating potential error costs among the various interests.¹⁹³ Again the procedural questions seep over into substantive ones, making sensitivity to cost allocation even more compelling.

Each group of procedural designers must engage in sophisticated cost calculations if their procedural judgments are to avoid injury to both the community interests and those of its members. Because a cost calculation must extend well beyond administrative costs, courts must be inclusive and flexible in

188. Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 110 (Philip B. Kurland et al. eds., 1983).

189. *But see* Bishop v. Wood, 426 U.S. 341, 349 (1976) (arguing that to consider the truth or falsity of a government employer's reasons for discharging an employee to determine the validity of a due process claim "would enable every discharged employee to assert a constitutional claim merely by alleging that his former supervisor made a mistake").

190. *Addington v. Texas*, 441 U.S. 418, 427 (1979).

191. *See id.* at 431 (concluding that a standard between a preponderance and a reasonable doubt was appropriate).

192. *See id.* at 429 ("It cannot be said . . . that it is much better for a mentally ill person to 'go free' than for a mentally normal person to be committed.").

193. *See* Easterbrook, *supra* note 188, at 110 ("If the goal of the *Eldridge* formula is the maximization of society's wealth, why did the legislature not enact the preferable procedures in the first place?").

weighing procedural costs. Justification for procedural moves that impose costs may ultimately be satisfied by reference to the combined value of the decision to the community and to relevant individual members. These costs must, however, to the extent possible, be inventoried and assigned some value.

B. Effectiveness

Effectiveness is, of course, a crucial aspect of procedural design. The community and its individual members are united in their concern for effectiveness. *Barry v. Barchi*, for example, involved the suspension of a horse trainer whose horse tested positive for drugs after it finished second in a race.¹⁹⁴ The Court conceded a "most acute" community interest in "preserving the integrity of the sport and in protecting the public,"¹⁹⁵ an interest obviously shared by the horse trainers as well. As to the issue at hand, delay in resolving the trainer's suspension, the Court observed: "[I]t would seem as much in the State's interest as Barchi's to have an early and reliable determination with respect to the integrity of those participating in state-supervised horse racing."¹⁹⁶

Mathews analysis mandates attention to the advantages anticipated from alternative procedures,¹⁹⁷ and procedural judgments often depend on the perceived impact of a procedural move.¹⁹⁸ Judgments about effectiveness, however, are difficult. Objective study of procedures is wholly insufficient to support most procedural judgments. The contribution of a particular

194. 443 U.S. 55, 59 (1979).

195. *Id.* at 65.

196. *Id.* at 66 (finding that the absence of a specified time period in the statute between the trainer's suspension and post-suspension hearing violated the Due Process Clause of the Fourteenth Amendment).

197. See *Mathews v. Eldridge*, 424 U.S. 319, 343 ("An additional factor to be considered here is the fairness and reliability of the existing pretermination procedures, and the probable value, if any, of additional procedural safeguards.").

198. See *Board of Curators v. Horowitz*, 435 U.S. 78, 90 (1978) (declining to enlarge the judicial presence in academia after determining that a hearing was not likely to improve accuracy in an academic decision); *Smith v. Organization of Foster Families for Equal. & Reform*, 431 U.S. 816, 851 (1977) (refusing to add procedures to the decisionmaking process of transferring a foster child and observing that "the natural parent can generally add little to the accuracy of factfinding concerning the wisdom of such a transfer"); see also *Ake v. Oklahoma*, 470 U.S. 68, 79 (1985) (requiring the state to supply a psychiatrist). On the other hand, in the Social Security recoupment context, an oral hearing was found to be worth the cost where the absence of fault would justify a waiver of repayment liability. See *Califano v. Yamasaki*, 442 U.S. 682, 697 (1979) ("Evaluating fault . . . usually requires an assessment of the recipient's credibility, and written submissions are a particularly inappropriate way to distinguish a genuine hard luck story from a fabricated tall tale.") (citation omitted).

procedural device to effectiveness has proven difficult to measure.¹⁹⁹ For this reason, *Mathews* analysis tends to tail off into a vacuum. Under current learning about the efficacy of particular procedural designs, procedural designers must rely on a mix of experience, personal judgment, and theoretical claims.²⁰⁰ Only in the rarest case might these judgments be informed by scientific analysis. Because support for objective analysis is inadequate, the discussion here explores evaluation techniques that might serve in the absence of sufficient empirical information about the value of certain procedures.

1. *Measuring Effectiveness.* Accuracy would seem to be an obvious effectiveness measure.²⁰¹ Accuracy, however, proves to be a slippery value. For one thing, objective measure of the accuracy-generating powers of a given procedural element is illusive.²⁰² Nonetheless, procedural designers must be sensitive to at least the goal of accuracy.²⁰³

Accuracy at the first level of analysis is a shared value. In the proper context, it recognizes the relationship between the individual's interest and the interest of society. The Court

199. See Michael J. Saks, *Enhancing and Restraining Accuracy in Adjudication*, 51 LAW & CONTEMP. PROBS. 243, 268-71 (1988) (discussing evidentiary values in light of the questionable value of different types of evidence).

200. See, e.g., *Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex*, 442 U.S. 1, 14 (1979) (relying on a study for the proposition that "[t]he requirement of a [formal] hearing . . . would provide at best a negligible decrease in the risk of error").

201. See, e.g., *McKenzie v. City of Chicago*, 118 F.3d 552, 558 (7th Cir. 1997) ("Achieving an acceptable error rate is an important element of the due process calculus under *Mathews* . . .").

202. JERRY MASHAW ET AL., *SOCIAL SECURITY HEARINGS AND APPEALS* xx (1978) ("Investigation of the accuracy of the [agency's] hearing . . . leads very quickly to the realization that there is no accepted standard for evaluating accuracy.").

203. For example, the Court in *Lassiter v. Department of Social Services* based its judgment on the value of the adversarial process in general, and the value of counsel on supposition. See 452 U.S. 18, 28 (1981) ("[O]ur adversary system presupposes[that] accurate and just results are most likely to be obtained through the equal contest of opposed interests . . ."). Indeed, the Court expressly recognized that empirical research did not demonstrate that representation increased accuracy. See *id.* at 29 n.5.

Similarly, the *Heller v. Doe* opinion flounders on the absence of empirical data regarding procedural efficacy. See 509 U.S. 312, 329 (1993) (wrestling with the issue of whether relatives and guardians should participate in an involuntary commitment proceeding). The patients contended that the interest of family members was adverse to that of the patients and preferred to rely on the state's determination, without the intervention of relatives. See *id.* at 330. The Court relied on the assumption that information from relatives would increase accuracy. See *id.* at 331. This assumption was challenged by the patients' representative, who contended that the relatives' participation would "skew[] the balance" against the patients. *Id.* at 330.

recognized the individual's interest in accuracy in *Heller v. Doe*: "At least to the extent protected by the Due Process Clause, the interest of a person subject to governmental action is in the accurate determination of the matters before the court, not in a result more favorable to him."²⁰⁴ In resolving the due process requirements for terminating a mother's rights in *Lassiter*, the Court observed that the community "has an urgent interest in the welfare of the child, [and that] it shares the parent's interest in an accurate and just decision."²⁰⁵ The Court summarized the interaction of the mother's interest and the community's interest: "[T]he parent's interest is an extremely important one . . . [and] the State shares with the parent an interest in a correct decision"²⁰⁶ The state provides effective procedures for the benefit of both the mother and the child, and the community benefits as much or more from the correct resolution of this dispute.²⁰⁷

Although ideally it would seem that both the community and the individual have an interest in accuracy, the individual's interest in accuracy cannot be calculated in the same way as that of the community. As observed above, sorting out the individual's interest to answer the systemic questions of procedural design depends on whether the individual is in an *ex post* or *ex ante* position. Indeed, it must be recognized that the last thing some individuals desire is an accurate decision because an accurate decision will actually deny them what they seek. Still, while *ex post* an individual may wish for an inaccurate decision in his or her favor, individual members are generally served by accurate decisions in the long run.²⁰⁸

The community always seeks an accurate decision because only a correct decision can accomplish its program's goals.²⁰⁹ Here, however, the government interest may deviate from the

204. *Id.* at 332.

205. 452 U.S. at 27.

206. *Id.* at 31.

207. See *Parham v. J.R.*, 442 U.S. 584, 605 (1979) ("The *parens patriae* interest in helping parents care for the mental health of their children cannot be fulfilled if the parents are unwilling to take advantage of the opportunities because the admission process is too onerous, too embarrassing, or too contentious.").

208. Refer to notes 167-72 *supra* and accompanying text.

209. See *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 18 (1978) ("Quite apart from its duty as a public service company, a utility [a quasi-governmental entity]—in its own business interests—may be expected to make all reasonable efforts to minimize billing errors and the resulting customer dissatisfaction and possible injury."); *Bell v. Burson*, 402 U.S. 535, 540 (1971) (refusing to require an individual to post security against a future judgment where there was no reasonable possibility of such a judgment being rendered).

community's interest. Governmental institutions, just as the individual, may not always benefit from an accurate decision. But in broad, systemic terms, the community interest is best served by a firm accuracy goal.²¹⁰

Still, a simple notion of accuracy cannot suffice as the sole measure of effectiveness in our legal culture.²¹¹ Studies suggest that the choice of procedure is a choice between types of inaccuracy and hence, to some extent, this choice converts the effectiveness consideration into a question of social policy.²¹² Saks's empirical analysis suggests that procedures are in fact often intended to create inaccuracy, and notes examples of law's "steps at restraining accuracy by actively pursuing inaccuracy."²¹³ He observes that Thibaut and Walker, in a well-accepted empirical study, found that the adversarial process and its rival from the continental system affected the facts presented to fact finders.²¹⁴ They demonstrated that the "inquisitorial" process used on the continent has disadvantages in confronting sampling error.²¹⁵ "However, this study has identified a major, and heretofore unsuspected, effect of adversary decisionmaking: the model introduces a systematic evidentiary bias in favor of the party disadvantaged by the discovered facts."²¹⁶ That is, the adversarial process creates an incorrect view of the information balance where the weight of the evidence clearly rests on one side of the controversy.²¹⁷ On the other hand, another process may create other accuracy bias as does the "inquisitorial" model. The fundamental procedural

210. See, e.g., *Stuart v. United States*, 109 F.3d 1380, 1385 (9th Cir. 1997) (finding a low risk of error in the administrative procedure for the cancellation of an installment land contract because the Bureau of Indian Affairs had provided a detailed paper record and a right to appeal prior to canceling a land sale).

211. In suggesting reasons why "the law does not pursue a policy of continual enhancement of the factfinding process[.]" Michael Saks offered, among others, "that accuracy is not everything, and that reliable and valid factfinding has merely been trumped by other legitimate values that the law is pursuing." Saks, *supra* note 199, at 272.

212. See *id.* at 271-73.

213. *Id.* at 270 ("Every time the law rejects information that would enhance factfinding it is at some level choosing to reduce the likelihood of an accurate result.").

214. See JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* 39-40 (1975).

215. See Saks, *supra* note 199, at 270 (citing THIBAUT & WALKER, *supra* note 214, at 39) (observing that the inquisitorial model does not compensate for the possibility of incongruence between the evidence presented and evidence available).

216. THIBAUT & WALKER, *supra* note 214, at 40.

217. As discussed below, however, this study established that the adversarial model increased satisfaction. See *id.* at 77, 79-80 (controlling for background and cultural differences).

choice is actually based on the "brand" of inaccuracy preferred in the legal culture. In general, our procedural design system is committed to the adversarial process because it focuses on the quality rather than the quantity of the evidence.

The community's choice of this procedural model implies a commitment to a targeted accuracy. Procedural designers might choose another "brand" of accuracy, but they should be conscious that this alternate sense of accuracy might be criticized as contrary to the community's choice.²¹⁸ Thus, even in the absence of sound information about the actual accuracy contribution of a procedural move, a procedural designer might evaluate that move as to consistency with the sense of accuracy implied by the particular community project.

2. *Filling the Gap in the Absence of Concrete Information About Effectiveness.* Because objective information about a procedure's effectiveness is generally unavailable, procedural design at this point must look to surrogates. In lieu of better data on effectiveness, procedural designers often resort to assumptions based on personal judgment and perceived consistency with our legal culture. This experience, whether personal or institutional, grounds these assumptions on something like empirical information. As discussed below, tradition, as an expression of this experience, provides "data" about the value of certain procedural moves and this data is legitimately part of the effectiveness evaluation. Individual or anecdotal information may have considerable value in guiding procedural design.²¹⁹

Unfortunately, supporting assumptions are often neither self evident nor sufficiently tested. For example, in *Goldberg*, Justice Brennan found that the opportunity for written submission by welfare recipients was "an unrealistic option."²²⁰ Yet he relied on no objective support.²²¹ It seems equally likely that oral

218. See, e.g., *Medina v. California*, 505 U.S. 437, 451 (1992) ("The Due Process Clause does not . . . require a State to adopt one procedure over another on the basis that it may produce results more favorable to the accused.").

219. See, e.g., *Friendly*, *supra* note 3, at 1274, 1276 (recognizing the sentiment of the court's desire for a full airing of the facts, cross examination of witnesses, and the import of a judicial outcome when requiring a hearing).

220. *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970). Other courts have made similar assertions. See, e.g., *Gray Panthers v. Schweiker*, 652 F.2d 146, 159 (D.C. Cir. 1980) (recognizing the policy reasons behind a hearing requirement and finding serious procedural deficiencies in the current process that could be alleviated by the provision of an oral hearing).

221. See *Goldberg*, 397 U.S. at 268-69 (basing conclusory statements on assumptions that welfare recipients are uneducated, poor writers).

presentation will be difficult for otherwise disadvantaged community members and that the opportunity for written submissions will make assistance easier and the process more congenial.²²²

Many of our legal culture's assumptions are, in fact, challenged by some of the empirical work that exists. One fundamental assumption in our system, for example, is that the decisionmaker who views a witness is the best judge of credibility.²²³ Yet research suggests that, in fact, decisionmakers actually do a better job of judging credibility through an evaluation of written memorialization.²²⁴ Similarly, research shows that even lay decisionmakers are capable of distinguishing reliable hearsay from unreliable hearsay.²²⁵ Although the structural combination of decisionmaking within an interested institution is generally contrary to our legal culture,²²⁶ a study suggested that federal presiding officials feel no greater threat to

222. Justice Brennan's findings in this regard are somewhat curious on their face. After observing that "[w]ritten submissions are an unrealistic option for most recipients," *Goldberg*, 397 U.S. at 269, Justice Brennan goes on somewhat inconsistently to assert: "Moreover, written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important." *Id.* Are rhetorical devices more valuable to welfare recipients than the opportunity to prepare written statements in a familiar environment with the possible assistance of nonprofessionals?

223. See, e.g., *Gray Panthers*, 652 F.2d at 161 ("Most often mentioned by the courts is the notion that an oral hearing provides a way to ensure accuracy when facts are in dispute, especially if credibility is an issue.").

224. See Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1087-88 (1991) ("The assumption that nonverbal channels are more important in the communication of deception than the verbal cues is simply not true."); see also Margaret A. Lareau & Howard R. Sacks, *Assessing Credibility in Labor Arbitration*, 5 LAB. LAW. 151, 155-56 (1989) ("Thus, at least some traditional notions about the relationship between witness demeanor and witness credibility are simply not so.").

225. See Margaret Bull Kovera et al., *Jurors' Perceptions of Eyewitness and Hearsay Evidence*, 76 MINN. L. REV. 703, 704 (1992) ("Proponents of reform argue 'that it is better to admit flawed testimony for what it is worth, giving the opponent a chance to expose its defects, than to take the chance of a miscarriage of justice because the trier is deprived of information.' . . . This study suggests that jurors are, in fact, skeptical of hearsay evidence and capable of differentiating between accurate and inaccurate hearsay testimony.") (footnote omitted).

226. Compare Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 30-31 (1984) (questioning the propriety of immigration judges' being subject to the influence of the INS's "political leadership"), and Friendly, *supra* note 3, at 1279 ("Instead of the *Goldberg* formulation permitting a welfare official (even with some involvement in the very case) to act as decisionmaker[,] . . . there is wisdom in recognizing that the further the tribunal is removed from the agency and thus from any suspicion of bias, the less may be the need for other procedural safeguards."), with *Schweiker v. McClure*, 456 U.S. 188, 195-97 (1982) (finding a presumption of no bias, despite a lack of structural separation, and that any bias must be proved directly).

their independence when housed in the agency than when "protected" from the agency through administrative law judge status.²²⁷

Absent empirical information, the second best solution might be the consideration of how procedures should carry out their functions, rather than relying on personal bias and unsupported assumptions. Fortunately, some very insightful conceptual analysis is available. Legal theorists offer some valuable guidance that might serve in lieu of objective information about the procedural moves and that might guide incorporation of whatever empirical information is or will become available.

Fuller offered an indirect method for evaluating procedural effectiveness: mode of participation.²²⁸ Evaluation of due process might begin with the "norms" of participation. These norms give adjudication its moral force as against other processes.²²⁹ Eisenberg focused the search for participation norms on the reaction of the decisionmaker.²³⁰ He suggested three valuable norms:

The adjudicator should *attend* to what the parties have to say.

The adjudicator should *explain* his decision in a manner that provides a substantive reply to what the parties have to say.

The decision should be *strongly responsive* to the parties' proofs and arguments in the sense that it should proceed from and be congruent with those proofs and arguments.²³¹

Indeed, responsiveness to proof and argument distinguishes adjudication from other types of governmental decisionmaking processes.

227. See Charles H. Koch, Jr., *Administrative Presiding Officials Today*, 46 ADMIN. L. REV. 271, 277-80 (1994) (citing a survey of federal adjudicators' opinions about the challenges to their independence).

228. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 364-65 (1978) ("This whole analysis will derive from one simple proposition, namely, that the distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision . . .").

229. See Melvin Aron Eisenberg, *Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller*, 92 HARV. L. REV. 410, 430 (1978) (noting that once the relevant legal principles are established, the parties are better situated to negotiate to a binding decision in spite of any prior incorrect premise concerning legal obligations).

230. See *id.* at 411-12 (advocating that the norms of participation are proactive obligations of the adjudicator).

231. *Id.*

What norm of responsiveness might guide evaluation of the effectiveness? In *United States v. James Daniel Good Real Property*, the Court stated: "The purpose of an adversary hearing is to ensure the requisite neutrality that must inform all governmental decisionmaking."²³² The decisionmaker must be clearly receptive to the proof and argument generated by whatever means, however informal.²³³ A restraint on decisionmaker dominance is perceived as a significant "norm."²³⁴ Many of the processes prevent information from reaching the decisionmaker and limit the decisionmaker's range of consideration.²³⁵

Adjudication resolves individual disputes but it also develops community centered decisions. This second function is obviously of greater interest to the community than to the individual.²³⁶ Effectiveness, then, must also be measured in terms of facilitating incorporation and growth of community values. This distinction is important in terms of information the process must produce. Where the process must generate "legislative facts" in order to support the development of community interests, it should differ from its role of responsiveness to "adjudicative facts" necessary to resolve individual disputes.²³⁷ Fuller noted that adjudication has a limited capacity for "polycentric" problems.²³⁸ He offered several situations in which the process is "dealing with a situation of interacting points of influence and therefore with a polycentric problem beyond the proper limits of

232. 510 U.S. 43, 55 (1993) (criticizing ex parte preseizure proceedings).

233. See Friendly, *supra* note 3, at 1279 (arguing that the more impartial the decisionmaker, the "less procedural formality" is necessary).

234. See THIBAUT & WALKER, *supra* note 214, at 119 (suggesting litigants have a common interest in limiting the control of the decisionmaker).

235. See *id.* at 121 (recognizing that a requisite degree of disputant control over the procedure assures the parties full opportunities to present their evidence).

236. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 164 (The Foundation Press, Inc. 1994) (1958) ("The body of decisional law announced by the courts in the disposition of these [individual] problems tends always to be the initial and continues to be the underlying body of law governing the society.").

237. See Eisenberg, *supra* note 229, at 413 (recognizing that the court is generally limited and bound by the parties' proofs and not free to make an independent inquiry). Saks suggested that the law intuitively avoids totally predictable answers in order to assure that judges have sufficient numbers of "data points" so they may be informed in their lawmaking capacity. See Saks, *supra* note 199, at 274 ("If the courts have too few cases in their sample, they will not have enough exposure to social problems to provide effective guidance through wise rules; if they are overwhelmed by caseloads, they cannot give them the attention necessary to develop thoughtful law.").

238. See Fuller, *supra* note 228, at 395.

adjudication.²³⁹ Eisenberg asserted: "Adjudication is an appropriate ordering process only when decision can be reached by determining rights through the application of an authoritative standard."²⁴⁰ Adjudicative-type responsiveness is thus inappropriate for problems involving "multiple criteria" as well.²⁴¹

The participation criteria must vary according to whether the adjudication focuses more on individual dispute resolution or on the implementation of community projects. Eisenberg asserted that if the latter is dominant, then the process should be "consultative," and not strongly responsive to proof and argument.²⁴² Adjudication must, nonetheless, deal with a wide variety of disputes. In many of these disputes, it must resolve interacting controversies, and it must apply multiple criteria. In short, adjudication must develop, or at least glean, societal values. To the extent these functions are necessary to resolving the individual dispute, the individual interests are intertwined with the community interest in a dynamic social ordering. Procedural design must assure the effective accomplishment of each of these tasks.

In the absence of information about the particular procedure's value, procedural design can focus on the appropriate kind and degree of participation by the necessary individual community members.²⁴³ It can also analyze the capacity for the process to be sensitive to broader community values.²⁴⁴ In short, procedural design can match participation to the goals of the process. When Eisenberg's "responsiveness" is key, then the design should focus on individualizing participation. When, however, general values become important, design must shift to a more "consultative" process. Each of these moves, however, must always be sensitive to both the community's interests and those of its individual members. Such judgments can be guided by

239. *Id.*

240. Eisenberg, *supra* note 229, at 424.

241. *See id.* at 424-25 (stating that polycentricity involves choices that are interactive, such as choosing players for different positions on a football team; the concept of multiple criteria, in contrast, describes choices with no interaction).

242. *See id.* at 414-23 (reasoning that this path will bear more fruit for the collective community).

243. But see the value of participation in different decisionmaking models in Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 207 (1997) (valuing participation because it lends legitimacy, provides information, makes the process fairer, and forges a greater understanding and consensus about the common good).

244. An unfortunate impediment to evolving this understanding is the long-standing law that procedural due process does not apply to rulemaking which, as discussed below, prevents the courts from participating in procedural development for that form of decisionmaking. *See* 1 KOCH, *supra* note 1, at § 2.20[3].

whatever information, experience, and thinking is available. And, as more information about the value of procedural elements becomes available, these conceptual aspects of effectiveness will guide the application of that information.

C. The Nature and Extent of the Substantive Impact on the Individual

By its nature, procedure suggests a norm of substantive neutrality.²⁴⁵ A commonality is easier to accept in the procedural context because the community's goal in that context is generally some objective substantive judgment.²⁴⁶ A purely procedural move, then, should not favor a particular substantive outcome.²⁴⁷

Yet, while separating the resolution of substantive issues from the process is analytically necessary, the decision's potential impact on the individual and society must be a factor in the degree of attention paid to procedural issues. The resolution of some claims will not compel the same process as those having a more significant impact even though the individual has the same level of interest in the outcome in both circumstances. A research grant, for example, will not justify the same level of process as a disability claim, even though both are serious matters to the

245. See LEA BRILMAYER, AN INTRODUCTION TO JURISDICTION IN THE AMERICAN FEDERAL SYSTEM 250 (1986) ("This test classifies as substantive those laws which have an effect on primary conduct, on transactions and relationships apart from the courtroom setting. Those laws which affect only the conduct within the litigation are classified as procedural."). An example of this valuable method for drawing the distinction between procedure and substance is the difference between a law that sets a 30 MPH speed limit, and one that requires an appeal to be filed within 30 days. Although both involve speed, the former is substantive and the latter is procedural. This distinction works even if some difficulty remains at the margin. See generally John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 726 (1974) (arguing that procedural goals are "concerned only with the most sensible way to manage a litigation process," but substantive rules are the laws concerning deterrence and compensation).

246. See, e.g., *United States v. Moreno*, 102 F.3d 994, 998-99 (9th Cir. 1996) (concluding that "the Government has a legitimate interest in excluding evidence which is not relevant or is confusing"). However, those litigating against the government have the same interest over time. Ultimately, both individuals and the community have an interest in not having irrelevant and confusing information presented to the decisionmakers.

247. Even assuming that there are many conflicting and incommensurable conceptions of good, each compatible with the full rationality of human persons, a workable political conception of justice would mean that procedures, while not actually attaining neutrality, can at least be evaluated for absorbing the disparate substantive values, systems, conceptions or principles. See John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 PHIL. & PUB. AFF. 223, 248 (1985) (considering the way in which social unity and stability may be understood by liberalism as a political doctrine).

individual claimant. Procedural design must adjust to the impact of the substantive outcome.²⁴⁸

Goldberg focused procedural due process analysis on the extent of the substantive loss. It required an extensive, formal process—indeed, a trial-like procedure—for decisions concerning a “grievous loss.”²⁴⁹ This unfortunate formulation forced the *Mathews* Court to conclude that the claimant did not face a “grievous loss,” even though there is no useful substantive distinction between the losses in the two cases.²⁵⁰ Rather, Justice Powell, in *Mathews*, needed to win back the freedom to tailor procedural design according to a particular program’s needs.²⁵¹ A doctrine that prescribed trial-like procedures in every case involving substantial loss was quickly deemed unworkable.²⁵² Nonetheless, Powell did include the weight of the substantive question in his procedural design evaluation.²⁵³ The *magnitude* of the individual interest, while not relevant to whether it is protected by due process (which is determined by whether it falls into the category of protected interests), is reflected in procedural design.²⁵⁴

Still, while the decision has a direct impact on the individual, it is clear that the community and individual

248. As discussed below, individuals will evaluate the process by its results. See Dennis P. Stolle et al., *The Perceived Fairness of the Psychologist Trial Consultant: An Empirical Investigation*, 20 LAW & PSYCHOL. REV. 139, 165 (1996) (discussing participants’ perceptions of procedural justice).

249. “The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be ‘condemned to suffer grievous loss’” *Goldberg v. Kelly*, 397 U.S. 254, 262-63 (1970) (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).

250. Compare Justice Powell’s contention: “The potential deprivation here is generally likely to be less than in *Goldberg*, although the degree of difference can be overstated,” *Mathews v. Eldridge*, 424 U.S. 319, 341 (1976), with Justice Brennan’s dissent: “[T]he Court’s consideration that a discontinuance of disability benefits may cause the recipient to suffer only a limited deprivation is no argument,” *id.* at 350 (Brennan, J., dissenting).

251. See *id.* at 343 (“[T]here is less reason here than in *Goldberg* to depart from the ordinary principle, established by our decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action.”).

252. See Friendly, *supra* note 3, at 1299-1301.

253. See *id.* at 1301-02.

254. For example, in distinguishing *Dixon v. Love*, another driver’s license suspension case, the Court in *Mackey v. Montrym* stated:

The private interest involved here actually is less substantial, for the Massachusetts statute authorizes suspension for a maximum of only 90 days, while the Illinois scheme permitted suspension for as long as a year and even allowed for the possibility of indefinite revocation of a license.

. . . .

The duration of any potentially wrongful deprivation of a property interest is an important factor in assessing the impact of official action on the private interest involved.

443 U.S. 1, 12 (1979).

interests work in tandem.²⁵⁵ In rating individual interests, for example, Friendly observed that, "whatever the mathematics, there is a human difference between losing what one has and not getting what one wants."²⁵⁶ This is no less true for the community than for the individual. The community, like the individual, is adversely affected when one of its members loses something. Adjustments must be made in community arrangements to accommodate the loss, and, hence, the "transaction costs" impose a deadweight loss on the community.

The substantive impacts add up to increase the demand for attention to procedural design.²⁵⁷ The nature and extent of the substantive impacts affect procedural design regardless of whether that impact is identified with the community interest or the interest of the community's members.²⁵⁸ The crucial point is that the weight of the impact affects the procedural design and the weight of the community's interests and its individual members move in the same direction, if with different magnitude or velocity.²⁵⁹ What has an impact on the individual, has an impact on the community; their interests are not truly adverse.

255. Therefore:

Society has a legitimate interest in protecting a juvenile from the consequences of his criminal activity—both from potential physical injury which may be suffered when a victim fights back or a policeman attempts to make an arrest and from the downward spiral of criminal activity into which peer pressure may lead the child.

Schall v. Martin, 467 U.S. 253, 266 (1984) (upholding a New York statute authorizing pretrial detention of juveniles to prevent them from committing other crimes) (citation omitted).

256. Friendly, *supra* note 3, at 1296; *see also* Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1, 10 (1979) (discussing the "human difference" between grant of parole and revocation).

257. Friendly observed:

As we go down the [list of various types of government action] from the more severe actions to the less, the needle would point to fewer and fewer requirements on the list of required safeguards. With the probable exception of *Goldberg* itself, the Court's decisions seem to conform to this scheme.

Friendly, *supra* note 3, at 1278-79 (footnotes omitted).

258. However, the general failure to carefully articulate the "government's interest" in various substantive controversies seriously inhibits this analysis in procedural design as well. *See* Gottlieb, *supra* note 1, at 937.

259. A disproportionate substantive impact on one or the other must also shape the procedural design. For example, the Fifth Circuit found that "[w]hen public safety is an issue, liberty or property interests can be deprived even without a prior hearing." *McCormick v. Stalder*, 105 F.3d 1059, 1062 (5th Cir. 1997). A substantive value such as "public safety" could be seen as the "grievous loss" equivalent in the community interest calculation calling for special procedural design. As suggested above, however, these conflicts between ex post individual interests and community interests do not separate the interests when viewed as part of a continuous relationship in which the individual ultimately benefits from the community's

D. Community Maintenance

Community maintenance must be a factor in procedural design.²⁶⁰ At first blush, this factor might seem of no concern for the individual. However, the community's existence is important to its members. For example, a teenage mother or a permanently disabled person reaps many benefits from membership in a community that is sensitive to their needs (whether it expresses that sensitivity by active government or otherwise). The community exists to serve the individuals and the individuals reap the benefit only if the community continues to exist.²⁶¹ Thus, community maintenance is both a community and an individual value.

Indeed, the procedural design question involves the community members whose interests are protected or advanced by the relevant program and hence who stand to gain the most from being members of the *particular* community. In recognition of the individual's interest, for example, the Court found that the very reason aliens claim due process rights is to remain members of this particular community.²⁶² A breakdown in a community sensitive to an individual's special needs would be devastating for the individuals directly involved, whereas it would be a mere inconvenience for others. Ironically, then, maintenance of the particular style of community, may be *more* important to the individual than to the community itself. The community's

concern for values such as "public safety."

260. The Supreme Court has stated:

[T]he Court has allowed summary seizure of property to collect the internal revenue of the United States, to meet the needs of a national war effort, to protect against the economic disaster of a bank failure, and to protect the public from misbranded drugs and contaminated food.

. . . [P]rejudgment replevin statutes serve no such important governmental or general public interest.

Fuentes v. Shevin, 407 U.S. 67, 91-92 (1972) (footnotes omitted).

Further:

To protect government's exceedingly strong interest in financial stability in this context, we have long held that a State may employ various financial sanctions and summary remedies, such as distress sales, in order to encourage taxpayers to make timely payments prior to resolution of any dispute over the validity of the tax assessment.

McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18, 37 (1990).

261. See Becker, *supra* note 169, at 294 ("I will argue that we can resolve many conflicts about disability and distributive justice by treating them as coordination problems.").

262. See Landon v. Plasencia, 459 U.S. 21, 34 (1982) (respecting the procedural rights of a permanent resident alien who was excluded after attempting to smuggle aliens across the border).

interest is in its survival; the individual's interest is in the survival of the *particular* community that protects or serves his or her interests.²⁶³ Thus, for both the sake of the community's interests and those of individual members, procedural design must value community maintenance.

E. Acceptability

Procedural design must seek "acceptability."²⁶⁴ Acceptability is often expressed as the appearance of fairness.²⁶⁵ Although appearance should not compromise other important values, it is itself a relevant value in the due process system of principles. Acceptability is at least as important to the community as it is to the individuals, and in fact may best be characterized as an inherently community-related factor in the procedural design.

Of course, perceptions about the justice of the outcome itself affect acceptability by disinterested community members, as well as those directly affected by the decision.²⁶⁶ Hence, acceptability cannot be divorced from cost/effectiveness in procedural design. Accuracy, however, does not necessarily create acceptability. For instance, a machine that can be proven to always deliver correct determinations as to permanent disability at a very low cost, and little inconvenience to the participants, will not necessarily be accepted.²⁶⁷ Certain procedural design characteristics will

263. See Murphy, *supra* note 125, at 590. Murphy stated:

If it could be shown . . . that even the persons treated unequally will be better off under the unequal practice than they would be under a practice that eliminated the inequality, then these persons are in no obvious sense being exploited for the general welfare. Thus it is by no means clear that they experience—at least ultimately—any injustice. They are winners too, and thus they no doubt would have rationally willed such an unequal practice in a Rawlsian original position.

Id.

264. See Robert S. Summers, *Evaluating and Improving Legal Processes—A Plea for "Process Values,"* 60 CORNELL L. REV. 1, 4 (1974) ("[A] legal process can be good, as a process, in two possible ways, not just one: It can be good not only as a means to good results, but also as a means of implementing or serving process values such as participatory governance, procedural rationality, and humaneness.").

265. "[J]ustice must satisfy [even] the appearance of justice." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243 (1980) (quoting *Offatt v. United States*, 348 U.S. 11, 14 (1954)).

266. See Stolle, *supra* note 248, at 165 (observing from a study in which a group of people was asked to evaluate certain processes that, "[i]n general, case outcome was a major contributor to participants' perceptions of procedural justice").

267. See, e.g., Saks, *supra* note 199, at 259. While not offering perfect accuracy, studies show that the polygraph is better able to detect lying than humans. Yet we would not replace human factfinders' credibility judgments with polygraph examinations. Saks observed:

Despite all of their experience and intuition, people are not skilled in the

improve acceptability regardless of outcome and, given the difficulty of measuring accuracy, the nature of the process may be a crucial aspect of acceptability.

Here we need to examine separately those considerations that affect the acceptability of the process.²⁶⁸ These include satisfaction, cultural values and traditions, dignity, equality, and consistency.²⁶⁹

1. *Satisfaction.* Procedural design must value participant satisfaction. The community and its directly affected members have an interest in the member's satisfaction with the process. Indeed, in the long run, the community has more interest in satisfactory treatment of its constituent members than do the members themselves. While individual members often have only one experience with a process, the cumulative effect of members' dissatisfaction would be harmful, even dangerous, to the community.

Conclusions about satisfaction, however, must go beyond the intuitive. Unfortunately, as with the other procedural design aspects, there is little empirical information about satisfaction. Little experiential "data" has been developed because procedural designers—courts, officials, and legislators—rarely justify their procedural decisions in terms of satisfaction. Hence, thinking and information about satisfaction is largely absent to guide our procedural design in that regard.

Fortunately, some information about the impact of procedures on satisfaction is available. For example, Thibaut and Walker provided an in-depth empirical examination into the factors that foster satisfaction in a legal process.²⁷⁰ They

unaided detection of lying. With all of its limitations, the polygraph examination process, in capable hands, errs less often. Yet the law's attitude toward this means of credibility assessment is clear. The right and power of jurors and judges to assess witness credibility intuitively is strongly protected and preserved—despite the fact that demeanor adds little to transcripts in terms of accuracy, and despite the fact that some of the very cues that factfinders are expected to rely upon actually *reduce* the accuracy of their assessments.

Id. (footnotes omitted).

268. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 666-67 (2d ed. 1988) (recognizing the value of process). Although Tribe distinguishes an "instrumental" approach from an "intrinsic" approach, see *id.*, the latter generally corresponding to the "acceptability" category, procedural design can still be guided by a combination of values that makes use of both approaches.

269. See Mashaw, *supra* note 1, at 46, 54, 57 (listing these values in addition to the "utilitarian" values he found in *Mathews*).

270. See THIBAUT & WALKER, *supra* note 214, at 1-3 (summarizing the purposes of the study); see also Paul R. Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739, 752-53 (1976) (describing Thibaut's and Walker's conclusion

compared the so-called "adversary" process, the passive decisionmaker model,²⁷¹ with its continental rival, the unfortunately termed "inquisitorial" process,²⁷² the active decisionmaker model.²⁷³ Thibaut and Walker found that "[o]ne of the most intriguing findings for participant subjects was the linear increase in satisfaction with the procedure, perceived fairness of the procedure, and opportunity for evidence presentation as the procedural mode moved along the continuum from the inquisitorial to the choice adversary method."²⁷⁴ Uninvolved observers and continental subjects—those not habituated to the adversarial process—showed a similar preference for the adversary process.²⁷⁵ This satisfaction emanates from leveling even though it distorts the true balance of factual support for one of the positions.²⁷⁶ They also observed that "subjects are more willing to trust an adversary *system* than an inquisitorial *attorney* to produce accurate, unbiased judgments."²⁷⁷ That is, participants and observers were impressed by the adversarial model's restraints on the conduct of the decisionmakers.

These findings have generalized implications for furthering satisfaction in procedural design. It is clear that the process for reaching the decision substantially affects satisfaction.²⁷⁸ The crucial advantage of the adversary process, for example, is not

that the adversary system is better than the inquisitorial system because it is more just).

271. See THIBAUT & WALKER, *supra* note 214, at 22-27.

272. See *id.*

273. In actual operation, the continental process is very adversarial. The difference is that the adversariness takes place in the decisionmaking stage rather than in the information gathering stage. Because the lawyers in the decisionmaking process tend to be the best lawyers in the system, dialogue at that stage should add considerably to the validity of the process.

274. THIBAUT & WALKER, *supra* note 214, at 94. Other studies have confirmed this finding in various settings. See, e.g., E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 211-14 (Melvin J. Lerner ed., 1988).

275. See THIBAUT & WALKER, *supra* note 214, at 77-80.

276. See *id.* at 77-78 (explaining that "[t]he subjects . . . were presumably aware of the frequent use of adversary procedures in American trials and might have seen any deviation . . . as . . . untrustworthy and unsatisfactory").

277. *Id.*

278. See Kovera, *supra* note 225, at 720. Kovera noted:

Psychological research . . . suggests that if participants perceive trial proceedings to be unfair, they will not be satisfied that justice has been served. This study's results suggest that this concern may be unwarranted. . . . This decrease in the level of juror satisfaction . . . appears to be linked to the inadequacy of the hearsay evidence presented in these conditions.

Id. (footnote omitted) (questioning the validity of the theory that a participant's level of satisfaction is based on whether trial proceedings are fair or not).

improvement in perceived accuracy (in fact, it may prove less accurate than its competitor), but improvement in the atmosphere of participant control as opposed to institutional control (even if scrupulously impartial). By the choice of a general commitment to adversarial individual dispute resolution process, our community can be said to value satisfaction. Therefore, a procedural design should reflect this goal.

2. *Cultural Imperatives and Tradition.* Cultural values ground our perceptions concerning which process should be used.²⁷⁹ In procedural design, as with other aspects of human process, it is difficult to maintain the existence of universal, fundamental truths, and hence cultural values must direct procedural design.²⁸⁰ Cultural values implicate a vast array of inquiries into ethics and morality, and quickly reach beyond the scope of the procedural design context.²⁸¹ Sufficient here is the

279. See Waldron, *supra* note 116, at 814 ("In the realm of practical life, we do not just do things; rather, we have *beliefs* about what we ought to do, and our actions are at least in part the upshot of those beliefs.").

280. Cultural values, however, may have less influence on our evaluation of procedures than might be supposed. See, e.g., THIBAUT & WALKER, *supra* note 214, at 79-80 (providing that satisfaction with the adversary process was the same for those from other cultures).

281. One dominant inquiry about the relationship between the law and cultural values has recently formed around the dialogue between liberalism and communitarianism. See MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 16 (1996) (observing that liberalism does not focus on the common good—communitarianism—but that it actually focuses on which values each individual supports); COMMUNITARIANISM AND INDIVIDUALISM (Shlomo Avineri & Avner de-Shalit eds., 1992); STEPHEN MULHALL & ADAM SWIFT, *LIBERALS & COMMUNITARIANS* 10 (2d ed. 1996) (discussing the communitarian view that liberal political theory divorces the individual from the end sought); Kenneth Baynes, *The Liberal Communitarian Controversy and Communicative Ethics*, in *UNIVERSALISM VS. COMMUNITARIANISM* 61 (David Rasmussen ed., 1990) (asserting that a controversy exists between liberals and communitarians because liberals focus on rights and communitarians focus on the common good, concepts the two groups believe do not overlap); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1514 (1988); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1566 (1988). Procedural design, as elsewhere, may be guided by Amy Gutmann's observation: "Communitarianism has the potential for helping us discover a politics that combines community with a commitment to basic liberal values." Amy Gutmann, *Communitarian Critics of Liberalism*, 14 PHIL. & PUB. AFF. 308, 320 (1985). The communitarian project may have relevance in procedural design. To paraphrase Sandel, if concern about aggregate or community values might undervalue our distinctness, concerns about individual fairness might undervalue our commonality. MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 16 (1982) [hereinafter SANDEL, *LIBERALISM*] ("If utilitarianism fails to take seriously our distinctness, justice as fairness fails to take seriously our commonality."). My inquiry rests on a coherence between individual fairness and community. It refers to this dialogue as it might illuminate some overarching values that might be incorporated into our principles for procedural design. With hopes of avoiding a digression into the massive and sophisticated literature here, my inquiry

assertion that the inclusion of cultural values into the system for procedural design is legitimate and necessary.

More to the point, however, is the understanding that cultural values affect the weight of both community values and individual members' values. That is, the two cannot be held adverse and balanced against each other. Indeed, the cultural values of a process are more heavily felt by the community than by the individual.²⁸² For one thing, courts have long assumed that the overarching community standard is procedural fairness.²⁸³ Statutes are assumed to incorporate fair procedures,²⁸⁴ and the due process clauses have been read to express a fundamental community demand for procedural fairness when those statutory prescriptions fall short.²⁸⁵ Combined, this law expresses a

can merely advocate mining the dialogue for a robust inventory of community values as they relate to individual values.

The most controversial aspect of communitarian thinking is the aggressiveness of the state in generating good values among its citizens, for example, providing education and other incentives to foster devotion to the community. See, e.g., Stephen A. Gardbaum, *Why the Liberal State Can Promote Moral Ideals After All*, 104 HARV. L. REV. 1350, 1352-53 (1991) (observing that some attack liberalism as being "devoid of moral substance"); Sheppard, *supra* note 52, at 1009-10 ("The law should encourage a citizen to live a good life and discourage a citizen from living a bad life."). "Legal perfectionism" asserts "that the law, through its sanctions and encouragements, makes it more likely that an individual will live the life of a good citizen. . . . [T]he doctrine of legal perfectionism does not imply the promotion of any single deontological or natural conception of law." *Id.* at 1010. The implication of this dialogue for procedural design may have been expressed by Vikram Amar: "[A] law may run afoul of substantive due process not because of what is on the individual's side of the scale, but rather because of the perfectionist aim that may be on the government's side of the balance." Vikram David Amar, *Some Questions About Perfectionist Rationality Review*, 45 HASTINGS L.J. 1029, 1029-31 (1994) (observing that courts may have trouble determining whether the perfectionist aims are being furthered).

282. See, e.g., SANDEL, *LIBERALISM*, *supra* note 281, at 149 (observing that community interests are viewed as either wholly external to individual interests or only partly internal to the individual).

283. See, e.g., *Burns v. United States*, 501 U.S. 129, 137-38 (1991) (noting the Supreme Court's willingness to construe statutes authorizing deprivations of liberty or property as requiring adequate process).

284. See, e.g., *id.* at 132-34, 137-38 (explaining that the Sentencing Reform Act of 1984 is assumed to incorporate fair procedures).

285. In *Arnett v. Kennedy*, Justice Rehnquist urged that where the law creating the due process interest also prescribes procedures, one must accept those procedures if one is claiming the right derived from that source. See 416 U.S. 134, 153-54 (1974). This approach, however, was not adopted by a majority of the justices even in *Arnett v. Kennedy*. See *id.* at 210-11. See also *Bishop v. Wood*, 426 U.S. 341, 355, 360-61 (1976) (White, J., dissenting) (criticizing the majority for relying on the abbreviated procedures provided by the city ordinance to ignore a due process violation). The "bitter with the sweet" approach has since been consistently rejected by the vast majority of the justices. For example, the Supreme Court in *Vitek v. Jones*, 445 U.S. 480, 490-91 (1980), and more recently in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985), soundly rejected the "bitter with

community standard from which we must extract a foundational community interest in procedural fairness for the community's individual members.

A major source of cultural values is tradition,²⁸⁶ and nowhere is tradition a more powerful force than in legal procedures. Tradition, of course, forms the system by which the community and its individuals measure a process and the foundational values inherent in a procedural design's acceptance.²⁸⁷ Sherry concluded: "[O]ur traditions have value, and I would add only that we must be careful of exaggerating that value."²⁸⁸ Legal tradition is a very strong motivator in resolving an array of procedural questions.²⁸⁹

Although tradition is inherently a community value, the community interest is necessarily intertwined with individual interests. Our tradition values fairness and sensitivity to individual community members. The individual interests, on the other hand, support attention to a community that furthers those values.²⁹⁰ From either perspective, then, tradition demands a commitment to both effectiveness and individual fairness.

Tradition must be a tool and not merely dogma. At present, tradition has substantial influence on procedural design in part because of the absence of information regarding the effectiveness of various procedural elements.²⁹¹ Incorporating tradition into procedural design must separate tradition's emotional impact from the weight of the "data" embedded in tradition. Tradition is, to some extent, formed by the empirical base of experience. For example, Justice Scalia observed: "To say that unbroken historical usage cannot save a procedure that violates one of the

the sweet" approach. Compliance with due process is always at issue regardless of whether the decisionmakers complied with statutory procedures or not.

286. See Suzanna Sherry, *Public Values and Private Virtue*, 45 HASTINGS L.J. 1099, 1099-1100 (1994) (recognizing how powerful the value of tradition is in law).

287. See *id.* at 1100 (acknowledging the importance of tradition but propounding that "we must be both willing and reluctant to alter the status quo, avoiding both an unthinking adherence to tradition and an overeagerness for change").

288. *Id.* (recognizing many of the observations offered by Novak relating to our tradition of community values and active government).

289. See, e.g., *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996) (observing that in a criminal procedure context, the "primary guide in determining whether the principle in question is fundamental is, of course, historical practice"); *Connecticut v. Doebr*, 501 U.S. 1, 16-18 (1991) (finding a state prejudgment attachment statute to violate due process because, among other things, it was inconsistent with common law).

290. See Mashaw, *supra* note 1, at 47-48 (furthering the idea that individuals want the community to foster fairness and sensitivity).

291. See, e.g., *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 36 (1991) (Scalia, J., concurring in the judgment) (conceding that tradition holds value in part because other alternatives are lacking).

explicit procedural guarantees of the Bill of Rights (applicable through the Fourteenth Amendment) is not necessarily to say that such usage cannot demonstrate the procedure's compliance with the more general guarantee of 'due process.'"²⁹²

To some extent, tradition is the result of an evolutionary process in which defects in procedural design have been probed and experimental correction tested. Ossifying tradition inhibits the very evolutionary strategy that it might be said to implement. Nowhere is that more true than in procedural design. Mashaw, while valuing tradition's evolutionary aspects, observed its limitations: "The use of tradition as a guide to fundamental fairness is vulnerable, of course, to objection. Since social and economic forces are dynamic, the processes and structures that proved functional in one period will not necessarily serve effectively in the next."²⁹³

The message of tradition, especially as a source of information about procedural design, is somewhat ambiguous. Our legal culture is dominated by a model of trial procedures that evolved from the English experience.²⁹⁴ The adversarial process in our system, for example, gains special support from our own custom and usage.²⁹⁵ Nonetheless, procedural design under the due process clauses has had a tradition of flexibility, moderating this dominance of trial-like procedures. Even as to the more fundamental notion of adversariness, courts break free in cases where evidence suggests that traditional procedural design is outweighed by other factors. For example, in *Washington v. Harper*, the Supreme Court found that "frequent and ongoing clinical observation by medical professionals" may be superior to an adversarial hearing in

292. *Id.* at 35 (Scalia, J., concurring in the judgment). On the other hand, in *Connecticut v. Doebr*, Justice Scalia concluded that the *Mathews* test could invalidate procedures that were not recognized at common law. *See Doebr*, 501 U.S. at 30-31 (Scalia, J., concurring in part and concurring in the judgment); *see also City of West Covina v. Perkins*, 525 U.S. 234, 242 (1999) ("The notice required by the Court of Appeals far exceeds that which the States and the Federal Government have traditionally required their law enforcement agencies to provide.").

293. Mashaw, *supra* note 1, at 54. Still, tradition must be incorporated into the system of principles as other than an anecdotal surrogate for data. Although it is only one factor, it must dominate the others.

294. *See generally* Zechariah Chafee, Jr., *Delaware Cases, 1792-1800*, in *ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW* 489, 508-09 (David H. Flaherty ed., 1969) (describing the English legal procedures as "new foreign weapons which enabled [Americans] to fight each other bitterly and endlessly").

295. *See, e.g., Burns v. United States*, 501 U.S. 129, 137 (1991) (declaring that Rule 32 of the Federal Rules of Criminal Procedure contemplated an adversarial process).

determining whether an inmate should be given psychiatric drugs against his will.²⁹⁶

The founding society cannot be said to have had a dogmatic vision of those procedures that might comply with the due process clauses. Indeed, it is more likely that they understood the Fifth Amendment at least to envision a wide range of procedural designs. Jefferson, and presumably others, were familiar with continental procedures and those procedures were not based on common law procedural assumptions.²⁹⁷ It might be that the early designers preferred the English system, but it must also be true that they recognized that its assumptions were not universally accepted. The fact that the French, for example, continued the so-called "inquisitorial process" even in criminal proceedings after their revolution²⁹⁸ suggests that this process was not held in great disregard by progressive thinkers of the time. The meaning of due process envisioned a wide range of alternatives, and hence the original meaning of that guarantee does not support a tradition of inflexible commitment to Anglo-American notions.

Our tradition, as it affects acceptability, moves between the preference for adversariness, influenced by the Anglo-American trial model, and the desire to maintain institutional flexibility.²⁹⁹ Tradition does not dictate trial-like procedures.³⁰⁰ Still, we have a strong tradition of participant control as opposed to the continental tradition of decisionmaker control. This tradition is an example of both the embodiment of experience and the longstanding emotional commitment inherent in the tradition factor.

3. *Dignity.* "Dignity" here encompasses a variety of related human elements that should be considered in procedural design.

296. 494 U.S. 210, 231-33 (1990) (recognizing that medical professionals are superior to the court in determining a patient's method of care); see also *Williams v. Wallis*, 734 F.2d 1434, 1438-39 (11th Cir. 1984) (listing reasons medical professionals are as competent to make decisions as the court).

297. See Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), in 15 *THE PAPERS OF THOMAS JEFFERSON*, 1789, at 266 (Julian P. Boyd ed., 1958).

298. See Edward A. Tomlinson, *The Saga of Wiretapping in France: What it Tells us About the French Criminal System*, 53 LA. L. REV. 1091, 1103-04 (1993) (discussing France's "inquisitorial" process).

299. Compare *Burns*, 501 U.S. at 137-38 (preferring adversariness in judicial proceedings), with *Harper*, 494 U.S. at 231 (preferring a non-adversarial process in recognizing that a decision to medicate a patient may be better made by medical professionals than by a judge).

300. See, e.g., *Harper*, 494 U.S. at 231 ("The Due Process Clause 'has never been thought to require that the neutral and detached trier of fact be law trained.'") (quoting *Parham v. J.R.*, 442 U.S. 584, 607 (1979)).

Robert Summers identified dignity considerations as core “process values.”³⁰¹ Mashaw asserted: “Whereas the utilitarian approach [suggested by *Mathews*] seems to require an estimate of the *quantitative* value of the claim, the dignitary approach suggests that the Court develop a *qualitative* appraisal of the type of administrative decision involved.”³⁰² Unfortunately, neither Summers nor Mashaw defined dignity other than through examples. Mashaw, for example, observed that the conflict in *Mathews* affected the claimants’ dignity in that a positive decision validated the assertion that a claimant *should* be excused from being a productive member of society, and a negative decision grouped a claimant among society’s duty shirkers.³⁰³

Some sense, however, if not a definition, of the term, seems necessary here. A useful oversimplification of a sense of dignity is humanness—those special characteristics that distinguish humans from other creatures.³⁰⁴ Or perhaps more useful: humanness includes characteristics the denial of which would render an individual a lesser category of humanity. Such a view leaves the value somewhat subjective but sufficiently concrete and universal for these purposes. If the individual or the community sees a characteristic as necessary for full status as a human being, then a threat to that characteristic is a threat to dignity. Such a threat creates a value to be incorporated in the system of principles that governs the procedural design.

Eisenberg observed one of the reasons for providing participatory process even when a decision is not to be made on a record of proof and reasoned argument: “Where a decision will have a serious impact on a discrete set of persons, preservation of individual dignity points to the desirability of an ordering process in which those persons will be able to express their view of the matter to the decisionmaker before the decision is made.”³⁰⁵ This concern is even more compelling in adjudicative decisions covered by procedural due process, where the decision must be based on “some kind” of record. Like Mashaw and Summers, Eisenberg

301. See Summers, *supra* note 107, at 23 (asserting that respect for human dignity and fair access to legal processes are important “process values”).

302. Mashaw, *supra* note 1, at 51 (emphasis added).

303. See *id.*

304. Cf. IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 57 (Mary Gregor ed. & trans., Cambridge Univ. Press 1997) (1785) (observing that human beings are different from all other beings).

305. Eisenberg, *supra* note 229, at 417.

would justify participatory opportunities in procedural design as those opportunities bolster dignity as a discrete value.³⁰⁶

Although commentators such as Summers, Mashaw and Eisenberg focus on individual dignity³⁰⁷—the dignity of the individual to whom the action is directed—dignity implicates serious community interests as well. Immanuel Kant firmly established dignity in our pantheon of primary values.³⁰⁸ Kant's "dignity" derives from moral actions: "[S]ince Kant insists it is not rationally conceivable that anything other than the capacity for practical reason could be of comparable value, the categorical imperative requires that human dignity should never be violated by treating human beings as if they were solely a means to the ends of others."³⁰⁹ That is, community members have dignity in the way they treat each other. In this way, dignity is as dignity does; individuals have dignity in the way they act towards other community members and not by some characteristic that is bestowed on them. It is through the community that individuals "exercise" their dignity, and hence individual dignity is necessarily intertwined with that of the rest of community. In no sense are the community's interests and individual dignity adverse to one another. Indeed, quite the opposite is asserted here: the community has a profound interest in the dignity of each of its members.

Procedural design must then assure the dignity of the individual member. This imperative acquires its force, however, from the recognition that dignity is a necessary element of human society. In sum, whatever its other virtues, a procedural design should not demean those affected.

4. *Equality and Consistency.* Equal treatment is a core component of procedural design.³¹⁰ The imperative for equal treatment tests procedural design in addition to, and to some extent, in lieu of, correctness. Mashaw found that "[j]ustice in a

306. See *id.* at 413-14 (affirming that participation in judicial proceedings increases the dignity of the proceeding).

307. See *id.* (recognizing the importance of individual participation in the judicial process); Mashaw, *supra* note 1, at 49 (concurring that without individuals participating in the process, dignity will be lost); Summers, *supra* note 107, at 23 (affirming individual dignity as a value that cannot be lost in procedural design).

308. See KANT, *supra* note 304, at 42 (designating dignity as a fundamental value that cannot be bought or replaced).

309. Michael J. Meyer, *Dignity*, in *ENCYCLOPEDIA OF ETHICS* 262, 263 (Lawrence C. Becker & Charlotte B. Becker eds., 1992).

310. See, e.g., Saks, *supra* note 199, at 246 ("[T]he law contains a central thread that is absent from comparable institutions that engage in similarly complex decisionmaking: the value of equal treatment.").

formal philosophical sense is often defined as equality of treatment.”³¹¹ Mashaw continued: “Indeed, insofar as adjudicatory procedure is perceived to be adversarial and dispute resolving, the degree to which procedures facilitate equal opportunities for the adversaries to influence the decision may be the most important criterion by which fairness is evaluated.”³¹²

Equality in procedure is often expressed in terms of consistency. If the process cannot assure correctness, it can at least assure that like cases are treated alike.³¹³ Administrative law strongly favors consistency.³¹⁴ Commentators have seen consistency as a vital check on arbitrariness.³¹⁵ A study of Social Security decisions, for example, developed a list of characteristics that were shown to predict expected outcomes against which actual decisions could be evaluated statistically.³¹⁶ The Fifth Circuit found that a process can be judged to have contributed to accuracy because of its tendency to generate the same results in similar cases.³¹⁷ Procedural design might then be evaluated based on its ability to generate consistent and/or predictable outcomes in similar procedural categories.

The acceptability of a process also depends on its consistency with similar processes throughout the greater system. For example, after concluding that Connecticut’s prejudgment attachment procedure violated common law procedures for such actions, the Court added: “Connecticut’s statute appears even

311. Mashaw, *supra* note 1, at 52.

312. *Id.* at 52 (footnote omitted).

313. See Saks, *supra* note 199, at 246 (“The unusual difficulty of finding a criterion against which to test the correctness of trial outcomes and the special concern in the law for equal process lead to an emphasis on reliability, rather than validity, in evaluating the working of the law.”). “[T]he law ought to strive to treat like cases alike (reliability) and, if possible, to make the correct decision on those similarly treated similar cases (validity).” *Id.* at 245-46 (footnote omitted).

314. See generally 2 KOCH, *supra* note 1, at 255-59.

315. Yet neither due process nor equal protection have convinced the government to change its position. See, e.g., *Madera Irrigation Dist. v. Hancock*, 985 F.2d 1397, 1403 (9th Cir. 1993) (positing that due process does not prevent the government from refusing to satisfy reasonable expectations created by past policies); *Seven Star, Inc. v. United States*, 873 F.2d 225, 227 (9th Cir. 1989) (“A claim that an administrative agency has made different decisions in different cases, in different years, does not give rise to a claim for relief on equal protection grounds.”).

316. See MASHAW ET AL., *supra* note 202, at 14 (“[G]iven a relatively short list of characteristics of a case, a computer program can predict with a high degree of accuracy whether the case will be an award or a denial.”).

317. See *Travelers Ins. Co. v. St. Jude Hosp.*, 38 F.3d 1414, 1417-18 (5th Cir. 1994) (asserting that the district court’s failure to hold a sanctions hearing did not deny due process to the sanctioned attorney).

more suspect in light of current practice.”³¹⁸ The Court noted that nearly every state provided a greater number of attachment procedures.³¹⁹ Thus, equality of treatment of similar individuals among procedural systems affects the evaluation of the process.

These individual-interest-oriented senses of equality do not capture the true sense of equality as a community value. Our community demands equality as a procedural value, but with a twist that disconnects individual justice from this sense of equality. Modern procedural jurisprudence is founded on a “liberalism” that concedes a plurality conception of good. This liberalism supposes, as Rawls expressed it, “that there are many conflicting and incommensurable conceptions of the good, each compatible with the full rationality of human persons, so far as we can ascertain within a workable political conception of justice.”³²⁰ Procedure then, if not itself value neutral, can be seen as absorbing disparate substantive values or principles. That is, conflicting and incommensurable values are given appropriate consideration within the decisionmaking context. This is the sense of equality that makes sense under modern conditions.³²¹

As discussed above, the incommensurability of rights is hotly debated and well beyond the scope of this work or its author.³²² Here, we need to assert only that the procedural design system must envision a “flexible” sense of equality because rights might be incommensurable. Rawls may have offered a practical equality test under such conditions: the “veil of ignorance.”³²³ The Thibaut and Walker empirical study summarized:

318. *Connecticut v. Doe*, 501 U.S. 1, 17 (1991).

319. *See id.*

320. Rawls, *supra* note 247, at 248.

321. *Cf. id.* at 245. Rawls further declared:

[L]iberalism assumes that in a constitutional democratic state under modern conditions there are bound to exist conflicting and incommensurable conceptions of the good. . . . This does not mean, of course, that such a conception [of justice] cannot impose constraints on individuals and associations, but that when it does so, these constraints are accounted for, directly or indirectly, by the requirements of political justice for the basic structure.

Id.

322. *See, e.g.,* Adler, *supra* note 88, at 1170 (explaining that incommensurability might be seen as “the incomparability of options or choices”).

323. *See* JOHN RAWLS, *POLITICAL LIBERALISM* 24 n.27 (1993). In one defense of the usefulness of the “veil of ignorance,” a concept first propounded in Rawls’s *A Theory of Justice*, Rawls observed:

We model [a disconnection between “people’s comprehensive doctrines” and “the content of the political conception of justice”] by putting people’s comprehensive doctrines behind the veil of ignorance. This enable [sic] us to find a political conception of justice that can be the focus of an overlapping

[S]ubjects behind the veil adopted a perspective that led them to prefer (and to judge as fair) systems they believed to favor the disadvantaged, while tending to preserve equal access to channels of information and to mechanisms of control. The principles of fairness in legal procedures developed in our simulation of the original position therefore correspond rather well with those postulated by Rawls as the likely objects of agreement in the ideal original position.³²⁴

In sum, "equality" as a community value requires a procedural system biased towards the disadvantaged.

The community's interest in equality is somewhat different from that of any given individual's, but no less intense. Our community's interest in "equality" in procedural design is to assure some advantage for those least able to participate without unduly compromising the effectiveness and overall responsiveness of the process. This community value will add weight to certain procedural imperatives beyond that apparent if all individuals are considered literally equal in the procedural system.

IV. APPLICATION OF THE SYSTEM OF PRINCIPLES

In application, as in concept, the goal is to coordinate, in procedural design, the community's interests with those of its individual members. The above factors, as points of sensitivity, provide a context for the coordination of these major categories of interests. This section suggests how these factors may be applied in developing individual procedural designs. Because design will necessarily be affected by the perspective of the designers, this section ends with some observations about how those perspectives might manifest themselves and perhaps be adjusted by this approach.

A. *Three Implications for Procedural Design*

A system of principles derived from the above-discussed factors could operate to improve due process design in three basic ways. First, the principles could alert designers as to the weight to be given to the procedural issues within the bundle of issues presented for resolution. Second, the system could evolve

consensus and thereby serve as a public basis of justification in a society marked by the fact of reasonable pluralism.

Id.

324. THIBAUT & WALKER, *supra* note 214, at 115.

categories of procedural questions in order to transfer general learning to particular procedural design tasks. Finally, these principles could affect the design by identifying the dominance of a particular concern that should be given priority in a particular procedural design.

1. *The Relative Importance of Procedural Design in Context.* The first-level implication of the above analysis is that community and individual interests, previously seen as adverse, should be seen as supporting each other. Together, they add weight or velocity to the demand for procedure. That is, if quantitative measure were possible, this analysis would add rather than subtract community and individual interests. This combined weight can be evaluated relative to the other (substantive) issues presented.

An analysis of the combined weight of the community interests and those of individual members will affect the judgment concerning the procedural question seriousness. As discussed above, a fundamental failing in all procedural analysis is the lack of objective information about the actual impact of a specific procedural element; nonetheless, judgments must be made. Designers will be informed as to the intensity of their concern over procedural design under current conditions of uncertainty about the procedure's value and effectiveness. The interests' combined weight will determine allocation of resources to the procedural aspects of the decision. Thus, for example, if the individual interest in the decisionmaking process is substantial, but the community interest is small, attention to process issues may be less compelling than if both the individual interest and the community interest are substantial.

It is important to remember that each decision involves a resolution of a bundle of issues. Appropriate procedure is one category within that bundle. Assigning weight to the procedural issue tells the decisionmaker how much attention to devote to procedural design. The decisionmaker, for example, could determine that the procedural issues, when the individual and community interests are coordinated, are very weighty. After careful consideration, however, and not in disagreement with the above determination, the decisionmaker could still design a fairly informal process because such a process serves the relevant substantive interests of both the community and its members best.³²⁵

325. The classic example is *Londoner v. Denver*, 210 U.S. 373, 386 (1908) ("Many requirements essential in strictly judicial proceedings may be dispensed with

2. *Recognizing Groupings of Factors to Evolve Categories of Procedural Designs.* The above is sort of a gross implication: the combined weight of the community interests and those of the community's members describes the importance of the procedural issues. The coherence, however, of these two types of interests, as they relate in applying the factors identified above, has a more subtle effect on procedural design. As has been shown above, each factor has implications for both the community and the individual, and each procedural element potentially serves both interests. Thus, not only will the combined weight of the two interests designate the procedural issues' importance in a given decisionmaking context, but evaluation of the coordinated interests will inform procedural design in a particular context.

The task is to develop categories of procedural questions for which answers continue to evolve. Remembering that categorization is a creative and dynamic process, and that sometimes evolution involves the balancing of interests and the trade-off of the factors discussed above, a system of principles should emerge in which a procedural designer will understand, under particular conditions, that certain procedures will coordinate all the factors, optimizing the community interests and those of its individual members. Simplistically, learning will evolve which tells a procedural designer that where the particular decisionmaking undertaking faces x set of factors, the best procedural design will be understood to include y set of procedural elements. The procedural designer will be expected to make his or her own contribution, so that application in the specific case will generally contribute to the evolution of procedural design principles. Specific categories will capture this development and serve as the springboard for new applications and further development.

Again, the development of this understanding is made difficult by the absence of objective information concerning the actual implications of certain procedural choices. Procedural designers, however, are not without tools to begin an evolution of a more precise procedural design system. An array of judicial thinking is embodied in the cases. Designers now depend on experience and judgment. Tradition, as an embodiment of experiential data, also supports the process. Legal theorists, such

[A] hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal." See also *Lassiter v. Department of Soc. Servs.*, 452 U.S. 18, 31 (1981) ("[T]he State shares with the parent an interest in a correct decision, . . . and, in some but not all cases, has a possibly stronger interest in informal procedures . . .").

as Fuller and Eisenberg, discussed above, help reason through judgments about the procedural goals in a particular context.

Procedural designers, judges and officials in particular, would make a substantial contribution to this experiential base by taking more care in justifying individual procedural moves. At this point, it is impossible to recommend more than this: procedural designers should articulate the factors they find controlling and how they hope their procedural choices might improve the particular procedural design's performance. Careful identification of the points of sensitivity in a procedural design will sharpen procedural design and advance the development of the law.³²⁶ More to the point, efforts to coordinate, or sometimes to trade-off, these two categories of interests as expressed within the above factors will advance procedural design. As this process evolves, procedural designers, perhaps with the aid of better empirical support, will compare the mix of factors in the case before them with a similar category of cases.

3. *Special Concerns May Affect the Final Design.* Adding detail to procedural design will also recognize that the dominance of either community interest or individual interest may affect procedural design. This observation recalls the form of balancing in which all interests survive, but some are given greater weight than the others. Here, however, while both interests must be reflected in the procedural design, one type of procedural design may better serve one interest than the other. The dominance of one interest may affect the final design, but not to the detriment of the other.

The recognition that the two interests have separate, as well as combined, weight allows fine-tuning of the design. The procedural designer may reach certain conclusions regarding the general procedural mix of what best serves the coordinated interest of the major interests, but may also recognize that the design must additionally concentrate on one of the lesser interests. From considering the above values, the procedural designer might, for example, adopt a procedure that serves the community's interest even if it does not serve the individual's. Still, to the extent possible, a design weighted toward one interest should avoid diminishing its performance relative to the other.

Although the principle of coherence must recognize that sometimes a process serving one interest will not optimize

326. Such an articulation of the procedural design task will inform the research task as well as the application task. With the clear need exposed, the motivation for empirical study of procedure may become more obvious.

service to the other interest, it at least forces the procedural designer to recognize both categories of interests. The community and its individual members are in a continuous relationship, and the overarching goal of the design is coordination of community and individual interests. Cooperation among individuals in such a relationship optimizes their interests and justifies their commitment to the community. Moreover, as argued above, the vitality of the particular community that supports the particular program is generally of interest to the individuals affected by decisions in those programs. In short, procedural designers must recognize the coherence of interest, even if in one context the individual interests and community interests compete.

For example, Fuller's participation thesis was limited to adjudication by the dominance of individual rights.³²⁷ As has been seen, however, the community has an interest in participation by its individual members. Fuller recognized the limitation of his approach, and hence invented the concept of "polycentric" tasks.³²⁸ To illustrate, he provides examples in which "we are dealing with a situation of interacting points of influence and therefore with a polycentric problem beyond the proper limits of adjudication."³²⁹ In these not rare circumstances, individual cases cannot be resolved without dealing with other "tensions." The individual controversy exists in the community context. The community and its other members cannot be excluded without violating principles of participation. Eisenberg adds the problem of "multiple criteria," criteria that cannot be confined to individual disputes, because, in our terms, those disputes necessarily implicate community values.³³⁰ Eisenberg solves the problem by propounding a system of degrees of "responsiveness" to proof and argument. In his system, then:

[R]esponsiveness runs on a continuum from a relatively restrictive and constraining norm, as in classical adjudication, to the more diffuse norm of serving the public's needs that is a general aspiration of democratic institutions. Similarly, participation runs on a continuum from cases in which all persons who are directly affected by a decision have a right to participate

327. See Fuller, *supra* note 228, at 357.

328. See *id.* at 394 (defining "polycentric" tasks as multiple implications of one decision).

329. *Id.* at 395.

330. See Eisenberg, *supra* note 229, at 424 (admitting that an individual's problem and its subsequent resolution affect not only the individual, but also the community as a whole).

in its formulation, as in negotiation, to cases in which participation may occur but is not institutionally defined and assured, as in legislation.³³¹

The source of dissatisfaction of these careful legal process observers is, in our terms, coordination of community interests and specific individual interests. As here, they are not contending that these broader interests are adverse to the resolution of the individual dispute; rather, they are hunting for a way to inject these other valid interests without diminishing the individual interests. These observers are, in short, trying to resolve the problem present here. They are not attempting to trade off these interests. As to individual dispute resolution, adjudication (with attention to both Fuller's polycentric problem and Eisenberg's multiple criteria), can be explained by sensitivity to the unity between the community interest and that of the community's members. Acceptance of the observation here that community interests are coherent with individuals members' interests allows the system to deal with this problem with some precision. Eisenberg, for example, recognizes that the "consultative" process of administrative rulemaking serves the community interests discussed above without being constrained by a rigid requirement of careful attention to proof and argument, or "strong responsiveness."³³²

Due process law, somewhat more intuitively, excludes rulemaking from its coverage.³³³ This exclusion is a gross response to the dominance of the community interests. The suggested analysis allows for an adjustment in which the dominance of the community interest and needs of the community's individual members in the decisionmaking can be accommodated without diminishing one interest to the benefit of the other. Such an approach supports due process doctrine for rulemaking, and similar generalized participatory concepts build around the needs of this category of decisionmaking tasks and its inherent community dominance. Although the fear of inappropriate judicial choices cautions against this move, the prospect of positive gains not only for individual interests, but also for community values as described above, support it.

331. *Id.* at 431.

332. *See id.* at 415, 417 (suggesting that some participation, even if the decisionmaker is not bound, serves dignity and the value of a well-informed decision).

333. *See* 1 KOCH, *supra* note 1, at § 2.20[3].

B. Perspective of the Designers

The system of principles suggested above must ultimately be implemented by procedural designers. These designers should be guided by the need to work with the above factors toward a goal of so coordinating the interests of the community and its individual members. The factors discussed above, as they incorporate the two major interest categories, should help procedural designers think through a particular design. Nonetheless, the designers' perspective cannot be ignored.

The due process clauses in the Fifth and Fourteenth amendments to the Constitution provide the foundation upon which judicial interpretation—especially in the last quarter of the twentieth century—has evolved a sophisticated procedural jurisprudence. There are, in addition to these foundational prescriptions, an array of statutory provisions that establish a variety of procedural designs. Among these are the generalized provisions of the state and federal administrative procedure acts. Our procedural system involves a rather complex interaction among these sources of procedural law.³³⁴ While this article has focused on due process jurisprudence, conceptually it can inform any institution engaging in procedural design—legislators and bureaucrats, as well as courts.

Nonetheless, procedural design undertaken outside the context of an individual decision has a different focus than does a design evaluation as applied in a specific case. Designer perspective is affected by whether the design is contemplated before individual application, or evaluated after individual decisions. Thus, procedural designers may be classified as either *ex ante* (legislators and officials), or *ex post* (the courts). Procedures are prescribed before the program begins in the legislation (although usually very superficially), and in the procedural rules and pronouncements of the administrators. Additionally, these *ex ante* procedural designs are in place when an individual decision is made. The procedures may be evaluated by the courts after they are used to make the individual decision, and this *ex post* evaluation focuses on the procedures as they are performed in a particular context. The perspective from the two distinct design stages creates biases that the coordination of interests would uncover and perhaps mitigate.

It is often observed that a procedural design's evaluation is distorted by the fact that courts, the *ex post* designers, have their

334. See generally 1 KOCH, *supra* note 1, at ch. 2.

attention drawn to a very specific individual circumstance.³³⁵ This perspective heightens the tension between the community interest and the now adverse individual interest, masking their coordinate interests. The courts are not unmindful of the community interests in procedural design, but they often over-emphasize the obvious individual interests at the expense of the more subtle community and nonparty individual interests. The system of design must inform these ex post designers regarding the interrelation of the factors in evaluating a process. By informing the ex post designers—the courts—such a system will increase their sensitivity to the larger context, ironically, by making them more sensitive to the full range of individual interests.

Ex ante designers necessarily focus on both the community interests and those of an abstract, aggregate individual member. These designers may not see the context in which their broader task is intertwined with all individual interests. It is perhaps here that the recognition of the coordination of interests will have greater effect because these designers will focus on procedural design as it expresses the community's interest in its individual members. Indeed, the most conspicuously absent players in procedural design are often the legislators. Perhaps the above strategy will motivate these ex ante designers to understand that procedural design, as well as substantive program design, implicates community interests.

A goal of coordinating the two major categories of interest may also mediate the conflict between the ex poste and ex ante designers. The allocation of authority over procedure between the legislators, administrative authorities, and the courts, creates a continuous tension. This tension is evident in the case law. In *Arnett v. Kennedy*, for example, the Court seemed to adopt a position, taking the "bitter" prescribed procedures with the "sweet" entitlement.³³⁶ It is, however, the ex ante designers—Congress, in this case—who have the dominant authority over procedural design, and hence their design would be presumed valid in a due process attack. The *Arnett*

335. See, e.g., Nagel, *supra* note 97, at 322. Nagel states:

[T]he importance of governmental policies is evaluated by judges with a kind of tunnel vision. . . . Any particular governmental policy can be made to seem unnecessary or unimportant or even senseless if it is detached from the institutional and social web that gives it meaning. The result is to systematically favor individual interests over collective interests.

Id.

336. 416 U.S. 134, 153-54 (explaining that participants must take "the bitter with the sweet" when procedures establishing rights are hurtful in themselves).

presumption has not been continued and was soundly rejected in *Loudermill*.³³⁷

Easterbrook asked: "If the goal of the *Eldridge* formula is the maximization of society's wealth, why did the legislature not enact the preferable procedures in the first place?"³³⁸ Easterbrook's rhetorical question supports the "bitter with the sweet" approach of *Arnett* in that it supports the notion that the courts should not impose additional procedures because the most cost-effective procedures are by definition provided by ex ante decisionmakers. Referring to the legislative judgment regarding these two costs, he asserted: "That they choose not to use these procedures is strong evidence that their costs outweigh their benefits."³³⁹ The justification for the bitter with the sweet doctrine would be more plausible in the rare situation in which there is some evidence that the political authorities actually attempted to coordinate interests. Given the general absence of care in procedural choices, and the undeniable judicial expertise in that area, courts should be active participants, even with respect to community interests.³⁴⁰ In other words, while courts must be active procedural designers in order to support and adjust ex ante procedural design decisions, they must also concern themselves with optimizing community, as well as individual, interests.³⁴¹ The coherence asserted above suggests that a judicial failure to coordinate these interests will endanger both categories.

The interaction between the ex ante and the ex post procedural designers will evolve procedural categories that will optimize the several factors as they serve both community interests and those of the community's individual members. Generally, the political institutions are thought to best define the community interests. In *Mathews*, Justice Powell accepted this idea in the procedural context: "In assessing what process is

337. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541-42 (1985). See also 44 *Liquormart, Inc. v. Rhode Island*, in which the Court refused to defer to the state legislature's judgment regarding a ban on advertising, and placed the burden of proof on the state to show that the restraint would further a substantial community interest. 517 U.S. 484, 505, 516 (1996).

338. Easterbrook, *supra* note 188, at 110.

339. *Id.* See also *Pierce*, *supra* note 3, at 1999 ("[L]egislatures and agencies are likely to do a better job of choosing appropriate procedures through application of the *Eldridge* test than courts have done.").

340. See *Gottlieb*, *supra* note 1, at 920 ("Judicial restraint is not legitimately employed as a one-sided tool to limit rights; it must operate to limit asserted governmental interests as well.").

341. See *Sheppard*, *supra* note 52, at 984 ("[T]he Court must individually determine the governmental interest supporting each argument brought by the state and federal governments.").

due . . . , substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of . . . programs that the procedures they have provided assure fair consideration"³⁴² The courts should be sensitive to their shortcomings in judging relevant community interests even as they rely on their expertise in procedural design.³⁴³

Nonetheless, the courts should be active procedural designers. Unfortunately, the Supreme Court has inhibited this evolutionary process by ordering great deference to the procedural judgment of the ex ante procedural designers. For example, *Vermont Yankee* placed authority in the ex ante designers—Congress and the relevant agency—and thus gave their designs a presumption of validity in a case in which statutorily prescribed procedures are challenged.³⁴⁴ The allocation between the ex post and ex ante designers, however, is now unclear because of the contrast between the consistent adherence to *Vermont Yankee* (presumption favoring the ex ante design in statutory challenge) and *Loudermill*'s firm rejection of the presumption favoring ex ante design in constitutional challenges.³⁴⁵

The judicial strategy should meld the courts' role with that of ex ante procedural designers rather than describing boundaries of authority. In doing so, the courts should remain sensitive to the legislative goals and administrative tasks. Although judicial expertise in procedural design is conceded, the recognition that procedural design carries a heavy dose of community values suggests a formative role for the legislators and officials. Indeed, under certain circumstances, courts might well demand that legislators resolve procedural design issues just as they sometimes force the legislators to resolve fundamental substantive policy issues.

342. *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976).

343. See *Gottlieb*, *supra* note 1, at 920 ("Judicial restraint . . . requires more judicial awareness of the competing interests heaped on the scales. In this respect, it is necessary to reconsider the mandated deference to legislative judgment in the rational basis test").

344. See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 543 (1978) (declaring that, absent constitutional conflicts, government agencies should be able to make their own rules and procedures); see also *Heller v. Doe*, 509 U.S. 312, 320 (1993) ("A State . . . has no obligation to produce evidence to sustain the rationality of a statutory classification."); *Steadman v. SEC*, 450 U.S. 91, 95-96 (1981) (stating that, absent "constitutional constraints," Congress has the power to "prescribe rules of evidence and standards of proof" for the federal courts).

345. See 1 KOCH, *supra* note 1, at § 2.34.

The *Loudermill* and *Vermont Yankee* lines of cases could do a better job of allocating procedural lawmaking authority. The allocation of authority over procedural issues rests with both the policymaking entities—legislators and agency officials—and the courts. Dominance shifts according to the institution that is best able to make judgments about the relevant values. While conceding that community and individual interests mutually support each other, the allocation of authority may depend on the respective weight of the two interests. Often a legislature or administrative entity will be in a better position to design procedures that respond to these values than are the courts. Courts should give such procedures more deference if they are based on a coordination of the community and individual interests.

Thus, interaction between the *ex ante* and *ex post* procedural designers should evolve procedural design categories. These categories will incorporate the points of sensitivity explored above. Through this process, the procedural designers will utilize and improve a range of procedural designs.