LEGAL COMPLEXITY: SOME CAUSES, CONSEQUENCES, AND CURES

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INTRODUCTION

Simplicity is a compelling virtue. Poets praise it.¹ Artists pursue it.² Moralists preach it.³ Monastics live it.⁴ Even today—*especially* today, as simplicity becomes more elusive—we more ordinary folk pay it at least verbal homage.

Scholars' views of simplicity are, well, more complex. On the one hand, simplicity cuts across our intellectual grain. We have a strong taste for complexity; indeed complexity amounts to a craft value—a point to which I shall return. On the other hand, scholars embrace simplicity (at least in its more sophisticated forms) out of professional ideology and custom. Recognizing that the cost of information is a crucial constraint on greater complexity, scholars

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1. "And, as the greatest only are, [i]n his simplicity sublime." ALFRED LORD TENNYSON, ODE ON THE DEATH OF THE DUKE OF WELLINGTON 6 (1852).

2. "Art, it seems to me, should simplify. That, indeed, is very nearly the whole of the higher artistic process" WILLA CATHER, ON WRITING 102 (1949).

3. "Embrace simplicity" LAO-TZU, THE WAY OF LAO-TZU (Wing-tsit Chan trans.), reprinted in JOHN BARTLETT, FAMILIAR QUOTATIONS 64 (Emily M. Beck ed., 15th ed. 1980).

4. "Our life is frittered away by detail Simplify, simplify." HENRY D. THOREAU, WALDEN 91 (J. Lyndon Shanley ed., 1971) (1854).

view simplification as a necessary concession to our limited knowledge. This insight yields many fruitful implications.⁵ Scholars perceive another of simplicity's virtues, this one at the meta-scientific level. There, the principle of Ockham's Razor asserts that simpler theories possess greater methodological, epistemological, and aesthetic elegance and value.⁶

I propose to explore complexity, simplicity's obverse—and more specifically, *legal* complexity. Of course, any attempt to analyze this subject systematically is fraught with difficulties. After all, legal complexity is hard to define, much less measure. It arises in a multitude of different contexts that may have little in common, contexts in which its meanings are likely to be different and its consequences not readily traceable. The task of distinguishing when it is a cause of some other condition from when it is an effect of some other cause, always difficult, is especially so because of complexity's frequent association with cognate concepts such as uncertainty. Even when its effects can be isolated, evaluating them is not a straightforward matter. In short, those who attempt to generalize about, and hence to simplify, a subject this subtle and intricate should reflect upon the words of the curmudgeonly Henry Adams, who denounced simplicity as "the most deceitful mistress that ever betrayed man."⁷

For all its pitfalls, however, the effort to analyze legal complexity seems a worthy enterprise. This is certainly not because legal complexity is a new subject. In fact, it is an ancient con-

5. Herbert Simon, for example, noted the irrationality of complex, formally rational decisionmaking in organizations, and developed a fundamental distinction between optimizing and "satisficing" behavior. HERBERT SIMON, *ADMINISTRATIVE BEHAVIOR* xxviii-xxxi (3d ed. 1976). In the political sphere, Charles Lindblom described, and sought to justify, incremental behavior—what he called "partisan mutual adjustment"—in terms of the need to reduce information and other decisionmaking costs. See CHARLES E. LINDBLOM, *THE INTELLIGENCE OF DEMOCRACY: DECISION MAKING THROUGH MUTUAL ADJUSTMENT* 21-84 (1965); Charles E. Lindblom, *The Science of "Muddling Through"*, 19 *PUB. ADMIN. REV.* 79 (1959). Ronald Coase analyzed how various kinds of complexity affect firms' structure and their pursuit of efficiency. See Ronald H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* N.S. 386 (1937), reprinted in *THE NATURE OF THE FIRM* (Oliver E. Williamson & Sidney G. Winter eds., 1991); Ronald H. Coase, *The Problem of Social Cost*, 3 *J.L. & ECON.* 1 (1960) [hereinafter Coase, *The Problem of Social Cost*]. Oliver Williamson extended Coase's insights in a variety of ways. See, e.g., OLIVER WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS* (1975).

6. For an elaborate historical development of this point, see THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962).

7. HENRY ADAMS, *THE EDUCATION OF HENRY ADAMS* 441 (1918).

cern,⁸ one that has continued to obsess lawyers, policymakers, social critics, editorial writers, and men and women in the street, who almost invariably condemn legal complexity in the most caustic terms.⁹ Yet despite the cascade of public and professional criticism, consideration of legal complexity in the academy is still in an embryonic stage; the subject remains more narrowly conceived than its importance warrants.

I define a legal system as complex to the extent that its rules, processes, institutions, and supporting culture possess four features: density, technicality, differentiation, and indeterminacy or uncertainty. I hasten to concede that one might well conceive and define it in other terms. An alternative and potentially useful definition, for example, might center on whether the people who are subjected to a legal rule, process, or institution perceive and experience it as complex, instead of on the objective qualities that a more detached viewer might ascribe to it (as my definition does).¹⁰ Still, I suspect that the four qualities on which I focus capture most, if not all, of what people would mean if they were to think about legal complexity.

Density and technicality are chiefly aspects of the system's rules. *Dense* rules are numerous and encompassing. They occupy a large portion of the relevant policy space and seek to control a broad range of conduct, which causes them to collide and conflict with their animating policies with some frequency. An example of a dense legal regime is that governing pension administration,¹¹

8. As Roscoe Pound noted in 1906, "[d]issatisfaction with the administration of justice is as old as law." Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729, 729 (1906), reprinted in 8 BAYLOR L. REV. 1, 1 (1956). Several of the problems that Pound discussed, such as the law's procedural focus and the "sporting theory of justice," are elements of legal complexity, although he did not use that precise phrase.

9. See, e.g., WALTER K. OLSON, *THE LITIGATION EXPLOSION* (1991).

10. Even parties subject to the same rule and engaged in the same transaction—the law governing an insurance contract, for example—might well perceive its level of complexity very differently, depending on their information and other resources and their stakes in and experience with the rule. Another aspect of the difference between these "objective" and "subjective" definitions of complexity is nicely illustrated by the *Tarasoff* litigation, discussed *infra* note 36. There, the therapists understood the court's rule to require them to warn those in danger, even though the rule in fact imposed only a general duty of care, which might or might not include a warning—a confusion facilitated by the court's alteration of its original decision. I am grateful to Marc Galanter for raising this point and these examples.

11. 29 U.S.C. §§ 1001–1461 (1988).

which cuts across and seeks to integrate a wide variety of legal specialties.

Technical rules require special sophistication or expertise on the part of those who wish to understand and apply them. Technicality is a function of the fineness of the distinctions a rule makes, the specialized terminology it employs, and the refined substantive judgments it requires. The Internal Revenue Code¹² is probably the leading example of technical rules.

A legal system is *institutionally differentiated* insofar as it contains a number of decision structures that draw upon different sources of legitimacy, possess different kinds of organizational intelligence, and employ different decision processes for creating, elaborating, and applying the rules. Product safety, for example, is institutionally differentiated in that it is governed by statutory provisions, regulatory standards promulgated by several different agencies and private technical organizations, tort litigation, and common law contract principles.¹³

The final feature—*indeterminacy*—is a quality both of rules and of legal processes and institutions. Indeterminate rules, processes, and institutions are usually open-textured,¹⁴ flexible, multi-factored, and fluid. The familiar reasonableness standard in tort law is an example of an indeterminate rule. Turning on diverse mixtures of fact and policy, indeterminate rules tend to be costly to apply and their outcomes are often hard to predict. Indeterminacy's relation to legal complexity is itself complex. Ironically, rules and institutions that are designed to reduce the law's indeterminacy may actually *increase* it, due to the cumulative effect of their density, technicality, and differentiation.¹⁵ Indeterminacy, then, may be a consequence, as well as a defining feature, of complexity.

Although I have been discussing complexity as if it were a fixed essence, it is of course nothing of the sort. Indeed, I have

12. 26 U.S.C. (1988).

13. See generally JERRY MASHAW & DAVID HARFST, *THE STRUGGLE FOR AUTO SAFETY* (1990); see also *Competitive Enter. Inst. v. National Highway Traffic Safety Admin.*, 956 F.2d 321 (D.C. Cir. 1992) (dispute between automobile lobby and NHTSA over fuel economy standards).

14. This concept is developed in H.L.A. HART, *THE CONCEPT OF LAW* 124-32 (1961).

15. See Boris I. Bittker, *Tax Reform and Tax Simplification*, 29 U. MIAMI L. REV. 1, 2 (1974).

just defined it as a composite of four variables. As such, it can only be located on a continuum ranging from extreme simplicity at one end to extreme complexity at the other. Thus a legal rule, process, or institution is neither simple nor complex; it is only more or less simple or complex compared to some other actual or ideal one. Complexity is multi-dimensional, and its dimensions cannot easily be measured, much less weighted. Hence it is neither possible nor desirable to attempt to classify something precisely as simple or complex. I shall therefore use the terms in a loose, relativistic sense, always assuming that other things remain equal. As long as my general analysis persuades, little should turn upon how any particular legal phenomenon is classified.¹⁶

Even so, some examples may help to sharpen the categories a bit. At the extremes, the rule that the President of the United States must be at least 35 years old¹⁷ is simple, whereas the rule against perpetuities¹⁸ is complex. Unlike the presidential age rule, the rule against perpetuities is embedded in a dense forest of norms, is notoriously indeterminate and highly technical (neither rule is institutionally differentiated). Moving away from the poles, tort law's reasonableness standard is moderately complex. Although neither dense nor technical, it is notably indeterminate, involving interaction among judge, jury, private groups, and often a legislature or agency. Precisely because contract rules generally seek to facilitate private choices, they tend to be fairly simple. Tax law, while including many bright-line rules, is quite complex; its

16. How, for example, should a system of scheduled damages for pain and suffering be classified relative to the existing system of largely indeterminate, jury-prescribed awards? In my discussion of these systems in Part IV, I treat the former as simpler than the latter. I do so because the former is relatively determinate and institutionally undifferentiated (the jury has much less to decide), and requires a less technical set of doctrines for controlling the jury. On the other hand, a schedule system could be quite complex, depending on how it is designed. Classification, then, is manifestly a matter of judgment.

17. U.S. CONST. art. II, § 1, cl. 4.

18. See *Lucas v. Hamn*, 364 P.2d 685 (Cal. 1961) (holding that rule against perpetuities so complicated that attorney of ordinary skill who misunderstands it cannot be held liable for malpractice), *cert. denied*, 368 U.S. 987 (1962). The modification of this rule proposed in the Uniform Statutory Rule Against Perpetuities, adopted in a number of jurisdictions, exemplifies one approach to legal simplification—here, through a savings clause principle of wait-and-see. See UNIFORM STATUTORY RULE AGAINST PERPETUITIES prefatory note, reprinted in JOHN H. LANGBEIN & LAWRENCE W. WAGGONER, SELECTED STATUTES ON TRUSTS AND ESTATES 674, 674 (1992).

rules are dense, technical, and elaborated through a differentiated system of agencies and tribunals.¹⁹

For all the broad-gauged interest in legal complexity, legal scholars have largely confined their analyses of this phenomenon to two aspects: (1) its transaction costs, including legal uncertainty; and (2) certain of its sources, especially litigation incentives, judicial decisions, and rule form.²⁰ These analyses are valuable and form the basis for much that follows; nevertheless, one is struck by their narrowness. Legal complexity, after all, has consequences that go well beyond transaction costs, and has sources besides litigation incentives and judicial lawmaking. Its forms, costs, structural causes, limits, and possible reform raise important social issues that need to be explored in greater depth and breadth.

My argument consists of four linked claims, which I develop and defend in turn in Parts I through IV. The first two claims—that legal complexity is increasing, and that this is problematic for a system of justice—are not, I think, particularly controversial. Of course, I can no more demonstrate the first (growing complexity) by merely citing examples than I can prove increased regulatory burdens by counting pages in the *Federal Register* (although many have purported to do so). Still, I hope in Part I to satisfy any doubters by showing that this trend appears in the forms, subject matter, goals, interpretation, and remedial structure of legal norms in a variety of areas.

19. Some claim—perhaps hyperbolically, certainly antagonistically—that the Federal Sentencing Guidelines are approaching the level of complexity of the Tax Code. See, e.g., José A. Cabranes, *The Federal Sentencing Guidelines: A Dismal Failure* 6 (remarks at the University of Chicago Law School, January 15, 1992) (on file with author); see also Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901 (1991).

20. On legal uncertainty, see Anthony D'Amato, *Legal Uncertainty*, 71 CAL. L. REV. 1 (1983); Werner Z. Hirsch, *Reducing Law's Uncertainty and Complexity*, 21 UCLA L. REV. 1233 (1974). Some scholars have analyzed the optimal level of rule precision or determinacy. Ehrlich and Posner define precision in terms of the number and simplicity of the facts to which legal consequences attach, Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 261 (1974), whereas Colin Diver defines it in terms of transparency, accessibility, and congruency, Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 67 (1983). Many scholars have noted the transaction costs of complex rules. See, e.g., sources cited *supra* note 5. Another group has explored how rule forms evolve through litigation, a genre summarized and extended in Jason S. Johnston, *Uncertainty, Chaos, and the Torts Process: An Economic Analysis of Legal Form*, 76 CORNELL L. REV. 341 (1991).

My second claim, that complexity is problematic for a system of justice, will likewise command widespread agreement. Numerous commentators, for example, point to the administrative and transaction costs that complexity generates.²¹ Although this point is correct as far as it goes, it deflects attention from two other kinds of complexity-induced problems, which I call *governance* and *delegitimation* costs. These have received much less attention, perhaps because they are less palpable and involve “softer” responses of a psychological and emotional nature; I seek to remedy this neglect in Part II.

My third claim speaks to the causes of legal complexity and is therefore more controversial. Scholars analyzing legal complexity have largely defined it in terms of uncertainty and other transaction costs, broadly defined.²² According to them, much complexity originates in the ways in which litigation incentives and adjudication affect the form of rules. Although this approach seems correct as far as it goes, it ignores another important set of causes, which I call the “political economy of complexity.” As discussed in Part III, this consists of the professional skills, career ambitions, and craft values that drive the dominant producers and rationalizers of law—here I refer not only to judges but also to legislators and their staffs, administrators, litigators, and legal scholars—to choose more, rather than less, legal complexity.

My final claim, presented in Part IV, is that the growing costs of legal complexity generate powerful behavioral responses in the direction of legal simplification²³—first among private decisionmakers, then among public officials, and relatively late in the game, among legal scholars²⁴—and that these responses can be used not only to define complexity’s limits but also to deduce general principles for evaluating particular reform proposals. I

21. Complex litigation, including mass toxic torts, is perhaps the most widely discussed example. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 542–47 (4th ed. 1992); PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* (enlarged ed. 1987); D’Amato, *supra* note 20, at 10; Hirsch, *supra* note 20, at 1241–45; Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL’Y 541, 553–68 (1992).

22. See, e.g., sources cited *supra* notes 20–21.

23. As discussed in Part III, *infra*, this simplification is more often *de facto* than *de jure*.

24. My analysis of the political economy of legal complexity in Part III may help to explain this interesting lag among academics.

conclude in Part V by identifying some specific simplification options that should be seriously considered.

An important caveat going to my normative argument is in order. As Henry Adams's epigram²⁵ and Jerry Brown's flat tax proposal remind us, simpler is not always better.²⁶ Legal complexity sometimes produces fairer, more refined, more efficient, even more certain, forms of social control.²⁷ The question always is: All things considered, are the benefits of a given level of complexity worth its costs? There is no general answer to this question, of course, and I do not seek to answer it for any particular legal phenomenon. By the same token, complexity should not be seen as a symbol of what is wrong with American law more generally. Indeed complexity is both a weakness and a strength. My goals, then, are more limited and theoretical: to enrich the discourse on complexity's causes and consequences, to suggest some possible cures, and to derive some criteria for knowing when to pursue simpler law.

This caveat—that simpler law is not always better law—is important because I shall say a great deal about complexity's *costs* but little about its *benefits*. I wish to be clear about this bias, lest it be misunderstood. It is purposeful; indeed it connects with my central point. Because the political economy of lawmaking presses the law toward greater complexity with little regard to whether any particular complexity is worth its costs, we end up with more complexity than we need (by some more objective account). This constitutes a kind of structural imbalance, which we can only hope to redress by urging the producers, rationalizers, and administra-

25. See *supra* text accompanying note 7.

26. The absurdity of a thoroughgoing legal simplicity was captured by Swift in his description of Brobdingnag's legal system:

No Law of that Country must exceed in Words the number of Letters in their Alphabet, which consists only in two and twenty. But indeed, few of them extend even to that Length. They are expressed in the most plain and simple Terms, wherein those People are not mercurial enough to discover above one Interpretation. And to write a Comment upon any Law is a capital Crime. As to the Decision of civil Causes, or Proceedings against Criminals, their Precedents are so few, that they have little Reason to boast of any extraordinary Skill in either.

JONATHAN SWIFT, *GULLIVER'S TRAVELS* 130 (Scholars' Facsimiles & Reprints 1976) (1726).

27. See, e.g., Bittker, *supra* note 15, at 1-2; Paul L. Joskow & Alvin K. Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 YALE L.J. 213 (1979). As Bittker points out, the reverse can also be true: simple language can be a source of complexity. Bittker, *supra* note 15, at 2.

tors of law to keep simplicity's more elusive virtues and complexity's corresponding vices constantly in mind.

I. THE GROWTH IN LEGAL COMPLEXITY

The legal system as a whole exhibits a marked tendency to become more complex, a feature that it appears to share with other systems, physical and social.²⁸ In the case of the law, this tendency is certainly not inexorable, as the replacement of writ pleading with much simpler code pleading and the replacement of tort law in the workplace with workers' compensation systems demonstrate.²⁹ Nor does complexity grow at the same rate and at the same time in all areas of the law.³⁰ Yet for all these qualifications, the strength and generality of this trend are striking. One can discern it *throughout* the legal system—in the form, subject matter, goals, interpretation, and remedial infrastructure of legal norms.

A. *The Form of Legal Norms*

Many legal norms evolved from relatively precise, acontextual, determinate, and hard-edged forms to relatively ambiguous, contextual, indeterminate, and open-ended ones. These two types of forms are sometimes referred to as rules and standards.³¹ Rules are not always simple, and standards are not always complex, but these formal categories do describe paradigmatic, antipodal types. They express distinctive ways in which the law views, values, argues about, and influences the nature of social relationships. Further, these formal types affect

28. This may reflect a more secular, perhaps even universal, dynamic affecting such systems. See generally NICHOLAS GEORGESCU-ROEGEN, *THE ENTROPY LAW AND THE ECONOMIC PROCESS* (1971); TALCOTT PARSONS, *THE SOCIAL SYSTEM* (1951).

29. Even here, however, one is also struck by the tendency of the simpler substitutes to grow more complex over time.

30. Consider the deep structural differences between tort law (decentralized, common law), patent law (technology-driven, statutory), administrative law (process-oriented), property law (transaction-oriented), and constitutional law (structure-oriented). Given such differences, the similarity of the rhythm and character of change in these fields is unexpected. Moreover, particular doctrines may oscillate between simpler and more complex forms. See Johnston, *supra* note 20 at 346.

31. See, e.g., Ehrlich & Posner, *supra* note 20, at 258; Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687-88 (1976). Carol Rose calls them "crystals" and "mud." Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 578-79 (1988).

substance, shaping both particular legal outcomes and the balance among competing social ideals and practices.

A movement from rules to more complex standards has been evident for some time. At the "meta-law" level, the evolution of legal norms from common law principles to statutes to administrative regulation, although animated in part by a quest for greater certainty, has only produced more open-ended complexity. Efforts to achieve greater certainty have generally failed, as the history of administrative law demonstrates. A generation of scholars, officials, and reformers urged that agencies make policy through rulemaking rather than the traditional case-by-case adjudication, in large part because of the greater certainty that rules were thought to afford. But in a longitudinal study of administrative law court decisions, Don Elliott and I found that during the last twenty years rulemaking made only minor inroads.³² Indeed we found a *retreat* from rulemaking back to adjudication in several important policy sectors.³³

The movement toward administrative rulemaking is intimately connected to the increased resort to administrative *discretion* as a dominant legal modality,³⁴ and the exercise of discretion in turn generates more legal complexity. Although the legal system employs many techniques to constrain and guide discretion—statutory language, judicial review, legislative oversight, public participation, and procedural requirements are examples—the pervasive delegation of discretion to agencies (and to courts) means that the resulting legal regime is almost certain to become more dense, technical, institutionally differentiated, and indeterminate than if the legislature had simply promulgated a rule itself. There are often compelling public interest reasons to confer discretion, even given the risk that it will sometimes be abused. Greater legal complexity, however, should be seen as one more consequence of doing so.

32. Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1014-15 (in 1984-1985, the high point in absolute terms for rulemakings during the study period, they constituted only 6.5% of cases coded as rulemakings, ratemakings, or adjudications; excluding agencies that did not use rulemaking at all, rulemakings constituted only 9.4%; the share of rulemaking declined between 1975 and 1984-1985). This study, it should be noted, measured rulemakings only indirectly, by counting circuit court cases involving such proceedings.

33. See *id.*; see also *infra* text accompanying notes 164-65.

34. See generally KENNETH C. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969).

Even tort law, which is administered by courts rather than discretionary agencies and which has traditionally been one of the simpler legal specialties, has become more complex. Its relatively fixed rules—for example, the no-duty rule, the impact rule limiting emotional distress claims, the rule restricting recovery of lost profits—are steadily giving way to more indeterminate standards shaped by more differentiated institutions.³⁵ An especially striking example is found in the well-known *Tarasoff* case, in which the California Supreme Court, after imposing a specific duty to warn foreseeable victims, amended its opinion to substitute a duty to exercise reasonable care to protect them, a vaguer, more general duty that has spawned much confusion.³⁶ Another example from the same court is found in *Rowland v. Christian*,³⁷ in which the court jettisoned the ancient categorical rules governing the duties that landowners owe to those injured on their property, in favor of a general reasonableness standard applicable even to trespassers. Also, judicial recognition of relatively open-ended cancerpho-

35. Even bright-line rules can become indeterminate around the edges. In the areas cited in the text, for example, courts applying relatively clear rules stretched their meanings in order to find: a special relationship as the predicate to imposing a legal duty, e.g., *Farwell v. Keaton*, 240 N.W.2d 217, 222 (Mich. 1976); impact, e.g., cases cited in RICHARD EPSTEIN ET AL., *CASES AND MATERIALS ON TORTS* 1055-56 (4th ed. 1984); and foreseeable economic loss, e.g., *People Express Airlines v. Consolidated Rail Corp.*, 495 A.2d 107, 116-18 (N.J. 1985). For an example of stretching in administrative law, see Peter H. Schuck, *When the Exception Becomes the Rule: Regulatory Equity and the Formulation of Energy Policy Through an Exceptions Process*, 1984 DUKE L.J. 163.

36. Compare *Tarasoff v. Regents of Univ. of Cal.*, 529 P.2d 553 (Cal. 1974) (*Tarasoff I*), withdrawn, 551 P.2d 334 (Cal. 1976) with *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334 (Cal. 1976) (*Tarasoff II*). See Daniel J. Givelber et al., *Tarasoff, Myth and Reality: An Empirical Study of Private Law in Action*, 1984 WIS. L. REV. 443, 465-68 (showing confusion in therapists' understanding of difference between *Tarasoff I*'s duty to warn and *Tarasoff II*'s more general duty). Subsequent cases have glossed *Tarasoff II* with a complex, even more indeterminate set of principles. E.g., *Hamman v. County of Maricopa*, 775 P.2d 1122, 1128 (Ariz. 1989) (extending duty to any foreseeable victim, not just target of specific threat); *Hedlund v. Superior Court*, 669 P.2d 41, 46-47 (Cal. 1983) (where threat was against mother, finding duty extended to child who suffered emotional harm while seated next to mother who was attacked; theory of recovery also included malpractice, although child was not defendant's patient); *Petersen v. State*, 671 P.2d 230, 236-37 (Wash. 1983) (finding duty extended to motorists injured in drug-related automobile accident caused by defendant's patient).

37. 443 P.2d 561 (Cal. 1968). Jason Johnston not only views this decision as moving from a relatively bright-line rule to a balancing rule producing uncertainty, but also as reducing the rule's efficiency. Johnston, *supra* note 20, at 379-82.

bia claims, traditionally dismissed as too speculative, is now widespread.³⁸

This discussion of legal forms is not meant to suggest that they have moved in only one direction, from simple rules to more complex standards. Some notable and interesting counter-examples exist. Consider the Federal Sentencing Guidelines, which established a generally binding grid for judges' sentencing decisions.³⁹ Albert Alschuler and others have criticized this reform as a misguided attempt to achieve some of the virtues of clear, simple rules, especially horizontal equity, by reducing the largely standardless discretion that sentencing judges previously enjoyed. To Alschuler, the Guidelines are characteristic of a more general style of contemporary legal thought in which numerous cases are aggregated and treated uniformly despite their real differences.⁴⁰ Other instances of simplification-through-aggregation can also be cited.⁴¹ Still, the dominant trend is toward legal forms that create more discretion and complexity, not less.

B. *The Subject Matter of Legal Norms*

The administrative state grew out of the effort to regulate areas of activity previously governed primarily by informal or contractual norms, and other areas previously regulated at lower levels of intensity or lower levels of government. It elaborated new bodies of law bearing all of complexity's hallmarks. Dense norms occupied much of the field of activity. Regulatory law also brought more technicality; specialized lawyering became so essential that the profession had to reorganize along new lines. New institutions—highly differentiated agencies and the diverse structures to which they give rise⁴²—proliferated. Meant to increase certainty, regulation actually reduced it on balance because of its

38. See discussion and sources cited in SCHUCK, *supra* note 21, at 31.

39. 18 U.S.C. §§ 3551–3580 (1988).

40. Alschuler, *supra* note 19, at 904–08.

41. One important example is hospital reimbursement under Medicare according to diagnostically related groups. See Social Security Amendments of 1983, Pub. L. No. 98–21, § 601, 97 Stat. 65, 149–63 (codified at 42 U.S.C. § 1395ww) (establishing prospective payment system under which payments to hospitals are based on fixed cost estimates rather than on the actual cost of providing care). Another example is the Social Security disability insurance grid system, which was challenged and upheld in *Heckler v. Campbell*, 461 U.S. 458 (1983).

42. See *infra* text accompanying notes 119–23.

greater ambition and its preservation of much of the common law regime.

Two examples will suffice to illustrate the point. Before *Baker v. Carr*⁴³ and the Voting Rights Act of 1965,⁴⁴ the federal law of voting rights was relatively simple, concerned largely with reapportionment, fraud, and egregious forms of intentional racial discrimination. Today, however, this body of law also involves the detailed federal regulation and review of thousands of state and local election laws involving structures of representation, voting rules, annexations, municipal finance, and the allocation of legislative business.⁴⁵ Bewilderingly complex law penetrates even private law fields. Employment and employee benefits law, for example, is now a dense mixture of private contracting, common law adjudication, statutory norms, detailed agency regulation, and informal control through legislative oversight.⁴⁶

C. *The Goals of Legal Norms*

Before the age of statutes,⁴⁷ the administrative state, and an avowedly policymaking judiciary, the policy ends invoked by American lawmakers were generally modest. Legislatures' principal goals were to facilitate private ordering and to establish public policies to buttress that system,⁴⁸ while common law courts usually hewed to a formalistic conception of judging that emphasized (at least at the level of judicial rhetoric) a fidelity to *stare decisis* and legislative intent, rather than articulated an instrumentalist stance.⁴⁹

43. 369 U.S. 186 (1962).

44. Pub. L. No. 89-110, 79 Stat. 437 (codified at 42 U.S.C. §§ 1971, 1973-1973p).

45. For the most recent example in the Supreme Court, see *Presley v. Etowah County Comm'n*, 112 S. Ct. 820 (1992). In addition to showing the expansion of subject matter, this case also exemplifies how institutional differentiation can increase complexity. Here, the Court declined to grant its customary deference to the Justice Department's construction of the Voting Rights Act, adding a new source of indeterminacy.

46. See generally JOHN H. LANGBEIN & BRUCE A. WOLK, *PENSION AND EMPLOYEE BENEFIT LAW* 579-614 (1990).

47. See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 1 & n.1 (1982).

48. See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1671-81, 1715-16 (1975).

49. Judges, of course, often alluded to the law's purposes at some level of generality. It is a matter of degree. For a fundamental dispute over that degree (among other disputes), compare MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 16-30 (1977) with A.W.B. Simpson, *The Horwitz Thesis and the History of*

The New Deal changed all that, and the change it wrought accelerated in the decades that followed. New legislative goals, largely implemented by administrative agencies, included health and safety, equal opportunity, income redistribution, financial security for the elderly, stabilization of markets, development of infrastructure, governmental reform, and many more. This transformation of public and private law invited judges to abandon even the pretense of formalism.⁵⁰ Spurred on by many legal scholars,⁵¹ they openly embraced a conception of role, a style of thought, and a rhetoric of decision that legitimated judicial policymaking in a variety of areas.

Once judges adopted an explicitly policy-oriented style, the more complex character of their new course quickly became clear. Leaving the familiar, secure terrain of formalism for the more exhilarating but perilous realm of policymaking, a larger number of decision-relevant goals came into view. This multiplicity of goals necessitated new legal doctrines capable of encompassing and harmonizing them. In tort law, for example, the courts pursued cost-internalizing and loss-spreading goals, "inventing" the doctrine of enterprise liability in the process.⁵²

The same imperatives led courts in both private and public law to adopt certain common decision methodologies that vastly complexify the system. Important examples include interest-balancing,⁵³ sequential burden-shifting,⁵⁴ and broad but incomplete,

Contracts, 46 U. CHI. L. REV. 533 (1979) (disagreeing, *inter alia*, with Horwitz's interpretation of opinions) and Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1721 (1981) (opinions reveal "rudimentary level" of instrumentalism, consistent with various purposes).

50. See BRUCE A. ACKERMAN, *RECONSTRUCTING AMERICAN LAW* (1984); Stewart, *supra* note 48, at 1678-81.

51. See, e.g., Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Owen M. Fiss, *The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

52. George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 463 (1985).

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

54. See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 648, 658 (1989) (altering burden-shifting formula to increase plaintiff's burden) (effectively overruled by the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071); *Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248 (1981) (refining burden-shifting formula for all Title VII cases); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-06 (1973) (establishing

spasmodic deference to other institutions.⁵⁵ By requiring judges to balance numerous diverse, and inevitably conflicting, policy goals, these doctrines are bound to be both technical and indeterminate. Institutional differentiation only magnifies this complexity, for the doctrines must be applied by agencies to whom the courts accord ill-defined deference and with whom they share adjudicatory power.

D. *The Interpretation of Legal Norms*

The interpretation of legal texts is an ancient problem, as the Talmud vividly demonstrates. Still, today's Babel-like cacophony of legal hermeneutics is unprecedented. For whatever reason—the influence of post-modernist literary theories on legal thought,⁵⁶

formula for shifting burden of proof between parties in Title VII race discrimination cases); *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 832 (E.D.N.Y. 1984) (using burden-shifting to solve indeterminate defendant problem), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988); *Sindell v. Abbott Labs.*, 607 P.2d 924 (Cal.) (allowing liability of DES manufacturers to be based on market share rather than on specific evidence of causation of harm), *cert. denied*, 449 U.S. 912 (1980); *Martin v. Abbott Labs.*, 689 P.2d 368, 381 (Wash. 1984) (adopting market share alternate liability theory); *Collins v. Eli Lilly Co.*, 342 N.W.2d 37, 53 (Wis. 1984) (considering market share when apportioning liability to each defendant), *cert. denied*, 469 U.S. 826 (1984). This approach (sequential burden-shifting) is designed to elicit information for the court in service of deterrence, compensation, and other policy goals.

55. These institutions include legislatures, administrative agencies, juries, and private organizations. On deference to legislatures, see, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452–55 (1987) (Scalia, J., concurring in the judgment) (arguing that courts should adopt a "plain meaning" approach to statutory interpretation); *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 251–56 (1989) (Scalia J., concurring in the judgment) (elaborating on the "plain meaning" approach). On deference to agencies, see, e.g., Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071 (1990); and the recent Supreme Court decisions in *Presley v. Etowah County Comm'n*, 112 S. Ct. 820, 831–32 (1992), and *Lechmere, Inc. v. NLRB*, 112 S. Ct. 841, 847–48 (1992). On deference to juries, see Peter H. Schuck, *The New Judicial Ideology of Tort Law*, in *NEW DIRECTIONS IN LIABILITY LAW* 4, 10–12 (Walter Olson ed., 1988). On deference to private organizations, see Consumer Product Safety Act, 15 U.S.C. §§ 2056(b), 2058(b) (authorizing Consumer Product Safety Commission to rely on privately developed safety standards and to issue proposed rules based on such standards); Occupational Safety and Health Administration Standards for Air Contaminants, 29 C.F.R. § 1910.1000 (1991) (imposing limits on 428 workplace hazards, and basing limits on consensus standards previously developed by private industry associations); and Janet Gilboy, *Government Use of Private Resources in Law Enforcement* (1992) (unpublished manuscript, on file with author). These deference doctrines often operate differently than their authors intend. See *infra* Section I(D).

56. See RICHARD POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION*

the related emphasis on interpreting norms contextually, the triumph of realism and instrumentalism over formalism in law, a more general delegitimation of traditional sources of authority—a plethora of competing approaches has thrown the field open.⁵⁷ No clear winner is likely to emerge anytime soon. Meanwhile, the technicality and indeterminacy of statutory norms grows.

An example of this growth is the fate of post-*Chevron*⁵⁸ judicial review of statutory interpretations by administrative agencies, one of the three principal pillars of the “new textualism.”⁵⁹ In *Chevron*, the Supreme Court promulgated a two-part test for judicial review of agency interpretations of statutes,⁶⁰ an approach that sought to render administrative law more simple and certain by constraining the interpretive freedom of lower courts. But less than a decade later, the doctrine’s growing complexity has already undermined that purpose. Contrary to *Chevron*’s intention, the rate at which the D.C. Circuit overturned agency interpretations actually rose in the years immediately following the decision;⁶¹ and even the Supreme Court has been unable to apply its own test consistently.⁶²

E. *The Remedial Infrastructure of Legal Norms*

Legal norms are supported and vivified by an adversary process, a court system, and an enforcement apparatus which have

(1988).

57. The rise of a “new textualism” signals uneasiness about, indeed a reaction against, this new interpretive freedom. See, e.g., William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990); Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827 (1991).

58. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

59. The others are clear statement requirements and “plain meaning” interpretation. Mashaw, *supra* note 57, at 828–29.

60. Courts must first ask whether Congress has addressed the precise question at issue, and if they find that it has not, must then ask whether the agency’s interpretation of the statute is reasonable. 467 U.S. at 842–43.

61. Whereas the D.C. Circuit initially decreased deference afforded to such interpretations, the affirmance rate in other circuits rose. Schuck & Elliott, *supra* note 32, at 1041–42.

62. Merrill, *supra* note 55, at 980–85. Two decisions in the Court’s most recent Term indicate that this failure continues, further magnifying the doctrine’s indeterminacy. *Presley v. Etowah County Comm’n*, 112 S. Ct. 820 (1992) (declining to defer to administrative interpretation of Voting Rights Act of 1965); *Lechmere, Inc. v. NLRB*, 112 S. Ct. 841 (1992) (reversing administrative order for employer to cease barring union organizers from premises).

grown more complex with the emergence of mass litigation, a bureaucratized judiciary, and highly differentiated remedies. The remedial system, for example, is now redundant in many respects. This redundancy can be seen in the increasing overlap between tort and contract, tort and workers' compensation, and public and private enforcement mechanisms.

Tort adjudication tends to be more complex than contract adjudication involving similar parties and subject matter.⁶³ Yet courts increasingly recognize tort causes of action for losses that traditionally sounded only in contract, and that are *still* remediable in contract—product liability⁶⁴ and liability for pure economic loss are examples.⁶⁵

Similarly, tort litigation over injuries already covered by workers' compensation systems continues, despite the fact that workers' compensation systems are supposed to produce simpler, swifter, and more certain compensation for workplace injuries.⁶⁶ The result is an immensely complex hybrid claiming system.⁶⁷

The complex mixture of public and private enforcement is exemplified by our environmental protection system. An intricate system, it is replicated at three levels of government. At each level, it combines officially enforced criminal sanctions, civil penalties, and administrative actions with privately enforced remedies against enforcement officials as well as polluters.

63. This is true for several reasons. First, tort law's standard of care and measure of damages are more open-ended. Second, the existence of a tort law duty may be an issue whereas the existence of a contract usually is not. Third, causation is often difficult to ascertain. Finally, pre-dispute legal counseling and documentary evidence are less commonly available in tort law.

64. See U.C.C. § 2-715 (1990) (providing that following a breach of contract the buyer may recover not only for loss of a product's economic value but also for "injury to person or property proximately resulting from any breach of warranty.")

65. Accountants' liability is an important area of expansion. Compare, e.g., *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y. 1931) with *H. Rosenblum, Inc. v. Adler*, 461 A.2d 138 (N.J. 1983). See generally John A. Siliciano, *Negligent Accounting and the Limits of Instrumental Tort Reform*, 86 MICH. L. REV. 1929 (1988). Although the contract remedy may require a series of linked privity-based actions, modern civil procedure makes this a relatively straightforward matter.

66. Tort law has become far more pro-plaintiff since then, but the tort system's complexity and costs have also increased markedly.

67. See Richard A. Epstein, *The Legal and Insurance Dynamics of Mass Tort Litigation*, 13 J. LEGAL STUD. 475, 488-95 (1984) (arguing for exclusive reliance on the workers' compensation system through reinstatement of the privity limitation in tort law); Paul C. Weiler, *Workers' Compensation and Product Liability: The Interaction of a Tort and a Non-Tort Regime*, 50 OHIO ST. L.J. 825 (1989).

II. THE PROBLEMATICS OF LEGAL COMPLEXITY

Should we view legal complexity as a problem? If we suppose that legal rules are largely epiphenomenal, reflecting the underlying social conditions to which they relate, then we might want law's complexity to keep pace with society's. Social complexity is growing remorselessly. Interdependencies increase. Cultures and markets fragment. Values and technologies change. Bureaucracies expand. Under these conditions, a denser, more intricate legal system may be both inevitable and desirable.

This is true, I believe, but only up to a point. A more complex law entails many significant transaction costs which must be accounted for. Such law tends to be more costly and cumbersome to administer, more difficult for lawmakers to formulate and agree upon, and more difficult to reform once established. Administrators and subjects of such law must invest more in order to learn what it means, when and how it applies,⁶⁸ and whether the costs of complying with it are worth incurring. Other costs of administering a complex legal system include those related to bargaining about and around the system's rules and litigating over them.⁶⁹

Thus, legal complexity magnifies transaction costs by generating uncertainty.⁷⁰ Although complexity does not alone generate all of the costs—some would exist even in a simple legal system with

68. As Bittker has noted in the tax context, these costs will be quite different depending on the audience. See *infra* text accompanying notes 179–80.

69. Many of these costs are classified as "transaction costs." For some taxonomies, see Robert C. Ellickson, *The Case for Coase and Against "Coaseanism,"* 99 YALE L.J. 611, 614–15 (1989); Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further,* 100 YALE L.J. 1211, 1232–34 (1991). The systematic positive and normative analysis of how transaction costs affect legal rules is a pillar of modern legal scholarship. See, e.g., POSNER, *supra* note 21; Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral,* 85 HARV. L. REV. 1089 (1972); Coase, *The Problem of Social Cost,* *supra* note 5.

Legal complexity and legal uncertainty are cognate concepts, but uncertainty is actually contingent on complexity, which as I have noted depends in turn upon other characteristics of the legal system. See *supra* page 3. The Internal Revenue Code, for example, is a complex legal (sub)system that contains many relatively certain rules. See *supra* text accompanying notes 12, 19.

70. While uncertainty (or indeterminacy) is largely a function of complexity as I have defined it, see *supra* note 69, uncertainty may have other sources as well, as when a simple rule is perceived and treated as complex by those who are subject to it. See *supra* note 10 and accompanying text.

simple rules⁷¹—it is clearly an important source of them. Just *how* costly legal complexity is depends in part upon our incentives and our capacities to comply, which are in turn shaped by our values, intelligence, technology, and social control mechanisms.

Complexity-induced costs can be both inefficient and unfair. In fields as diverse as agency regulation, trusts and estates, and torts, complexity can inhibit beneficial transactions, impose dead-weight losses, create frustrating delays, consume the energies of talented individuals, breed new and difficult-to-resolve disputes, and discourage compliance.⁷² Promoting passivity and entrenching the status quo, legal complexity can stultify a society that often depends on vigorous action in solving problems.⁷³ Complexity's costs, moreover, impose disproportionate burdens on the poor by raising prices and necessitating the services of lawyers and other professionals trained in the management of complexity.⁷⁴

Complexity alters our incentives and tests our capacities, straining their limits. But complexity increases while the constraints on our capacities—especially social values and intelligence—are relatively fixed, at least in the short run. At some point, complexity's demands are bound to outstrip our capacities to manage it, creating a gap between them; and unless the forces propelling complexity can somehow be reversed, this gap will widen.

Transaction costs generally, including those associated with complexity, have received much scholarly analysis—and for good reason. Like friction in mechanics, they are ubiquitous and limit the system's performance. But scholars have paid less attention to two other kinds of complexity-induced costs, which I shall empha-

71. To pick an extreme example, even if the liability rule for traffic accidents was that pedestrians always win, and even if everyone knew the rule, the costs of organizing a market on which these entitlements could be traded would be exceedingly high.

72. Louis Kaplow has developed several models of legal complexity that take into account its effects on the incentives of potential violators and enforcement agencies to acquire (and in the violators' case, reveal) information. See LOUIS KAPLOW, *A MODEL OF THE OPTIMAL COMPLEXITY OF RULES* (National Bureau of Economic Research Working Paper No. 3958, 1992).

73. For a striking example, see Robert A. Kagan, *Adversarial Legalism and American Government*, 10 J. POL. ANALYSIS & MGMT. 369 (1991) (illustrating costs of adversarial legalism with case study of the dredging of Oakland Harbor).

Such inefficiencies, of course, may have virtues as well as vices, as Samuel Gross reminds us. See Samuel R. Gross, *The American Advantage: The Value of Inefficient Litigation*, 85 MICH. L. REV. 734, 748-56 (1987).

74. See Hirsch, *supra* note 20, at 1246-47.

size here. *Governance costs* arise from the need to formulate and gain agreement on complex rules. *Delegitimation costs* occur when rules become so complex that their intelligibility and legitimacy decline.⁷⁵

A. *Governance Costs*

When a rule must be agreed upon by a number of rulemakers, its formulation entails costs; the more numerous those whose assents are necessary, the more costly the agreement will be.⁷⁶ A legal system that is complex in any of the senses I have defined will multiply these governance costs.

Guido Calabresi's image of a legal landscape constituted by the existing rules and practices⁷⁷ helps to show why. As the body of rules grows more dense, the legal landscape becomes more thickly populated and harder to traverse. Concealed declivities, sudden detours, arterial congestion, unexpected cul-de-sacs, puzzling signs, and jarring encounters abound. Because integrating new rules with existing ones becomes tricky and dangerous, the system must develop another layer of meaning: rules about rules.⁷⁸ In this locale, it is no longer enough to know one's location and destination; one cannot survive without a great deal of local knowledge about when the buses run, whether cabs will venture into certain neighborhoods, which vendors are trustworthy, and where it is safe to walk. People with a choice do not venture out unattended. Experienced guides equipped with maps and special know-how are essential, for only the initiated can lead a newcomer through the honeycomb of enclaves, each with its local patois, exotic cuisine, peculiar customs, and belligerent pride.⁷⁹

A legal landscape this complex engenders several kinds of governance costs that have generally been overlooked. First, those who make legal rules become more risk averse. Even fervent re-

75. A governance cost can readily be viewed as a kind of transaction cost, but it is not useful to characterize a delegitimation cost in that way.

76. JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 106 (1962); Ehrlich & Posner, *supra* note 20, at 267.

77. CALABRESI, *supra* note 47, at 3-7.

78. *E.g.*, Administrative Procedure Act, 5 U.S.C. §§ 551, 552a-559, 701-706 (1988); Regulatory Flexibility Act, 5 U.S.C. §§ 601-612 (1988).

79. This fierce localism is a vision worthy of G.K. Chesterton. See GILBERT K. CHESTERTON, *THE NAPOLEON OF NOTTING HILL* (1904).

formers hesitate to alter a landscape that is so hard to read; they know that in a more polycentric legal world, any change will have ripple effects, ramifying widely, swiftly, and unpredictably throughout the system's web.⁸⁰ When the risks of error are magnified, rulemakers are more likely to adhere to even an unsatisfactory status quo.⁸¹ This increased risk aversion surely contributes to the bleak policymaking deadlock, the sense of drift, that exists today in so many policy fields.

Institutional differentiation spawns legal indeterminacy, another governance cost. The proliferation of policymaking institutions multiplies the sources of innovation, information, and legitimacy—precious resources in any social system. On the other hand, this diversity also encourages conflict and raises decision costs.⁸² The only way to reach agreement among institutions may be to adopt open-ended, multi-factored or otherwise indeterminate legal standards. These standards do not really reduce conflict but simply use delegated authority to move the policy conflict from one rulemaking locus to others, usually agencies and courts.⁸³

Delegated standards thus increase the delegate's cost of decision, especially if it is itself a collegial or otherwise differentiated body. Judge Patricia Wald of the District of Columbia Circuit recently underscored this point when she defended the concededly problematic *Chevron* test to those who would prefer a more refined, complex standard:

Judges of radically different political and social viewpoints can only reason together on the basis of a few relatively simple prop-

80. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 395-404 (1978) (describing concept of polycentricity).

81. This is a logical implication from official risk aversion. I discuss the phenomenon in PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 70-71 (1983).

82. With respect to private actors, see, e.g., Henry Hansmann, *When Does Worker Ownership Work? ESOPs, Law Firms, Codetermination, and Economic Democracy*, 99 YALE L.J. 1749, 1780-83 (1990). With respect to public actors, see *infra* text accompanying notes 107-11.

83. Compare Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORGANIZATION 81, 97 (1985) (arguing that "[e]limination of discretion at one choice point merely causes the discretion that had been exercised there to migrate elsewhere in the system") with THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* (2d ed. 1979) (criticizing failure of Congress to make policy decisions); see also James S. Eustice, *Tax Complexity and the Tax Practitioner*, 45 TAX L. REV. 7, 11 (1989) (leaving unanswered tax policy questions to courts shifts complexity problem without eliminating it).

ositions that they can all agree govern, so that disputes can be narrowly focused on their application. The *Chevron* decision, warts and all, has accomplished this Were we to switch to a broader framework of what is good regulatory policy or which of thirty canons apply, our debates would be less focused, our work would be more complex, and our differences would more frequently prove irreconcilable. A simple decisional framework may be essential to collegial decisionmaking in a court of widely differing views.⁸⁴

B. *Delegitimation Costs*

I have been discussing costs of legal complexity borne in the first instance by those who must administer the system.⁸⁵ But if the complex legal landscape contains many pitfalls for the governors, it is *terra incognita* for the governed. In a society that values negative liberty⁸⁶ and personal "space," the density of the legal system—the penetration of law into every corner of human life, or what has been called "hyperlexis"⁸⁷—is bound to be a source of deep resentment.⁸⁸ When rules are indeterminate, their precise meanings cannot be easily grasped, nor can their applications be readily predicted. Confusion and uncertainty follow. If the rules are technical, they will often be opaque to the common mind, common sense, common experience, and even common morality.⁸⁹ Intelligible only to experts, the law is likely to mystify and alienate

84. Patricia M. Wald, Comment, *The "New Administrative Law"—With the Same Old Judges in It?*, 1991 DUKE L.J. 647, 668–69 (footnote omitted).

85. These costs, of course, flow through to the rest of us, in the forms described earlier: blocked transactions, deadweight losses, delays, litigation, heightened risk aversion, and conflict among governing institutions. Again, this does not deny that some of these effects entail countervailing benefits. Litigation, for example, is a public good insofar as it creates precedents that clarify and refine the law for the use of others, a benefit that is, of course, especially valuable in connection with complex rules. To the extent that the rules are more complex than they need to be, however, this is a bootstrapped benefit.

86. This concept is elaborated in ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118 (1969).

87. "Hyperlexis," a term coined by Bayless Manning, describes "the pathological condition caused by an overactive law-making gland." Bayless Manning, *Hyperlexis: Our National Disease*, 71 NW. U. L. REV. 767, 767 (1977).

88. See, e.g., OLSON, *supra* note 9, at 1–11; Michael J. Cacace, *The Nation's Love-Hate Relationship with Lawyers*, FLA. B.J., Oct. 1991, at 94, 94–95.

89. This common sense, common morality criterion is akin to what Anthony D'Amato calls "natural law" and John Finnis calls "practical reasonableness." D'Amato, *supra* note 20, at 49–51 (citing JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 100–27 (1980)).

lay citizens whose intelligence it often seems designed to mock. When this Delphic law also emerges from an institutional black box that is itself dense and difficult to comprehend, its legitimacy—the sense of “oughtness” that the lawmakers hope will attach to it—is diminished.

The fact that these characteristics of the complex legal regime seem to be objective may for a time earn it acquiescence, even support. But as we shall see, complexity is not neutral in its effects; it advantages some groups and disadvantages others,⁹⁰ a fact that is well understood by those who seek to influence the shape of the law. Once citizens begin to suspect that these advantages and disadvantages are unfairly, rather than randomly, distributed, and that this distribution is purposeful rather than adventitious, they will come to view complexity in an altogether different, less tolerant light. Profound cynicism about and alienation from the legal system may result.

One cannot measure these delegitimation costs directly, of course, much less know the extent to which legal complexity is their cause. Historical studies indicate that popular disgust with legal complexity and a quest for simplification was an important factor leading to the adoption of code pleading in this country.⁹¹ This successful reform of the formal law—what John Langbein calls “legal implosion”—is surely exceptional. More commonly, I suspect, the public suffers excessive complexity in silence, responds with informal simplifications,⁹² or simply fails to comply.

The literature reveals remarkably little empirical inquiry into the link between complexity and noncompliance. Our ignorance extends even to the tax field, where understanding this relationship is an important policy priority.⁹³ There is evidence, however, that these delegitimation costs are great. Taxpayers bewildered by tax law's complexity and uncertainty appear more likely to violate it.⁹⁴

90. See *infra* Part III.

91. Alison Reppy, *The Field Codification Concept*, in DAVID D. FIELD: CENTENARY ESSAYS 17, 21–25 (Alison Reppy ed., 1949).

92. See *infra* Part IV.

93. For a discussion of some of the methodological obstacles to such studies, see Susan Long & Judyth Swingen, *An Approach to the Measurement of Tax Law Complexity*, J. AM. TAX ASS'N, Spring 1987, at 22, 25 (proposing six indices of complexity); Joel Slemrod, *Complexity, Compliance Costs, and Tax Evasion*, in 2 TAXPAYER COMPLIANCE 156, 178 (Jeffrey A. Roth & John T. Scholz eds., 1989) (reviewing methodological issues; “only recently has research been focused on the relationship between complexity, compliance costs, and tax evasion”).

94. E.g., Jeffrey A. Roth et al., *Understanding Taxpayer Compliance: Self Interest*,

Voluntary compliance, so critical to the tax law's integrity, depends upon its intelligibility. "Erosion of taxpayer morale," James Eustice observes, "is not an unimportant side effect of all this confusion—if taxpayers think the whole system is unknowable, the temptation to use self help to fashion their own private tax shelters becomes well high irresistible."⁹⁵

There is ample evidence of delegitimation costs in fields other than tax. A Rand study of corporate responses to modern product liability law, for example, found that the law emitted such noisy, random, and confusing signals to manufacturers that it had little effect on the product design decisions it was supposed to influence.⁹⁶ New York's hypertechnical signature and petition requirements nearly kept Paul Tsongas, a genuine presidential contender, off the primary ballot, a result that was averted, ironically, only by invoking another technicality.⁹⁷ Recently, in some Latin American societies, legal complexity has helped to produce an immense illegal sector.⁹⁸ In the United States, complexity has helped to delay,

Social Commitment, and Other Influences, in 1 TAXPAYER COMPLIANCE, *supra* note 93, at 71, 129 ("Of the seven guilt neutralization mechanisms investigated by Thurman . . . the justification, 'It is okay to claim an undeserved tax deduction when you are not really sure what the rule is,' was the most widely accepted and most consistently related to compliance.")

95. Eustice, *supra* note 83, at 19 (but citing no empirical support for proposition); see also JOHN F. WITTE, THE POLITICS AND DEVELOPMENT OF THE FEDERAL INCOME TAX 62 (1985) (arguing that complexity "makes the task of enforcement significantly more difficult, and it makes it easier to plead ignorance or error when the intent was truly fraud").

Humorist Dave Barry imagines that taxpayer noncompliance

has something to do with the fact that the tax code is larger than the average taxpayer's home and nobody in the entire world really understands it because it was apparently written by hostile mutant non-English-speaking lawyers from space, plus it is revised about every 25 minutes, plus it is used to take taxpayers' money away and turn it over to a federal government that routinely spends it on activities like declaring National Deviled Ham Awareness Month. Nah, that couldn't be it. It's probably some kind of chemical disorder in the taxpayers' brains.

Dave Barry, *Schedule 936850345-D*, INT'L HERALD TRIB., Apr. 4-5, 1992, at 18.

96. GEORGE EADS & PETER REUTER, DESIGNING SAFER PRODUCTS: CORPORATE RESPONSES TO PRODUCT LIABILITY LAW AND REGULATION 27-29 (1985).

97. See Michael Specter, *Once Again, New York's Arcane Election Laws Shape Race*, N.Y. TIMES, Feb. 28, 1992, at B1 (candidates subject to summary removal from ballot for spelling errors on ballot, incorrect ordering of witness sheets, wrong type of clips used to bind pages, etc.); Michael Specter, *Now It's a Technicality That Keeps Tsongas and Brown on Ballot*, N.Y. TIMES, Mar. 11, 1992, at A18 (lawsuit challenging Tsongas dismissed on technicality).

98. See, e.g., HERNANDO DE SOTO, THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD (1989); Peter H. Schuck & Robert E. Litan, *Regulatory Reform in*

and in some cases defeat, the implementation of many important regulatory statutes.⁹⁹

Again, however, these weighty objections to complexity would not necessarily be decisive in any particular situation. A simpler regime, after all, might be even worse. I underscore the disadvantages of complexity here only because the rulemaking process systematically obscures them.

III. THE POLITICAL ECONOMY OF LEGAL COMPLEXITY

Legal complexity clearly has many causes. The economy has grown larger and more interdependent. The social conditions that the law seeks to regulate have grown more difficult to understand and control. Higher levels of education and professionalism have increased the public's taste and tolerance for complexity in all social institutions, including the legal system. All of the components of the legal world—law, lawyers, litigation, legal commentary, legal techniques, problems deemed fit for legal regulation—have expanded enormously.¹⁰⁰

One must not assume, however, that more social complexity leads inexorably to more legal complexity. The two are closely related, of course, but one does not always follow from the other. Complexity, like most other things, is subject to the law of diminishing returns. Social actors manifestly understand this. Research in experimental psychology and organizational behavior indicates that they radically simplify their complex decision environments in order to make them manageable, and that this strategy is both rational and typical.¹⁰¹ Instances abound in which legal simplification seems the best, or at the least a plausible, response to social complexity. I discuss some of these examples in Part IV.

Beyond a certain point, then, legal complexity is simply not preordained by social complexity. In a real sense, we choose it. Why and in what sense do we choose it? One can argue that the

the Third World: The Case of Peru, 4 YALE J. ON REG. 51 (1986).

99. See, e.g., Robert Pear, *U.S. Laws Delayed by Complex Rules and Partisanship*, N.Y. TIMES, Mar. 31, 1991, at A1 (noting delays in legislation on the homeless, air pollution, waste storage, etc.).

100. See, e.g., Marc Galanter, *Law Abounding: Legalization Around the North Atlantic*, 55 MOD. L. REV. 1 (1992).

101. See, e.g., JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al. eds., 1982); Lindblom, *supra* note 5, at 80; SIMON, *supra* note 5, at 81-83.

social choice for complexity is not a conscious one. In this "external rationality" account, legal complexity is not so much the goal of any individual actor's choice as it is the indirect consequence of a multitude of decisions made on other grounds, such as a desire to address a new condition or to accommodate a hard case. These decisions then combine to yield a complexity that survives because individual actors lack the incentive to change it. This external rationality story surely explains a good deal of legal complexity.

I wish to offer a different account—one of *internal* rationality. In this story, the main producers, rationalizers, and administrators of law—legislators and their staff, bureaucrats, litigants, lawyers, judges, and legal scholars—generally benefit from legal complexity while bearing few of its costs.¹⁰² On balance, they prefer a complex system and hence choose rules and institutions that tend to support and perpetuate it. This is not to deny that an aroused public opinion can occasionally be mobilized to demand greater legal simplicity, and that this demand may sometimes carry the day, as the code pleading movement did in the nineteenth century. It is to claim, rather, that the burden of political inertia usually ensures legal complexity's triumph.

I noted earlier that the benefits and costs of complexity are not evenly distributed and that this uneven distribution is hardly an accident. Political actors understand this fact and seek to exploit it, even if they cannot always precisely gauge the relevant magnitudes and distributions.¹⁰³ The beneficiaries of complexity are many. They include groups that are relatively well equipped to cope with complexity and for whom complexity can create a competitive advantage outweighing its costs, groups that complexity insulates from public accountability, and groups that supply the services that complexity renders valuable. I shall specifically discuss these groups in a moment.

102. Although I mean to use self-interest here in a fairly strong, nontautological sense, I recognize the often valid criticism, directed at some versions of "public choice" theory, that self-interest can be defined self-referentially and nonfalsifiably. See, e.g., Jerry L. Mashaw, *Explaining Administrative Process: Normative, Positive, and Critical Stories of Legal Development*, 6 J.L. ECON. & ORGANIZATION 267, 269-72 (1990); Symposium, *The Theory of Public Choice*, 74 VA. L. REV. 167 (1988). By rooting their self-interest in rather conventional professional, careerist, and economic goals, I hope to minimize the force of this objection.

103. See *infra* text accompanying notes 106-17.

Those who ultimately bear complexity's costs, of course, are even more numerous. These cost bearers have an incentive to press politicians and other law producers to simplify the rules of the game—but they constitute an exceedingly diffuse group. Free rider and other obstacles to political organizing will likely dissipate most of their energies and pressures.

Only those cost bearers with the most at stake—insurers and other institutional litigators, narrowly focused regulated interests, and the like—are left to demand simplification, yet they labor under a serious political disadvantage. Given their obvious economic stakes in underlying substantive issues (say, mass tort claims or natural gas prices), political opponents can easily stigmatize their complaints about complexity as self-serving and pretextuous. Complaints about complexity will seem especially disingenuous in a political ethos like ours that increasingly demands disinterested, public interest arguments for policy change.¹⁰⁴ In contrast to the cost bearers, the beneficiaries of complexity can drape themselves in lofty public interest goals, such as securing the individual's right to a day in court, preventing the shrewd from circumventing the law, and heading off problems before they arise.

Thus, the political economy of legal complexity contains some structural elements favoring its survival and flourishing. When the interests of law producers are added to the equation, one can readily predict that many worthy simplification reforms will die on the vine and that others will succeed only if they happen to coincide with the interests of politically powerful groups or with the government's own fiscal stakes.¹⁰⁵

Legislators and Their Staff. Legislators might prefer legal complexity for four self-interested, electorally related reasons. Complexity can help them to (1) confer divisible policy benefits on constituents; (2) confer divisible non-policy benefits; (3) enhance their power over bureaucrats; and (4) ease the legislature's collective action problem.

Complex statutes enable legislators to create private goods, conferring divisible policy benefits on one or a few groups without having to confer them on all. Legislators who wish to target a

104. See generally STEVEN KELMAN, MAKING PUBLIC POLICY: A HOPEFUL VIEW OF AMERICAN GOVERNMENT 248-70 (1987) (examining the role of public spirit in the political process).

105. For two such examples see *supra* note 41.

statutory policy to favor (or disfavor) particular interests can employ a number of complexifying techniques. For example, they can multiply and refine policy categories, classify groups, and establish new institutional power centers. In these ways, they can hope to calibrate their political support, achieving a level of control that simpler, less discriminating statutes do not usually permit. Complexity can also help to obfuscate certain political goals (such as wealth redistribution) that would invite opposition to policies that seemed to implicate them. Tax legislation is notorious for this.¹⁰⁶ Recent immigration legislation accomplished a similar sleight-of-hand. Without quite naming the Irish, the statute created a special new preference for them and concealed it in a remarkably complex and opaque formula.¹⁰⁷

In addition to (or instead of) targeting policies at particular constituencies, complex laws also create opportunities for legislators to engage in targeted intervention at the law application stage. This "casework" with the relevant bureaucracy permits legislators to confer highly visible, selective benefits on favored constituents without limiting their own freedom of action on larger, politically riskier policy issues. Legislators can, for example, oppose a new benefits policy yet intervene on behalf of constituents later on when the agency denies their claims. Indeed, a prominent political scientist has argued that legislators create complex new programs and bureaucracies in part *so that* they can intervene selectively later on when problems materialize.¹⁰⁸

Complex laws also enable legislators to exercise influence over the personnel, policies, and budgets of the agencies and the programs that they create.¹⁰⁹ Such influence is politically valuable

106. See, e.g., Richard L. Doernberg & Fred S. McChesney, *On the Accelerating Rate and Decreasing Durability of Tax Reform*, 71 MINN. L. REV. 913 (1987) (public choice model attributing recent increase in the rate of tax reform to shorter-term "contracts" between legislators and private interests); Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1 (1990) (criticizing public choice model and emphasizing prestige and symbolism explanations of recent legislation).

107. Immigration Act of 1990, § 132(c), 8 U.S.C. § 1153 note (Supp. II 1990) (providing that no less than 40% of the visas during a three-year transitional period must go to "the foreign state the natives of which received the greatest number of visas issued under section 314" of the 1986 law). That "foreign state" was Ireland. See Donatella Lorch, *Organizing for Visas: Irish, Lottery and Luck*, N.Y. TIMES, Oct. 12, 1991, at 31, 33.

108. MORRIS P. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT 44-47 (2d ed. 1989).

109. See, e.g., Matthew D. McCubbins et al., *Administrative Procedures as Instruments*

in itself, and is also essential in assuring bureaucratic compliance. The potential for this influence provides a powerful motive for legislators to enact complex statutes, and also explains much of their post-enactment activity.¹¹⁰

Legal complexity can help legislators avoid collective action problems that a simpler law might well exacerbate. Legislators who wish to reduce conflict, minimize rulemaking costs, and reach consensus in the face of their strong incentives to behave opportunistically often resort to complex legislative forms. Examples include logrolls, omnibus bills, ambiguous provisions, and delegation of rulemaking authority to other more specialized institutions.¹¹¹ Ironically, then, legal complexity can help to solve politicians' problems by creating new problems for their constituents.

A final consideration concerns legislators' staff aides. In recent decades, their number has increased dramatically.¹¹² This growth, coupled with other changes in legislative operations at all levels of government, has led to staff dominance of much of the legislative process and output.¹¹³ Although their incentives largely parallel those of their elected employers, staff members also have strong personal, professional, and careerist reasons to draft more complex bills. Complex legislation enables staff members to enlarge and exhibit their professional and technical expertise, deepens legislators' dependency on their advice, magnifies their influence over policy and administration, and enhances their personal satisfaction and career prospects.¹¹⁴

of *Political Control*, 3 J.L. ECON. & ORGANIZATION 243 (1987).

110. By placing complex procedural constraints upon an agency's decisionmaking process, politicians are able to respond to potential deviations from the status quo prior to the implementation of a change in policy, and thereby retain effective control over agency decisions. Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989).

111. See *supra* text accompanying notes 80-83.

112. The number of aides serving on members' personal staffs in the U.S. House of Representatives rose from 4,055 in 1967 to 7,569 in 1989; the number serving on members' staffs in the U.S. Senate rose from 1,749 to 3,837 in the same period. NORMAN J. ORNSTEIN ET AL., *VITAL STATISTICS ON CONGRESS, 1991-1992*, at 126 (1992).

113. For some revealing case studies, see BRUCE A. ACKERMAN & WILLIAM T. HASSLER, *CLEAN COAL, DIRTY AIR* (1981); MICHAEL J. MALBIN, *UNELECTED REPRESENTATIVES* (1980). For a discussion of the concerns raised by the explosion in Congressional staffing, see FIORINA, *supra* note 108, at 118-21.

114. See MALBIN, *supra* note 113, at 172-78 (discussing workload which in part re-

Perhaps the most revealing evidence of the legislative impulse toward complexity is its ability to prevail even when a constituency for simplification exists and public pressures for reform are strong. The Tax Reform Act of 1986,¹¹⁵ which was sold to the public as a simplification measure, has actually increased the law's complexity in important respects.¹¹⁶ This outcome is not as paradoxical or unusual as it might seem. Politics, fairness, and economic efficiency often require policymakers to adopt grandfather rules, side payments, subsidies, and other transitional and compensatory mechanisms in order to move from a complex regime to a simpler one.¹¹⁷

Bureaucrats. For somewhat different reasons, agency officials possess strong incentives to elaborate legal networks that meet all of my complexity criteria.¹¹⁸ By filling most of the relevant policy space with rules, agencies constrain the ability of regulatees to either elude agency jurisdiction or circumvent agency standards. Dense rules are designed to foreclose such tactics. Indeterminate rules also serve important bureaucratic interests. Although costlier for agencies to apply and for regulatees to apprehend, they nevertheless possess a virtue that often proves decisive: they preserve agencies' future freedom of action in policy environments dominated by uncertainty and the need for flexibility.¹¹⁹

flects complexity).

115. Pub. L. No. 99-514, 100 Stat. 2085 (codified as amended in scattered sections of 26 U.S.C.).

116. See Doernberg & McChesney, *supra* note 106, at 958-59. This is especially true of the intricate, detailed transitional rules necessary to implement the new policy against real estate tax sheltering. See C. EUGENE STEUERLE, *THE TAX DECADE: HOW TAXES CAME TO DOMINATE THE PUBLIC AGENDA* 116-17 (1992).

117. See Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132 (codified in scattered sections of 12 U.S.C.); Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469 (codified in scattered sections of 12 U.S.C.); Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (codified as amended in scattered sections of 45, 49 U.S.C.); Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified in scattered sections of 49 U.S.C.); Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (codified in scattered sections of 49 U.S.C.); Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, 96 Stat. 1102 (codified in scattered sections of 49 U.S.C.).

118. Their success in doing so is of course the subject of innumerable jeremiads against regulation. See, e.g., WILLIAM A. NISKANEN, JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971).

119. Agencies may also want the rules to leave some flexibility for the regulated even at the price of some uncertainty. Johnston points out that even when agencies issue relatively precise rules, the courts' refusal to recognize compliance with such rules as a defense to tort liability has, if anything, added to the complexity and uncertainty faced

Agencies need no special incentives to elaborate technical rules; the nature of their tasks ordinarily ensures that their rules will usually be intelligible only to cognoscenti in the field. In addition, technical rules promote agency autonomy.¹²⁰ Being more opaque to the generalist institutions like Congress and the media that seek to influence it, such rules make agencies more difficult to control and help obscure their pursuit of controversial policies. The same is true of complex procedures that make agency decisions more costly to challenge. Finally, agencies are not merely instances of institutional differentiation; they are also causes of it. Their endemic need to mobilize outside information and political support prompts them to proliferate new entities: coordinating mechanisms, advisory committees, administrative review panels, technical support groups, intergovernmental bodies, a specialized bar, a specialized press, and many others.¹²¹ These entities then take on lives of their own, which interact with agency activities to promote additional complexity.

These agency interests in complexity are mirrored in the interests of some of those in the private bureaucracies that agencies regulate. For every new regulatory program or legal complexity, there is a set of corporate officials whose jobs and occupational advancement depend upon understanding, complying with, and managing it.¹²² This cohort does not ordinarily dominate a company's decisionmaking process; but it does act as a kind of pro-complexity Trojan Horse inside the corporate structure, weakening somewhat management's more reflexive, cost-conscious resistance to complexity.

Litigants, Lawyers, and Judges. As noted earlier, the question of how the litigation process shapes legal rules has received considerable scholarly attention.¹²³ Indeed, of all the causes of legal

by regulatees. Johnston, *supra* note 20, at 366.

120. See JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 244-48 (1989) (technical task structures make agencies more independent of congressional control).

121. See Thomas O. McGarity, *The Internal Structure of EPA Rulemaking*, LAW & CONTEMP. PROBS., Autumn 1991, at 57 (describing the structural and decisionmaking apparatus of the Environmental Protection Agency).

122. See MASHAW & HARFST, *supra* note 13, at 117 (auto manufacturers devote substantial resources to regulatory affairs offices, which coordinate compliance with health, safety, and related requirements).

123. See *supra* note 20 and accompanying text.

complexity, litigation dynamics appears to be the only one that *has been* analyzed systematically.

Some scholars, like Jason Johnston and Carol Rose, argue that incentives endogenous to the litigation process generate a pattern of perpetual oscillation between bright-line and open-ended rule forms.¹²⁴ Others, however, discern an inexorable trend toward indeterminacy. Priest and Klein, for example, show that disputes turning on determinate rules will be settled rather than litigated (regardless of their content), which assures that the rules litigants bring to court are at the indeterminate end of the spectrum.¹²⁵ Making a related point, Anthony D'Amato argues that because a rule is easier to challenge than to defend, and a rule that disadvantages tends to invite challenge, the resulting litigation systematically favors the evolution of more indeterminate rules.¹²⁶ Henderson and Eisenberg also claim that indeterminate rules tend to favor plaintiffs, but for different reasons. They emphasize that such rules, by creating jury questions, enhance the settlement value of plaintiffs' claims, and that this trend is a one-way ratchet: courts, having adopted indeterminate rules, find it hard to go back to more precise ones.¹²⁷ Richard Epstein likewise sees a firm trend toward indeterminacy, but ascribes it to the incentives of lawyers, who seek to maximize demand for their services by promoting more complex rules that invite expert interpretation and manipulation.¹²⁸ Michelle White argues that tax lawyers, like tax accountants and the Internal Revenue Service, have vested inter-

124. Johnston, *supra* note 20, at 371. Carol Rose, focusing on property law, also perceives oscillation, but for her it is driven by judges who muddy the crystalline rules to protect the "fools" ensnared by them, and by legislators and transactors who must then try to restore a regime of crystals in the interests of efficiency. Rose, *supra* note 31, at 603-04.

125. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

126. D'Amato, *supra* note 20, at 23-24.

127. James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479, 515 (1990); see also Theodore Eisenberg & James A. Henderson, Jr., *Inside the Quiet Revolution in Products Liability*, 39 UCLA L. REV. 731 (1992).

128. Richard A. Epstein, *The Political Economy of Product Liability Reform*, 78 AM. ECON. REV. pt. 2, at 311, 313 (1988). Johnston criticizes Epstein's view on several grounds. Lawyers, he says, can only realize this goal through their clients' litigation. Although he does not go on to say that lawyers never subordinate the clients' interests to their own, he does argue that the lawyers might benefit more from oscillation than from a steady trend toward indeterminacy. Johnston, *supra* note 20, at 371-72.

ests in a complex tax law, although each group favors a different level of complexity.¹²⁹ Boris Bittker suggests that since tax experts' analytical and critical skills account for much of the law's complexity, they cannot be expected to make it simpler and more enforceable.¹³⁰

Some litigation models view judges as merely ratifying the moves of the parties and their lawyers, whereas other models ascribe greater importance to judges' own goals and their discretion to pursue them.¹³¹ I endorse the latter, having suggested elsewhere that the jury reduces the cost to judges of innovating—of rejecting, refining, or distinguishing precedent. With a jury, judges can innovate secure in the knowledge that it will be up to anonymous jurors to determine the concrete meaning and consequences of the change.¹³² Judicial innovations tend to make the law more complex,¹³³ although there are certainly exceptions.¹³⁴ Some judicial innovations are dictated by traditional criteria, but many others reflect different motives. The judge may wish to reduce her boredom, call attention to herself in order to attract support from special interests,¹³⁵ or burnish her reputation for creativity, inde-

129. Michelle J. White, *Why Are Taxes So Complex and Who Benefits?*, 47 TAX NOTES 341 (1990).

130. Bittker, *supra* note 15, at 10–11. For a Bittkeresque parody of the notion that the Code's complexity reflects nothing more than profit-maximizing by tax professionals, see Boris I. Bittker, *James S. Eustice*, 45 TAX L. REV. 1 (1989).

131. See Priest & Klein, *supra* note 125 (supporting the former model); Henderson & Eisenberg, *supra* note 127 (supporting the latter model).

132. Schuck, *supra* note 55, at 11. A recent example of this is the *en banc* decision of the California Supreme Court in *Mitchell v. Gonzales*, 819 P.2d 872 (Cal. 1991), in which the court replaced the "but for" test for cause-in-fact in negligence actions with the "substantial factor" test, which is somewhat less determinate and could send more cases to the jury.

133. See, e.g., Wex S. Malone, *Ruminations on Cause-in-Fact*, 9 STAN. L. REV. 60, 99 (1956) ("Thus distinction is heaped upon distinction and law becomes increasingly and unnecessarily complex.")

134. See, e.g., *INS v. Chadha*, 462 U.S. 919 (1983) (moving to institutional simplification); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978) (moving to less density); *Miller v. California*, 413 U.S. 15 (1973) (moving to less technical rule); *Baker v. Carr*, 369 U.S. 186 (1962) (moving to more bright-line rule).

Perhaps the most notable simplifying innovation is the current effort to simplify asbestos and some other mass tort litigation. This, however, should be seen as the extreme case in which complexity's limits have manifestly been reached, and I therefore discuss it in Part IV.

135. Most American judges are elected, and in some states reelection can be a very risky and expensive business. See, e.g., John T. Wold & John H. Culver, *The Defeat of*

pendence, and professional skill with lawyers, academics, journalists, and other court-watchers. Doctrinal innovations, moreover, are also likely to enhance what D'Amato has called the "information value" of a decision.¹³⁶

Although the interests favoring complexity are systematic and powerful, they are not monolithic. Some litigants, lawyers, and judges do have countervailing interests in promoting simpler law, at least some of the time. Because litigants bear many of the costs of a complex adjudication process, some of them will be disadvantaged by complex substantive rules—although it must be added that most clients play little or no role in the formulation of legal arguments.¹³⁷ Contingency fee lawyers, who must bear most of the costs of litigating under complex rules and procedures, may prefer simplicity out of narrow self-interest.¹³⁸ Even lawyers who would benefit financially from a more complex law may nevertheless support simplification reforms for public interest reasons.¹³⁹ As for judges, simple rules are easier to administer and generate fewer disputes, an important consideration for overwhelmed courts.

My claim, then, is not that the interests of litigants, lawyers, and judges in legal complexity are invariably and unalterably opposed to greater simplicity in law. It is only that these interests tend to predominate, and that this fact is an important reason for the growth in legal complexity.

Legal Scholars. Like other denizens of the legal culture, but for altogether different reasons, legal scholars are drawn to legal

the California Justices: The Campaign, the Electorate, and the Issue of Judicial Accountability, 70 JUDICATURE 348 (1987); Peter Applebome, *Texas Court Fight Puts Focus on Elected Judges*, N.Y. TIMES, Jan. 22, 1988, at B4.

136. D'Amato, *supra* note 20, at 19–22 (describing information value as a measure of the divergence of an actual message or result from an anticipated message or result).

137. See generally DOUGLAS E. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* (1977) (describing relationship between lawyers and their clients in personal injury cases); see also DONALD L. HOROWITZ, *THE JUROCRACY* (1977) (describing powerful role of lawyers in administering government programs). This is less true of corporate clients, who can draw upon their own in-house legal expertise and who also are repeat players.

138. For an economic model that predicts that contingency fee lawyers are the group tending to prefer the simplest law, see Michelle J. White, *Legal Complexity* (June 30, 1989) (unpublished manuscript on file with author).

139. Robert Gordon, while noting that "historically lawyers have sacrificed income repeatedly" in order to advance other goals, argues that this form of professional public spiritedness has declined over time. Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 40, 48 (1988).

complexity. Earlier, I called it a craft value. Like our competing attraction to elegantly simple theories, complexity is aesthetically pleasing. We delight in stories that are richer, more encompassing, and more satisfying than simplicity generally permits. This taste, moreover, is not merely aesthetic. It also reflects a uniquely scholarly commitment, which views and seeks to understand reality as an intricate array of fields on which congeries of forces interact in hard-to-predict ways. This commitment, as much as anything else, distinguishes scholars from other well-educated, sophisticated folks.¹⁴⁰

There are reasons to think that this distinctive scholarly commitment to complexity, always great, is growing apace in the law schools. Creativity—the discovery of new information, the elaboration and testing of novel hypotheses, and the subversion of traditional paradigms—is the supreme academic virtue, the stuff of which Nobel laureates, scholarly superstars, and distinguished university departments are made. Perhaps because legal scholars are generally less interested than their natural and behavioral science colleagues in discovering new data and testing theories,¹⁴¹ they have been that much busier seeking to elaborate novel theories and subvert traditional paradigms.

Three “schools” of legal theory have dominated recent legal scholarship, although they do not begin to exhaust the set of approaches to legal analysis. These schools—legal process/judicial policymaking, Critical Legal Studies (CLS), and law and economics—occupy the academy’s ideological center, left, and right, respectively.¹⁴² No general characterization of these schools can fully capture the diversity and nuanced positions within them. Still, a common theme is that their approaches, if seriously pursued, would tend to make the law more complex. This tendency I believe reflects more the logic of the scholars’ theories than any

140. The most important of these groups are the media (whose attitudes toward complexity are shaped by the technical constraints), policymakers (whose biases toward complexity are not intellectual), and what used to be called the intelligentsia (when Marxism was more in fashion).

141. See generally Peter H. Schuck, *Why Don't Law Professors Do More Empirical Research?*, 39 J. LEGAL EDUC. 323 (1989).

142. For a recent, perspicuous discussion of the three schools, see William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707 (1991). My characterizations of these schools in this section draw heavily upon this account.

normative commitment on their part to legal complexity *per se*. I now turn to a discussion of this tendency.

The "new" legal process/judicial policymaking scholars, of whom John Hart Ely is perhaps the exemplar in public law, stress the need to maintain the integrity of the lawmaking process through three principal norms. First, different institutions have distinctive roles to play in the legal system, roles derived from the institutions' particular legitimating forms and norms and technocratic capacities. Second, these institutions should employ utilitarian, instrumental rationality methodologies in their interpretation of legal materials. Finally, the acid test of the law's integrity, and the source of its legitimacy, is procedural regularity.¹⁴³

Taken seriously and taken together, these three norms—institutional competence, purposivism, and proceduralism—militate in favor of greater legal complexity. The *institutional competence* norm implies differentiation in decisionmaking institutions. It dictates that legislatures make social policy judgments, courts interpret and apply the law, juries find facts, agencies apply technical expertise, private interests order their relationships in the shadow of law, and so on. The *purposivism* norm implies that the law will be interpreted to further multiply, often conflicting policy goals. The *proceduralism* norm implies that legal rights will be surrounded by extensive process safeguards. Purposivism and proceduralism will generate (in my terms) dense, indeterminate rules.

CLS scholarship rejects the formalistic premises of the legal process school, emphasizing instead the importance of law's subjectivity, contextuality, and indeterminacy.¹⁴⁴ In this view, conditions that putatively simple rules treat as objective and determinate are actually social constructions privileging certain perspectives and groups, constructions that do not exist apart from the interpreter's subjectivity. CLS scholars maintain that rules, like all texts, are inherently ambiguous, contextual, and manipulable.¹⁴⁵ The legal system that they constitute, being wholly epiphenomenal, reflects and advances the interests of the already powerful. In these related senses, then, *all* legal rules and systems are, and must be, com-

143. *Id.* at 709-23.

144. *Id.* at 764-84.

145. See, e.g., PETER GOODRICH, *READING THE LAW* 16-19 (1986); Eskridge & Peller, *supra* note 142, at 765-66.

plex, and the mystification induced by the law's complexity can be used to secure a kind of passive acquiescence in—a bogus legitimation of—the system.

Law and economics scholars are more ambivalent about legal complexity than are scholars from the other two schools. On the one hand, perhaps the most valuable contribution of law and economics to the analysis of law is its systematic attention to the costs of legal complexity as it affects efficiency.¹⁴⁶ Efficiency requires minimizing the transaction costs that complexity generates, as well as minimizing the efficiency-distorting practices that complexity may facilitate, such as the strategic use of legal procedures, rent-seeking rules, and uncertainty itself.¹⁴⁷

On the other hand, any serious pursuit of efficiency (not to speak of equity) will often require complex rules. After all, the goals and constraints relevant to a given policy are likely to be numerous, and the legal rules, in order to be efficient, must take account of, and be tailored to, each of them. Accomplishing this may necessitate a system of multi-factored rules, multiple defenses, complex party structures, sequential burden-shifting, and so on. In their quest for elegantly simple theories, even the best law and economics scholars sometimes overlook the complexity of efficiency. Richard Posner's insistence that the common law contributory negligence rule is efficient is perhaps the clearest example of this error.¹⁴⁸ In fact, efficient deterrence requires a well-calibrated comparative fault system, often long causal chains, new damage categories, and rules that are sensitive to risk preference and insurance market factors. No simple rule or set of rules can satisfy all of these constraints.

The fact that legal scholars tend to prefer complexity says nothing, of course, about the extent to which this preference actually affects the law. Indeed if the law schools are as increasingly isolated from the legal profession and hence from the rest of society as some have claimed,¹⁴⁹ scholars' influence may be negligible.

146. For an example, see POSNER, *supra* note 21.

147. A controversial example is cited by Peter Huber, who states that "[p]laintiffs' lawyers can profit handsomely from the disorder and inherent unpredictability" that are caused by what Huber calls "the right-field slouch"—an asymmetrical curve of verdicts in which, because of a few enormous recoveries, the mean verdict is much higher than the median. Peter Huber, *Junk Science and the Jury*, 1990 U. CHI. LEGAL F. 273, 291.

148. See Gary T. Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 YALE L.J. 697, 703-10 (1978).

149. See Harry H. Wellington, *Challenges to Legal Education: The 'Two Cultures'*

Nevertheless, courts' growing reliance upon recent law school graduates as judicial clerks, coupled with their growing reliance upon academic scholarship (and a more theoretical scholarship at that),¹⁵⁰ assures that scholars' theories—and their proclivities for complexity—will continue to influence the law's direction.

Let me be clear that my explanation accepts the claim that genuine public interest concerns may demand complexity. It may be, for example, that a simple rule in a given situation would require too many exceptions or be evaded too easily. I also recognize that legal actors who prefer legal complexity *on balance* may nonetheless feel countervailing pressures for simplicity. This is especially true of bureaucrats and others who must administer law in the face of complexity's costs. Moreover, as my external rationality theory¹⁵¹ posits, legal actors may not always (or even usually) think in such explicit terms about the choice for or against complexity. Finally, my internal rationality story¹⁵² is neither better than nor inconsistent with either an external rationality account or the significantly narrower internal rationality accounts favored by some law and economics scholars, which stress how litigation incentives shape law into more complex forms. Given our ignorance about the precise causes of legal complexity, *all* of these stories are plausible. Those who would reduce that ignorance need all the help we can get.

My claim, then, is a modest one, albeit far-reaching in its implications for reform. It is that the influentials who systematically shape the legal and political processes have strong personal, professional, and ideological interests in legal complexity that are often effective in securing these interests in the formal law.

Phenomenon, 37 J. LEGAL EDUC. 327 (1987). A recent but still unpublished empirical study of the contents of law reviews lends some support to Wellington's view. Michael J. Saks, *Law Journals: Their Shapes and Contents, 1960 and 1985: Address Before the AALS Symposium on Legal Scholarship* (Jan. 6, 1989) (law reviews in 1985, as compared with those in 1960, are more dominated by scholars than practitioners, are more critical of existing doctrine, and are more useful to policymakers and theorists than to practitioners).

150. Saks, *supra* note 149 (mean number of citations of law review articles in judicial opinions rose 59% from 1960 to 1985). *But see* Lawrence Friedman et al., *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773, 812-17 (1981) (noting a growing citation of law reviews, but little use of social science).

151. See *supra* text accompanying note 101.

152. See *supra* note 102 and accompanying text.

IV. THE LIMITS OF LEGAL COMPLEXITY

I have argued that the forces favoring legal complexity are broadly based, powerful, and systemic. Does this mean that the law will continue to move inexorably along this path, becoming ever more dense, indeterminate, technical, and institutionally differentiated? The answer, clearly, is "no." In nature, the momentum of objects in motion is limited by friction and gravity. In politics, the momentum of triumphant forces is limited by events, organizational dynamics, competition, and new ideas. In the legal system, the momentum of complexity is limited by the responses to complexity's rising costs by those who bear them.

Still, these costs are not always immediately apparent, and those benefited by complexity have strong incentives to employ rhetorical and political tactics to conceal, disguise, or reconceive them. The costs may be rationalized in terms of some transcendent ideal,¹⁵³ or even depicted as benefits.¹⁵⁴ The policymaking process, moreover, tends to increase complexity. Officials often misdiagnose problems and adopt operationally complex reforms. The response to many regulatory failures—natural gas price controls, for example—is more extensive regulation rather than reconsideration of the underlying regulatory strategies.¹⁵⁵ The enormous costs of mass tort litigation have led to procedural fixes such as consolidated trials and class actions which only generate new uncertainties, legal challenges, delays, and unfairness.¹⁵⁶

Complexity's costs, then, can be ignored, rationalized, and multiplied for a time, perhaps for a long time. Eventually, however, they become insupportable. The political momentum and behavioral incentives reach a critical juncture; countervailing pressures for simplification begin to affect both the law and how peo-

153. An example is courts' insistence that "the cost of protecting a constitutional right cannot justify its total denial." *Bounds v. Smith*, 430 U.S. 817, 825 (1977).

154. An example is consumer groups' celebration of the egregiously inefficient tort system for assuring "a day in court" which few can actually obtain.

155. See STEPHEN BREYER, *REGULATION AND ITS REFORM* 240-60 (1982).

156. *E.g.*, JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION, REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 17-22 (1991); SCHUCK, *supra* note 21, at 262-68; Richard Epstein, *The Consolidation of Complex Litigation: A Critical Evaluation of the ALI Proposal*, 10 J.L. & COM. 1 (1990); Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69 (1989). These costs have led to substantive law changes as well. Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 13 CARDOZO L. REV. 1819, 1840-68 (1992).

ple respond to the law. I believe that we have reached that point. Many producers and consumers of the law now act as if the returns to complexity were diminishing. They are devising strategies to contain, circumvent, and turn complexity to their own advantage.¹⁵⁷

The reaction against legal complexity proceeds in two domains, at different tempos. My discussion of its political economy¹⁵⁸ indicated that in the public sphere of formal law, the forces favoring complexity control the relevant processes and norms and usually overwhelm the simplifiers. In the informal domain, however, the responses to complexity need not be mediated by or effectuated through politics or formal legal changes. Instead, they can seek to avoid or reduce these costs through informal simplifications of various kinds. We can distinguish at least three informal strategies: contract, unilateral simplification, and withdrawal.

Contract. Cost bearers often circumvent legal complexity by contracting around it, agreeing with others who also stand to benefit from a less complex system to substitute and be bound by a new, simpler regime. There are many familiar examples of this simplification strategy. Disputants agree to use arbitration, mediation, or other alternative dispute resolution approaches that they regard as less costly than litigation.¹⁵⁹ Contracts specify a particular choice-of-law rule, measure of damages, or liability standard, rather than leaving such issues to a court and jury. Jeffrey O'Connell's various "neo no-fault" proposals employ this approach.¹⁶⁰ So does negotiated rulemaking, a form of regulatory proceeding in which participants attempt to reach a consensus,

157. A recent example in the marketplace is the airline industry's radical simplification of a fare structure that had become so complex that passengers and their agents had great difficulty in dealing with it. Bridget O'Brien & James S. Hirsch, *Simplifying Their Fares Proves More Difficult than Airlines Expected*, WALL ST. J., June 4, 1992, at A1 (competition for passengers is preventing airlines from maintaining simple structure). But see Edwin McDowell, *Airfare Plan Fails, American Admits*, NEW YORK TIMES, Oct. 17, 1992, at A41; David Field, *Pricing Plan Crumbles as Other Airlines Add Innovations*, WASH. TIMES, Oct. 14, 1992, at C1.

158. See *supra* Part III.

159. Society, of course, may have a different view of the relevant costs and benefits of such techniques. For a provocative view on this question, see Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

160. Jeffrey O'Connell, *A "Neo No-Fault" Contract in Lieu of Tort: Preaccident Guarantees of Postaccident Settlement Offers*, 73 CAL. L. REV. 898, 906-08 (1985).

including an agreement not to challenge the negotiated rule in court.¹⁶¹

Unilateral Simplification. Instead of contracting around complexity, cost bearers may act unilaterally, substituting their own, simpler set of practices for the more burdensome ones that the law prescribes. H. Laurence Ross's study of insurance adjustment practices showed that insurers followed adjustment decision patterns that deviated markedly—and invariably in the direction of greater simplicity—from the formal rules and procedures dictated by the tort system and by insurance contracts.¹⁶² Robert Ellickson's recent study of dispute settlement practices utilized by ranchers and farmers in Shasta County, California, revealingly entitled *Order Without Law*, analyzed the conditions under which neighbors resolved their disputes according to informal, extralegal norms that had little to do with the formal rules of property law. He found—not surprisingly—that they were much more likely to do so when the stakes were small relative to the costs of the legal system, and when the rules otherwise governing the dispute were technically complex, such as water law.¹⁶³

Other research has unearthed unilateral simplification in the area of public law. My own study of the Department of Energy found evidence that procedural complexities, many of them mandated by judicial and executive order, had magnified the costs of using informal rulemaking as the mode for energy policymaking. As these costs rose, the agency decided—with mixed results—to abandon rulemaking in favor of policy development largely in the form of adjudications by a special office authorized to grant exceptions to rules.¹⁶⁴ A recent study of the National Highway Traffic Safety Administration found an even more dramatic abandonment of rulemaking in favor of adjudication taking the form of vehicle recalls. The authors attribute this unilateral shift to what I call in-

161. See Negotiated Rulemaking Act of 1990, 5 U.S.C. §§ 581-590 (Supp. III 1991).

162. See H. LAURENCE ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT* (1970).

163. ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 257 (1991). Ellickson cites other milieus, involving interacting social groups, in which similar simplification incentives operate. See *id.* at 189-206.

164. Schuck, *supra* note 35, at 194-96; see also Peter L. Strauss, *Rules, Adjudications, and Other Sources of Law in an Executive Department: Reflections on the Interior Department's Administration of the Mining Law*, 74 COLUM. L. REV. 1231, 1254-58 (1974).

stitutional differentiation—there, the uncertainties, procedural barriers, delays, and other costs entailed by having the agency's rules reviewed by courts ignorant of the agency's regulatory tasks.¹⁶⁵

Withdrawal. At the extreme, unilateral simplification in the face of complexity costs takes the form of partial or complete withdrawal from the field. A notorious example is the liability insurance availability crisis of the mid-1980s. According to most analysts, it contributed to a reduction or cessation of risky but socially valuable activity in fields as diverse as after-school sports programs, day care, general aviation, contraceptive research, vaccines, and obstetrical care.¹⁶⁶ Many other less familiar instances of legal complexity driving out desirable activity could also be cited.

How durable are these formal and informal simplification strategies in the face of the powerful forces favoring legal complexity? Unfortunately, this question is very difficult to answer. Complexity's costs and benefits are remarkably dynamic, responding to shifts in technology, public attitudes, politics, and other social vectors. For example, telecommunications law, only recently simplified by a technologically driven deregulation, already faces re-regulation forces.¹⁶⁷ A similar cycle may occur in medical malpractice law, where simplifying—and often arbitrary—caps and defenses have been established¹⁶⁸ that may engender a complexifying backlash instigated by consumer groups.

As these examples suggest, legal simplicity—no less than complexity—also has its cost-driven limits. For this reason, the equilibrium between complexity and simplicity is likely to move back and forth along the continuum over time. But this pattern of oscillation does not mean that the formal and informal regimes will reach identical equilibria. In the informal context, the equilibrium will be quite sensitive to changes in costs and benefits, while the formal law equilibrium will be sensitive to such changes only

165. See MASHAW & HARFST, *supra* note 13, at 147-71.

166. E.g., INSTITUTE OF MEDICINE, MEDICAL PROFESSIONAL LIABILITY AND THE DELIVERY OF OBSTETRICAL CARE 38-42 (1989); THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION (Peter W. Huber & Robert E. Litan eds., 1991); TORT LAW AND THE PUBLIC INTEREST: COMPETITION, INNOVATION, AND CONSUMER WELFARE 55-68 (Peter H. Schuck ed., 1991); George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521 (1987).

167. See, e.g., Consumer Television Consumer Protection Act of 1992, Pub. L. No. 102-385 (passed Oct. 9, 1992).

168. PAUL C. WEILER, MEDICAL MALPRACTICE ON TRIAL 19-69 (1991).

as they are institutionalized through the political influence of different groups.¹⁶⁹

If legal complexity usually takes hold in the formal law regime and cost-justified simplicity finds a niche in the informal, why not just rely on private incentives to generate informal simplicity where it is warranted? Would that approach leave any problems that simplicity-minded law reformers would still need to address? The answer, I think, is "yes." Many cost-justified simplicity strategies cannot flourish unless the law formally affirms, protects, and promotes them.

Some simplifications—deregulation of financial services is an example—cannot be implemented without changes in the law because the complexity is now legally mandated.¹⁷⁰ In such cases, any informal simplification strategy short of unilateral withdrawal will probably be illegal.¹⁷¹ Even when the complexity is voluntary, however, some simplifications cannot reap their full advantages unless they are established by law. Adverse selection problems, for example, may undermine any noncompulsory insurance schemes. Some of Jeffrey O'Connell's imaginative contractual no-fault proposals, which seek to elide the political obstacles to legislation, may suffer from this difficulty.¹⁷² Free rider problems may also discourage even the beneficiaries of simplicity from investing in such a strategy unless the law assures them that others will do likewise. Another point, related to these market failures, is that formal, more or less comprehensive schemes may be needed to

169. This difference between the two regimes helps to explain why simplifications in the formal law regime may not forestall further simplifications in the informal one. If my analysis of the political economy of complexity is correct, politicians will tend to strike their balance at a higher complexity level than society in general or cost-bearing groups in particular might wish. Even though Virginia lawmakers decided to replace tort law for birth-related neurological injuries with a no-fault system, obstetricians and patients will still search for other strategies that yield even better complexity equilibria. *See id.* at 153–54 (criticizing Virginia no-fault plan).

170. *See, e.g.,* Glass-Steagall Act of 1933, ch. 89, 48 Stat. 162 (codified as amended in scattered sections of 12 U.S.C.).

171. Indeed in some regulated industries, even unilateral withdrawal may be illegal unless the regulatory agency formally authorizes it. *See* 15 U.S.C. § 717f(b) (1988) (requiring pipeline operators to obtain approval of Federal Energy Regulatory Commission before abandoning natural gas pipelines or facilities); 49 U.S.C. § 10903(a) (1988) (requiring railroads to obtain approval of Interstate Commerce Commission before discontinuing service along rail lines).

172. *See* O'Connell, *supra* note 160, at 908–10 (acknowledging adverse selection problems of "neo no-fault" approach and proposing ways of addressing them).

achieve scale economies or other efficiencies. The Canadian health insurance system's universality, for example, apparently derives some of its advantages from lowering administrative costs and what I have called delegitimation costs.¹⁷³

Finally, even absent these problems, contracts to simplify will not be entered into unless there is some assurance that the formal law will enforce them. Medical malpractice law provides an important example. At least viewed *ex ante*, providers and patients would probably *both* be better off with any of a large number of simpler liability regimes.¹⁷⁴ Under the current state of the law, however, they cannot contract for them with any expectation that their informal simplifications will be upheld by the courts.¹⁷⁵ This is also true for many other fields of activity¹⁷⁶—river canoe rentals, for example—as evidenced by the frequency with which providers unilaterally withdraw from those fields despite the existence of simpler alternatives that would probably leave most or all parties better off.

V. TOWARD LEGAL SIMPLIFICATION: A STRATEGY FOR REFORM

What, then, should public-spirited reformers do about legal complexity? Does the preceding analysis provide any analytical leverage for our choices about the amount of complexity that is appropriate to a given legal problem?

Improving the balance between complexity and simplicity requires three levels of analysis. At the first level, we can try to assess complexity's costs and benefits more comprehensively, as I attempted to do earlier in drawing attention to governance and delegitimation costs.¹⁷⁷ At the second level of analysis, we can

173. See Theodore R. Marmor & Jerry L. Mashaw, *Canada's Health Insurance and Ours: The Real Lessons, the Big Choices*, AM. PROSPECT, Fall 1990, at 18, 22.

174. For discussion of some of the variables bearing on this question, see Neil K. Komisar, *Injuries and Institutions: Tort Reform, Tort Theory, and Beyond*, 65 N.Y.U. L. REV. 23, 38-47 (1990) (distribution and magnitude of impacts and stakes among actual and potential victims and injurers affects effectiveness of different systems of risk control).

175. E.g., *Tunkl v. Regents of Univ. of Cal.*, 383 P.2d 441 (Cal. 1963). Even if unenforceable as such, a limited liability contract may nevertheless have some value to the provider (and thus to the patient)—for example, by discouraging suits or furnishing evidence of knowledge of a risk. I am indebted to Boris Bittker for pointing this out.

176. See, e.g., *Wagenblast v. Odessa Sch. Dist.*, 758 P.2d 968 (Wash. 1988) (invalidating release form concerning interscholastic sports accidents).

177. See *supra* Sections II(A), (B). Another example of a more comprehensive calcu-

seek general principles to guide our future balancing choices. Again, the earlier discussion is instructive. By scrutinizing the informal simplification strategies that groups adopt in order to minimize complexity's costs, we can gain a clearer understanding of what those costs are, as well as of the likely benefits of adopting simpler alternatives. More to the point, we can deduce from these cost-minimizing strategies some useful criteria for determining both *where* to look for promising simplification opportunities and *how* to implement reform. I shall call these balancing criteria the cost distribution, audience, mimicking, and user fee principles.

The Cost Distribution Principle. The earlier discussion of the political economy of complexity indicated that the *de jure* complexity level partly reflects the control that law producers exercise over its development, and that it is therefore unlikely to be socially optimal. If law producers can easily externalize complexity costs to diffuse, poorly organized interests, they will be even less inclined to adopt simpler, less costly alternatives.¹⁷⁸ This suggests a criterion that reformers can use to discern when simplification efforts may be fruitful. By studying how complexity costs are distributed, reformers can identify situations in which these costs are disproportionately borne by groups that face high obstacles to political organization, and in which the benefits of complexity flow primarily to well-organized groups. In these situations, complex arrangements may persist for no better reason than that powerful groups are advantaged by them and can free-ride on weaker, more diffuse cost bearers.

The Audience Principle. Boris Bittker has suggested another criterion for identifying potentially fruitful areas for simplification. Call it the "audience principle." It holds that the complexity of a rule should be tailored to the sophistication and cost-bearing capacities of those who will have to interpret and implement it. Bittker notes that complex tax rules are less problematic if they are addressed to experts who must apply them to uncommon transactions than if they are addressed instead to numerous lay people who must understand and apply them to common

lus is Samuel Gross's analysis of the benefits of some complexity-induced inefficiencies. See Gross, *supra* note 73.

178. An example is consumers who cannot externalize their costs to insurers or to other groups that can organize to protect their own (and indirectly, consumers') interests.

transactions.¹⁷⁹ Bittker's criterion, while concerned with the plight of individual taxpayers, would apply as well to other mass administration areas, such as welfare, voter registration, pension administration, and social insurance, where simplification might have a large payoff. The audience principle, moreover, would be concerned with effects on small businesses as well as on individuals.

Another application of this audience criterion emphasizes the fact that some subjects of legal regulation seem more closely linked to basic democratic values than others. In contrast to Bittker's point about the administrative costs of complexity in different settings, the focus here is on how complexity affects the democratic morale and self-government in different settings. One would expect that the public's perception of the law's legitimacy is jeopardized more by the needless and perhaps strategic complexity of, say, rules on voting and political competition¹⁸⁰ than by the complexity found in, say, the regulation of food and drug products.

The Mimicking Principle. In addition to knowing *where* to simplify, we need to know *how* to simplify. By studying the ways in which people contract around the formal law, we can often obtain good information about its inefficiencies, including its excessive complexities.¹⁸¹ As a presumptive balancing principle, we should consider altering the formal law to mimic the informal simplification strategies. This principle, however, can serve only as a first approximation; if the informal strategies offend public norms or are products of market failures or strategic behavior, the formal law should not mimic them.

Making the formal law and informal practice more congruent is not necessarily superfluous. As long as private incentives alone are unlikely to generate the desired complexity level,¹⁸² the fact that some informal simplification has occurred does not mean that the resulting level is now optimal. Having the formal law affirm, protect, and promote simplification may still be socially beneficial.

179. Bittker, *supra* note 15, at 5.

180. See, e.g., *supra* note 97 and accompanying text.

181. Indeed, that possibility may be an important reason for selecting a particular legal rule based on informal practice. See, e.g., Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 YALE L.J. 729 (1992).

182. See *supra* text accompanying notes 170-76.

Unfortunately, even the most desirable informal practices cannot always be successfully mimicked by the law. Samuel Gross explains some of the reasons why this is so:

Informal norms of behavior suffer from the limitations of their advantages: their relative flexibility, and their responsiveness to interests that legal systems are hard-pressed to regulate—trust, reputation, civility, etc. Because of these features, such norms may operate very well in practice, and yet be too vague, too complex, too changeable, or too personal to enact as laws, or even fully to articulate.¹⁸³

The User Fee Principle. Where feasible, lawmakers should seek to tax the special beneficiaries of legal complexity for the special costs associated with those benefits. I use the word “special” in recognition of the fact that it is usually very difficult to isolate, allocate, and quantify most complexity costs, and that the effort to do so will seldom be worth its cost. Still, some situations exist in which marginal complexity costs can be accurately calculated and assigned. For example, the Federal Rules of Civil Procedure authorize the court to assess a party with the costs of any excessive discovery it has occasioned.¹⁸⁴ The court may also shift some of a defendant’s litigation costs to a plaintiff who rejects a settlement offer and then fails to recover more than the offered amount at trial.¹⁸⁵ It may be feasible to apply this principle in other situations in which the political economy of complexity can be more closely aligned with the public interest in both achieving an efficient level of complexity and in fairly distributing its costs. A crude effort in this direction is exemplified by statutes that exempt from certain regulatory requirements companies below a certain size.¹⁸⁶ In part, the theory of such exemptions seems to be that imposing the same compliance costs on large and small businesses would put the latter at a competitive disadvantage, which would be both unfair and inefficient.

At the third level of analysis in improving the complexity-simplicity balance, we can ask whether these criteria point to any *specific* reforms that seem likely to promote justice by reducing

183. Gross, *supra* note 73, at 756.

184. FED. R. CIV. P. 26(c), 37(a)(4).

185. FED. R. CIV. P. 68.

186. See, e.g., Americans with Disabilities Act of 1990, 42 U.S.C. § 12111(5)(A) (Supp. II 1990).

the administrative, transaction, governance, and delegitimation costs of legal complexity.¹⁸⁷ Some promising simplification proposals do exist. Whether they can deliver what they promise and whether they are politically feasible are questions, of course, that must await more detailed analysis. Before dismissing them as naïve, however, we should remember that a reform that is politically unattainable now may become more attractive later as the pressure of events, competition, attitudinal shifts, and other changes alter its cost-benefit profile.

Many simplification reforms focus primarily on reducing uncertainty-related *transaction costs*. One approach is to adopt clearer, simpler rules. If bargaining costs are low and the rule is merely a default that the parties may displace by contract, almost *any* transparent rule may be an improvement.¹⁸⁸ Commercial law reform proposals, of course, often take this approach.¹⁸⁹ Since transparent rules are more certain and easily administered, however, they can be superior even if the rules are not mere defaults and their bargaining costs are high. The Keeton-O'Connell no-fault auto insurance plan exemplifies this position,¹⁹⁰ as do certain elements of Paul Weiler's recent medical malpractice reform proposal.¹⁹¹ Clear "safe harbor" rules that establish periods of repose in the products liability field¹⁹² or acceptable practice in the medical malpractice area¹⁹³ also reduce uncertainty-related transaction costs.

187. Again, I assume that complexity's beneficiaries will fully exploit any gains from it without our help.

188. See Ayres & Gertner, *supra* note 181, at 737.

189. *Id.* at 765.

190. ROBERT E. KEETON & JEFFREY O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM 5-10 (1965) (under such plans, the issue is occurrence of accident and injury, not fault).

191. WEILER, *supra* note 168, at 114-32.

192. See, e.g., ARIZ. REV. STAT. ANN. § 12-551 (1991) (product liability actions must be commenced within 12 years of sale); CONN. GEN. STAT. ANN. § 52-577(a) (1991) (product liability actions must be commenced within 10 years after defendant parted with the product); TENN. CODE ANN. § 29-28-103(a) (1991) (product liability actions must be commenced within 10 years of date of purchase); see also Robert A. Van Kirk, Note, *The Evolution of Useful Life Statutes in the Products Liability Reform Effort*, 1989 DUKE L.J. 1689.

193. See, e.g., 42 U.S.C. § 1320c-6(c) (1988) (exempting physicians and providers from civil liability for actions taken on account of or in compliance with norms applied by peer standards review organizations).

Simpler legal rules may reduce *governance costs*, not just transaction costs. Returning to Fuller's spider web metaphor for the legal system,¹⁹⁴ policymakers may be less risk averse if they think that innovating in an area that they *do* govern will not reverberate in others that they do not. This consideration, for example, should counsel courts against extending tort principles into the realm governed largely by private contractual arrangements under the Uniform Commercial Code.¹⁹⁵ Similarly, less institutional differentiation might reduce the legal indeterminacy that such differentiation tends to spawn. In tort cases, for example, technical standards issued by regulatory agencies and satisfying certain conditions could be made presumptively binding on juries.¹⁹⁶ Jury discretion could be constrained by using scheduled damages to compensate pain and suffering, consortium, and other nonpecuniary losses.¹⁹⁷

Simpler legal rules may also reduce *delegitimation costs*. Scheduled damages, for example, could limit the great inequities resulting from allowing different juries to award very different damages to victims who are in fact similarly situated.¹⁹⁸ No-fault systems could reduce the delay and capriciousness of tort litigation, which by denying timely compensation to deserving accident victims delegitimizes the system. Sometimes, however, a more complex rule may be needed to produce a simpler, more equitable law. For example, I have proposed that judges with large asbestos caseloads abandon the exceedingly simple first-come, first-served

194. See *supra* note 80 and accompanying text.

195. See JAMES A. HENDERSON, JR. & AARON D. TWERSKI, *PRODUCTS LIABILITY: PROBLEMS AND PROCESS* 279-80 (1987); Morris G. Shanker, *Strict Tort Theory of Products Liability and the Uniform Commercial Code*, 17 CASE W. RES. L. REV. 5 (1965).

196. See SCHUCK, *supra* note 21, at 291.

197. See AMERICAN LAW INSTITUTE, *ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY* 199-230 (1991) (considering a similar "scale" approach to the calculation of pain and suffering damages); James F. Blumstein et al., *Beyond Tort Reform: Developing Better Tools for Assessing Damages for Personal Injury*, 8 YALE J. ON REG. 171, 177-86 (1991); Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering"*, 83 NW. U. L. REV. 908 (1988-89); Peter H. Schuck, *Scheduled Damages and Insurance Contracts for Future Services: A Comment on Blumstein, Bovbjerg, and Sloan*, 8 YALE J. ON REG. 213, 216-19 (1991).

198. See Bovbjerg et al., *supra* note 197, at 923 (providing data indicating that within each of eight "severity levels" of tort claims the highest valuation of damages is generally scores of times higher than the lowest); Schuck, *supra* note 21, at 559-67. This "demoralization cost" engendered the demand for sentencing guidelines in the context of criminal law. See *supra* note 19.

rule for scheduling trials in favor of a more complex rule that would sequence claims according to the seriousness of plaintiffs' present injuries, after applying medical criteria.¹⁹⁹

Although the proposals I have just mentioned are directed primarily at the tort system, the critique of legal complexity extends far beyond this area to all areas of public policy. The focus of simplification reformers, then, should be broad indeed. At its most general level, their goal should be to increase the supply of socially valued activities by reducing the complexity-related costs of performing them. For example, voter registration—an inconvenient, time-consuming process in many jurisdictions—could be facilitated by simply linking it to applications for a driver's license.²⁰⁰ A similar technique can be used to encourage people to consent to donating their organs in the event of a fatal accident.²⁰¹ Pruning away the needlessly, indeed cynically, complex signature and petition requirements from New York's election law would prevent partisans from exploiting its complexity to foster costly litigation and deny serious candidates access to the ballot.²⁰²

A large number of far-reaching simplification reform proposals in the area of public law involve deregulation.²⁰³ Financial services, international trade, energy, and biotechnology are attractive candidates for such reform. Other proposals fall under the rubrics of incentive-based regulation. Environmental protection furnishes many opportunities for reforms of this kind, including emissions trading and pollution taxes.²⁰⁴ Performance-based management is

199. See Schuck, *supra* note 21.

200. See S. 250, 102d Cong., 1st Sess. (1991) (proposed National Voter Registration Act of 1991, also known as the "Motor Voter" bill, under which voter registration would take place during driver's license application and renewal); H.R. 4366, 102d Cong., 2d Sess. (1992) (providing for voter registration at time of driver's license application and renewal). Professor Raymond Wolfinger has studied the effects of complex voter registration procedures and argued that simpler procedures would strengthen the legitimacy of the electoral process without having significant partisan effects. RAYMOND E. WOLFINGER & STEVEN J. ROSENSTONE, WHO VOTES? 80-88 (1980); see also Peverill Squire et al., *Residential Mobility and Voter Turnout*, 81 AM. POL. SCI. REV. 45, 57-58 (1987) (proposing simplified registration procedure).

201. See, e.g., CONN. GEN. STAT. §§ 14-42(b), 19a-279(b) (1990) (requiring state to give drivers an opportunity to indicate on driver's licenses whether they wish to donate organs in event of fatal accident).

202. See *supra* note 97 and accompanying text.

203. For a summary of such proposals, see Ronald Cass, *Privatization: Politics, Law and Theory*, 71 MARQ. L. REV. 449 (1988).

204. See Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law*,

an analogous reform within bureaucracies.²⁰⁵ Still other proposals involve a change in the mix of market and regulatory forces, as in public education and health care.²⁰⁶ More generally, policymakers should institutionalize a periodic review designed to purge laws of their unwanted encrusted complexities. Several techniques now in use for other purposes—for example, legislative revision commissions, sunset reviews, and regulatory and small business impact statements—might serve as fruitful models.

Few legal simplification efforts, of course, work in precisely the way they were envisioned, as the experiences with airline deregulation and sentencing guidelines demonstrate.²⁰⁷ Efficient markets, moreover, are neither easy to establish and maintain nor unproblematic in their operation. What makes such reforms at least plausible, then, is not that they are perfect, but rather the fact that centrally coordinating innumerable individual and firm decisions fairly and efficiently has proved to be an unmanageably complex task.²⁰⁸ In retrospect, the earlier faith that improvements in information technology and other management techniques would enable bureaucracies to keep pace with complexity in these areas seems hopelessly fatuous. If anything, complexity's resistance to centralized control seems to have increased over time.

VI. CONCLUSION

An analysis of legal complexity, then, holds important lessons for lawmakers, citizens, and scholars. The professional producers, rationalizers, and administrators of law must think more carefully about the complex rules and systems that they have tended to prefer. Perhaps a more systematic view of the causes and consequences of complexity may bring them to different conclusions about its merits in one legal realm or another.

37 STAN. L. REV. 1333, 1341-51 (1985).

205. See generally DAVID OSBORNE & TED GAEBLER, *REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTORS* (1992).

206. See JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS & AMERICA'S SCHOOLS* 199-201 (1990); PAUL STARR, *THE LOGIC OF HEALTH CARE REFORM* (forthcoming 1992).

207. See *supra* text accompanying notes 39-40.

208. There is abundant evidence of other societies' inability to manage it, from the strong privatization movements in virtually all Western European nations to the collapse of centrally administered economies in Eastern Europe and other parts of the world.

Given the political economy of complexity, however, law producers are unlikely to take this more systematic view on their own unless citizens insist upon it by rewarding law producers when they devise worthy simplifications and penalizing them when they embed excessive complexity in the law. We know that the case for simplicity in law can occasionally carry the day politically. The deregulation of surface transportation²⁰⁹ and energy production,²¹⁰ the Paperwork Reduction Act,²¹¹ and the "bubble" approach to pollution control²¹² are examples, flawed though they surely are in some respects. Sustaining these simplification victories over time, and refining them as their imperfections become manifest, will be more difficult.

We scholars also have a crucial role to play in the campaign to domesticate legal complexity. Our professional detachment, analytic training, and commitment to understanding complexity equip us to conduct relatively sophisticated, broad-gauged studies of its effects in different legal settings, of the strategies that people adopt in its shadow, and of the merits of proposed reforms that seek to strike a superior balance.²¹³ But we are educators as well as scholars. As we learn more about legal complexity's consequences, we should infuse that learning into the political economy of complexity, reminding anyone who will listen about the elusive virtues of simplicity in law.

209. See, e.g., Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (codified in scattered provisions of 49 U.S.C.); Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (codified as amended primarily in 45, 49 U.S.C.).

210. See, e.g., Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350 (codified in scattered provisions of 15 U.S.C.).

211. Pub. L. No. 96-511, 94 Stat. 2812 (codified as amended in 5, 20, 30, 42, 44 U.S.C.).

212. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). For an analysis of *Chevron*, see Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 458-61 (1989).

213. See, e.g., RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985); STEPHEN D. SUGARMAN, *DOING AWAY WITH PERSONAL INJURY LAW* (1989).