Administrative Due Process as Social-Cost Accounting

Jerry L. Mashaw
Yale Law School

Follow this and additional works at: https://digitalcommons.law.yale.edu/fss_papers

Part of the Law Commons

Recommended Citation
https://digitalcommons.law.yale.edu/fss_papers/1151

This Article is brought to you for free and open access by the Yale Law School Faculty Scholarship at Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship Series by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
ADMINISTRATIVE DUE PROCESS AS SOCIAL-COST ACCOUNTING

Jerry L. Mashaw*

When governmental—or, for the purposes of this Article, administrative—action deprives a person of life, liberty, or property, the Constitution requires that the affected individual be accorded "due process of law."1 However, the constitutional right thus defined is so open-textured that it seems to be a question in the form of an answer: What process is due process?

Judicial response to this now ubiquitous constitutional question might proceed from several perspectives. Courts might search the due process jurisprudence and/or administrative practice for analogies to the contested procedure. This historically oriented review would seek to determine whether the challenged procedure so departs from tradition or upsets settled expectations concerning procedural fairness that it should be invalidated.2 Alternatively, a court might approach a claim of procedural unfairness with a view toward fundamental notions of humane treatment or individual dignity.3 When exercising this type of review, a court would be particularly sensitive to both the concrete and the symbolic effects of its approval or disapproval of the process on the associational and libertarian values instinct in American constitutionalism. A third

Copyright © 1981 by Jerry L. Mashaw.

* Professor of Law, Yale University. My thanks to participants in faculty workshops at the Cornell, Georgetown, University of Miami, U.S.C., Stanford and SUNY at Buffalo Law Schools for helpful discussions of earlier drafts of this Article.

1. U.S. CONST. amend. V.

2. This historical approach, with notions of precedent at its center, was exemplified by the Supreme Court's opinion in Davidson v. New York, 96 U.S. 97 (1877). Concerning the meaning of due process, the Court wrote:

[Al]part from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive, and satisfactory, there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded.

Id. at 104.

perspective might look at the contribution of various procedures to accurate decisionmaking, and invalidate administrative procedural choices whenever the "error costs" from administrative actions seem substantially to outweigh the benefits of procedural simplicity.4

Each of these approaches has quite different implications for due process analysis, yet each also has substantial support in the jurisprudence and in the literature.5 Which approach courts ought to take, if any, is a question of obvious interest. As a way of creeping up on this broader normative inquiry, it seems appropriate first to attempt to explain, with more precision than has been attempted heretofore, what each type of analysis requires of a court committed to it. Any criterion for judgment asserts values and makes demands for relevant information—assertions and demands that a court may or may not be able to defend or satisfy while remaining intellectually honest and consistent with its sense of the appropriate judicial role in constitutional adjudication. It is, therefore, at least worth asking whether a proposed decision rule asserts inappropriate values or makes impossible information demands on a court attempting to employ it in a serious and responsible way.

This Article analyzes the values and information demands of the "cost benefit" or "cost minimization" approach suggested above. The Article begins with the modest claim that the Supreme Court has in recent important cases utilized a model for due process analysis that attempts to minimize the social costs of administrative decisionmaking. Second, it argues that a lack of specification in the Court's cost-minimization model leads it to overlook costs that should be considered and to misestimate costs that it treats as relevant. Third, the Article argues that the cost-minimization model, if seriously pursued, makes enormous, often impossible, information demands on the court and litigants before it. Some strategies for managing the information gaps are suggested and analyzed. Finally, it considers some implications of the cost-minimization model for the development of an appropriately "restrained" judicial posture and for doctrinal developments in administrative due process.

5. See id. at 47 n.61.
For purposes of simplicity, the discussion that follows explores the use of the cost-minimization model in the context of determining entitlements to social-welfare payments. Two decisions of the United States Supreme Court, *Goldberg v. Kelly*\(^6\) and *Mathews v. Eldridge*,\(^7\) provide the focus for the discussion. Because these cases are doctrinally significant and are analytically indistinguishable from cases in other areas of administrative activity,\(^8\) no loss of generality results from this choice.

Throughout the discussion, I will take seriously the analytic content of the opinions in these cases, and will ignore explanations of the Court's behavior that rely on shifting personnel, personal philosophies, or general "political" context. The analysis is concerned with what it means to confront due process questions in certain ways, not with the validity or explanatory power of various theories of Court watching.

In carrying out this program, the Article engages in metaphorical language concerning social welfare, preference aggregation, and the like, which may induce giddiness, if not nausea, in the axiomatic social choice theorist. It treats agenda artifacts, such as existing programs, as significant expressions of a constitutional commitment to majority rule, and uses graphs that must be constructed with aggregated, but unspecified, cardinal-utility measures. The exercise is one of tracing some of the problems and implications of constitutional decisionmaking, in an institutional context that is layered with contradictions and whose underlying assumptions are fuzzy not just at the margins, but at the core. The contradictions and ambiguities are accepted, and, in the usual middle-level way of legal-policy analysis, we try to see what productive ideas might be generated by working through the implicit logic of existing norms. The analysis can aspire only to care, not to rigor. Beyond puns on "social" and "choice," it has in common

---


\(^7\) 424 U.S. 319 (1976).

\(^8\) *Goldberg* and *Eldridge* are technically cases about the timing of hearings, rather than structure or necessity. Nevertheless the cost-benefit style calculus used to address the timing issue is applicable to other issues and has been so employed by the Supreme Court in a broad range of subsequent cases. See, e.g., *Mackey v. Montrym*, 443 U.S. 1 (1979) (automatic suspension of driver's license for refusing to take breath-analysis test not violative of due process); *Parham v. J.R.*, 442 U.S. 584 (1979) (absence of hearing prior to voluntary juvenile commitment not violative of due process); *Dixon v. Love*, 431 U.S. 105 (1977) (absence of hearing prior to revocation of driver's license not violative of due process).
HOFSTRA LAW REVIEW

with that literature only its basic lesson: The wisdom of modesty when constructing institutions, or, in the constitutional-adjudication context, imposing decision rules for collective decision-making.

THE EXEMPLARY CASES

In Goldberg v. Kelly, the Court, in 1969, decided that benefits under the program of Aid to Families with Dependent Children (AFDC) could not, as a matter of due process of law, be terminated before providing the recipient with a trial-type hearing (including specific notice of issues, opportunity to present evidence orally and to confront and cross-examine adverse witnesses), a neutral decider, a decision based wholly on the hearing record, and an opportunity to be represented by counsel. The prior decision structure, which included a notice indicating the intention to terminate and the grounds for termination, as well as an opportunity to submit written objections prior to termination, was determined to be constitutionally inadequate. In Mathews v. Eldridge, in 1975, the Court faced the same issue—a claim of constitutional entitlement to a pretermination oral hearing—with respect to social security Disability-Insurance benefits (DI). It held that a pretermination oral hearing was not required. In positive terms, this meant that the Social Security Administration (SSA) could terminate benefits, constitutionally, on the basis of (1) documentary evidence submitted by treating and consulting physicians that had never been made available to the claimant and (2) information submitted by the claimant pursuant to a general request for information concerning his or her condition and a subsequent notice of intent to terminate benefits.

The difference in the Goldberg and Eldridge results does not represent a doctrinal shift. In both Goldberg and Eldridge, the Court considered three “factors”: (1) the interests of the claimants in the receipt of benefits; (2) the contribution of the requested procedures to avoiding erroneous terminations; and (3) the fiscal and administrative burdens of the requested procedures. Yet, as the majority opinion in Eldridge reflects, the Court perceived a critical difference in the magnitude of the relevant costs and benefits at stake in the two cases. The Court described the situation of ter-

10. 424 U.S. at 349.
11. Id. at 339-43.
minated AFDC recipients as "immediately desperate," whereas it believed DI recipients to be in less straitened circumstances. The "claimant's interest" in avoiding erroneous deprivation was therefore more significant in the AFDC than in the DI program. Moreover, the Court believed that adding formal procedures would substantially improve accuracy in AFDC determinations but not in DI cases. Having made these two distinctions, and having no reason to believe that adding procedural safeguards was cheaper in DI than it had been in AFDC, the Court decided not to impose the Goldberg hearing requirements on Eldridge-type determinations.

The Court's conclusions are deeply problematic on empirical grounds. It is likely that terminated DI recipients are very nearly as "desperate" as terminated AFDC recipients, that oral hearings are peculiarly important to the determination of many DI claims, and that the administrative costs of pretermination hearings in AFDC cases are higher than they would be in the DI program. More importantly for this discussion, the Court's conclusions are disputable because the underspecification of its due process model leaves ambiguous what questions are in fact being asked, and, therefore, what empirical evidence is relevant.

INTERESTS, BURDENS, AND SOCIAL WELFARE: AN APPROACH TO SOCIAL-COST ACCOUNTING

It seems clear that the claimant's-interest criterion, for example, is not literally a question of how the claimant subjectively would value the continuous receipt of payments. The Court does not search for evidence of actual claimant valuation, even in qualitative terms like "desperation." Indeed, such an approach would be surprising. The Court has often made clear that the subjective expectation of claims is not the constitutionally relevant measure of the importance of a substantive claim of right. Similarly, dollar values of benefits cannot be the issue. A dollar is a dollar, and DI beneficiaries receive more of them per claim than AFDC beneficiaries. Using this measure, the Court would have come to conclusions opposite to those it in fact reached. But what, then, is the Court seeking to count?

It seems plausible to view the Court as searching for the rela-

12. Mashaw, supra note 4, at 37-46.
five "social value" or "utility" of transferring dollars from taxpayers to AFDC and DI claimants. As in most constitutional adjudication, the Court seeks to specify some consensus, or at least widely held, value as a starting point for analysis. Here, the starting point is implicit, but nonetheless apparent. The claimants may make claims to societal resources (procedural protections) to the extent that those claims "convincingly" support the general welfare; conviction results at least in part from a perception of the social importance of accurate decisionmaking. Potential desperation is thus a proxy for general social concern with the claimant's plight. The Court, believing that greater desperation occurs among terminated AFDC recipients than among terminated DI recipients, therefore found it more socially valuable to avoid erroneous AFDC terminations than erroneous DI terminations.

Assuming that the Court is, indeed, interested in the social value of protecting the claimant's interest, is it similarly interested in the social costs of respecting that interest via procedural safeguards? In a special sense of "social costs," the Court is obviously so concerned. It mentioned "administrative" and "societal" costs —costs that are "social" at least in the sense of "paid out of public monies." But what of other social costs, for example, the dissatisfaction of taxpayers compelled to support ineligible persons pending a hearing on their proposed termination? Are these also to be included on the cost side of the equation?

It seems plausible to think so. First, evidence from other cases suggests that the Court is concerned with the effects of procedural formality on the accomplishment of public purposes. That concern is not solely with the budgetary costs of procedure, but with a procedure's potential to inhibit the achievement of important social objectives. Moreover, however difficult it may be to estimate social costs and benefits, or to express them in a common currency, an attempt to do so is at least coherent. Indeed, to read the Court's due process test in *Goldberg* and *Eldridge* as simply seeking to compare private interest, qualitatively expressed, on the benefit side of the equation, with public expenditure on the cost side, would make the Court's calculus incoherent at the outset. Formulation of the cost/benefit comparison as a question of social

15. 424 U.S. at 347.
costs and social benefits at least provides a basis for rational argument—a commodity of presumptively high value in legal discourse.

From the foregoing, it is perhaps obvious that the social costs of AFDC and DI claims adjudications are of two types. First, there are social benefits foregone when eligible persons are denied, and social costs incurred when grants are made to ineligibles. These are the "error costs" of the system. Second, there are the direct costs of running the adjudicatory system (personnel, etc.) and the indirect costs of various types of adjudicatory processes (administrative inefficiency, and the like). These are the "administrative costs" of the system. Just as obviously, minimizing the sum of these costs seems desirable. 17

This type of cost minimization seems to be what the Court had in mind when it said that it must consider, along with the cost of a procedural safeguard, the contribution pretermination hearings will make in preventing erroneous deprivations. Any procedural device that yields a savings in error costs in excess of its administrative costs is desirable. As a standard for constitutional adjudication, the point seems to be that at some level of failure to capture these potential benefits, administrative procedures will be considered irrational, arbitrary and, therefore, unconstitutional.

It may be objected, of course, that the calculus is incomplete because it neglects the costs and benefits of processes—not as instrumental devices for achieving substantive social goals—but as

17. It is worth noting that the cost-minimization approach just presented is not an approach based upon notions of economic efficiency and does not implicitly assert that the maximization of aggregate economic wealth is a constitutional value—or a value at all. See Dworkin, Is Wealth a Value?, 9 J. LEGAL STUD. 191 (1980). See generally Symposium on Efficiency As a Legal Concern, 8 HOFSTRA L. REV. 485 (1980). An economic-efficiency analysis cannot, in fact, be made applicable to a procedural analysis such as the Goldberg/Eldridge approach, which views process accuracy as instrumental to programmatic goals that are distributive rather than efficiency oriented. Or, to put the point differently, an efficiency analysis would have to abandon any close association with markets as sources of information about values and seek to "monetize" returns in a rather metaphorical fashion in order to take account of distributional purposes. One might then question whether the economic analysis was distinguishable from the utilitarian analysis in either its basic moral assertions or its analytic technique.

Nevertheless, analysis of procedure in economic efficiency terms may be superior to a social-welfare approach with respect to that arguably large class of substantive legal norms that rather clearly serve efficiency ends. And it is undeniably the case that much of the technical apparatus for talking about social-welfare calculations is borrowed from economic analysis. See generally Posner, An Economic Approach to Legal Procedure and Judicial Administration, 3 J. LEGAL STUD. 399 (1973).
devices for self-realization, participatory governance, and the like, or for their opposites, alienation and anomie. Or it may be asserted at the outset that general social-welfare calculations do not provide an appropriate methodology for judicial decisionmaking. In one sense, these arguments relate to the comparative “goodness” of other approaches to due process review. They assert that there are better ways of deciding, and that such claims would require for their evaluation a full explication of those alternative perspectives. That task must be left to another day.

In a second sense, however, these objections may be asserting that a social-welfare approach is ineffectual or inappropriate in more absolute terms. It may be objected, for example, that social-welfare talk implies aggregating individual preferences, and that we have no adequate technique for aggregating interpersonal utilities. Or it might be argued that any judicial attempt to assess general welfare consequences either subordinates judicial review to a prior social-welfare calculation at the legislative level or impermissibly invades the legislative function of making policy based on general-welfare calculations.

I hope the discussion which follows will cast some light on precisely these sorts of issues. For the efficacy question turns on the degree to which a social-welfare approach can say plausible, coherent, and useful things about social-welfare functions, given the inaccessibility of much important data concerning individual or aggregated preferences. And, in turn, the appropriateness of a judicial, social-welfare calculation depends upon the types of value assertions or demands for production of information that a conscientious court might make when attempting to construct such a calculation.

**A MORE Specified Model of the Social Costs of Error**

It is useful at this point to introduce a graphic representation of the social gains and losses from accurate and erroneous decisionmaking in the AFDC and DI programs. The graph estab-

---


lishes an analytic framework for the remainder of the discussion, and permits the isolation of a number of critical issues that the Supreme Court dealt with, if at all, on only an intuitive level.

Figure 1

Figure 1 assumes several—I believe reasonable—things about legislative decisions to make income transfers. First, the graph assumes that claimants are more or less deserving, rather than absolutely eligible or ineligible as the decisions concerning individual entitlements would imply. Common sense suggests that we will care more about the support of some "eligibles" than others, and be more outraged by some erroneous transfers than others. Moreover, from the perspective of a social-welfare calculus, it seems plausible to describe the legislative adoption of various income-transfer programs as a series of attempts to define as eligible for a transfer anyone to whom the transfer can be made at a net social benefit. The legislature may, of course, have stopped short of this
goal, thus failing to capture available social benefits, or may have overshot the mark, thus making transfers to some persons at a net social cost. But, in the ideal realm of judicial review of administrative procedure—based on an appreciation of substantive social-welfare goals as legislatively specified—the legislature must be viewed as having defined eligibility in a way that attempts to capture the available social benefits from a particular type of transfer program. Claimants and recipients range on both sides of this eligibility criterion or legislative standard from the clearly inappropriate (small gain/large cost), to the marginally ineligible, to the marginally eligible, to the clearly appropriate (large gain/small cost).  

Second, the graph assumes that the legislature makes flat-rate payments to those who meet or exceed the eligibility standard and nothing to those who fall below it. The marginally ineligible get nothing, and the marginal and infra-marginal eligibles get the same payment. Although income-transfer programs, including AFDC, do "price discriminate," they do so in sufficiently gross terms that one may sensibly imagine substantial numbers of both infra-marginal transferees, that is, persons to whom a transfer produced substantial "social welfare surpluses," and denied claimants who would be paid something were transfers less "lumpy." Moreover, even if prescribed payment amounts discriminated perfectly amongst claimants—thereby equalizing the social value of all transfers at the margin—decisions about eligibility would often affect the whole of the payment amount. And, of course, in contexts other than programs involving cash transfers (job security, civil commitment, licensure, and so on), decisions generally involve allocating very lumpy "goods" and "bads."

The social-welfare functions described by XAFDC and XDI constitute one plausible representation of the Supreme Court's view of the net social utility to be derived from making payments to claimants who lie at various places along the eligibility continuum OR. Thus, a payment at point B would produce net utility BD in the DI program, and a greater net utility, BY, in the AFDC.

22. Note that both the horizontal and vertical axes employ a cardinal, but undisclosed, ordering. One way to imagine the construction of the horizontal axis is a perfect plebiscite in which voters assign "deservedness" numbers on a scale of 1 to 100 to well-defined clusters of relevant personal characteristics. The task of administration is then to assign individual claimants to the correct characteristics cluster, and to determine whether the cluster falls below or above the score that has been determined to be necessary for eligibility. The vertical scale is constructed in the same way, this time asking voters to indicate the intensity of their joy or unhappiness at the prospect of a public transfer of a specified size being made to a person occupying determinate places on the horizontal scale.
program. The payoff to eliminating negative errors is obviously much greater in AFDC than in DI. And, because the Court assumes that the same procedures would eliminate more negative errors for point B AFDC claimants than for point B DI claimants, the case for increased procedural safeguards becomes even stronger. The *Goldberg* opinion might be described as holding that, under these circumstances, it is irrational not to attempt to capture the social-welfare gains from more accurate decision-making.\(^{23}\)

\(^{23}\) Another possibility, of course, is that the Court viewed the social-welfare functions as dichotomous and unequal—for example, as in Figure 2. This description
Some Obvious Problems with Goldberg-Eldridge Style Calculations

Describing the Comparative Heights of Social-Welfare Functions.—The comparison of current with past cases is a standard technique of legal analysis. The Eldridge Court compared that case with Goldberg and found larger social costs associated with AFDC than with DI errors. But how does the Court know how to describe the social-welfare functions of the two programs even in comparative terms? The imponderables confronted by such a description are indeed awesome.

If we assume that the legislature is concerned with maximizing social welfare, it would seem to follow that it would define AFDC and DI eligibility in a fashion that made identical the marginal social returns to payments under the two programs. But this only tells us that the marginal payments—those immediately above and immediately below the statutory standard—have similar social benefits and social costs. It says nothing about infra-marginal transfers and, therefore, nothing much about the shape or heights of the social-welfare curves. There is, alas, but one interesting property to the foregoing observation. It suggests that it would be wrong to assume that the DI and AFDC social-welfare functions have a different shape throughout their respective ranges. At least at the margin, the benefits and costs are the same.

Of course, the Eldridge Court did not characterize its assertion as one concerning the social value of AFDC and DI payments at every point on the curves. Rather, a cheerful reading of the case suggests an assertion that the average social value of AFDC payments exceeds that of DI payments. But, given the pervasive uncertainty concerning the shape of the two welfare functions, is there any reason to credit this assertion? I think not. The Court makes its assertion on the basis of the greater "need" of AFDC recipients. As an empirical matter, the Court may have correctly assessed the average relative need of recipients under the two programs. But as a conceptual matter, it has not explained why relative need defines relative social value.

fits the Court's analysis, but it seems implausible as a description of the relevant social values. It is simply hard to believe that society views the support of all DI recipients (those with lower back pain and those in iron lungs) and all AFDC recipients (unwed teenage mothers and widowed, middle-aged housewives) as equally valuable. We apparently do not want to bear the costs associated with a legislative or administrative system that attempts to make these sorts of worthiness discriminations, but that is a quite different matter from asserting that the same social consensus underlies every transfer.
If the social value of transfers is something that the Court seeks to establish by considering evidence of legislative intent, then the "neediness" criterion is clearly wrong. To ask whether the DI recipient is as "needy" or "desperate" as the AFDC recipient is to treat the social costs of negative error in the two programs as if both programs were premised on the need of recipients. But the DI program has no need standard. Its payments are based on a combination of prior FICA contributions and medical impairment. In that program, the social costs associated with negative error may result as much from a large component of "demoralization costs"—that is, a denial of what was thought to be a secure entitlement—as from the desperation of claimants. The Court can assert that the social-welfare schedule for AFDC payments is higher than that for DI payments only if it ignores the different legislative bases for the two types of payments.

Alternatively, the Court may be prepared to say that "need" is the only constitutionally relevant criterion for assessing the social costs of error. But such an assertion would be both inconsistent with the general pattern of its jurisprudence and impolitic in the extreme. That one's security of expectations with respect to governmental action should be inversely related to wealth is not a novel constitutional theory, but it is not a theory the Court has previously rushed to embrace.


induce some positive errors (not all appellants win, but they are paid pending a hearing decision), the heights of the social-welfare functions and the distribution of positive errors in the two programs are important.

Of course, the Court might believe that positive-error costs are very nearly identical for the two programs. This could be true under any of a number of conditions, including: (1) The social-welfare functions have the same shape between O and X (either PX or NX), and errors are identically distributed (both position and number) along OX for both programs; (2) the social-welfare functions in the OX range are the reverse of those represented, and the distribution of errors is similar for the two programs; (3) the social-welfare functions are as represented, and errors are similarly distributed, but fewer positive errors would be induced in the AFDC program; and (4) positive errors in AFDC are systematically skewed toward the marginally ineligible (near X on OX), whereas DI positive errors are not. The opinions, however, provide no guidance on these questions.

The Failure to Consider the Distribution of Errors.—While the relative heights of the functions X-AFDC and X-DI were apparently treated as critical, the Court largely ignored the question of the distribution of errors in the X-R segment of the eligibility continuum. If AFDC negative errors related predominantly to type Z claimants, whereas DI errors related predominantly to type B claimants (and errors were of roughly equal numbers), the social costs of negative errors would be equivalent in the two programs. Alternatively, were the DI program more “error prone” at the initial stages than the AFDC program, DI errors might in the aggregate be more costly than AFDC errors, even if each individual DI error were less costly than its AFDC counterpart.

Somewhat Less Obvious Analytic Difficulties

Error, Error, Who’s Got the Error.—The preceding discussion treats errors as if they were nonproblematic facts, the incidence of which the Court might have—and, given its own decision rule, should have—considered. The reality is, of course, more complex. Decisions on AFDC and DI claims are judgments based on a partial knowledge of facts—facts that often nudge the decisionmaker in different directions. And even perfect information concerning the relevant facts will not prevent disputes concerning these decisions. One disability examiner’s “broken down manual laborer” is another’s “malingering;” one AFDC eligibility technician’s
“good cause” for refusing employment is another’s “lame excuse.” What does an error mean in a system of judgmental administration?

The question is difficult. Even so, it seems clear that, with respect to the AFDC and DI programs, “error” should not mean what the Court’s discussion takes it to mean: reversal on appeal. Appeals are de novo in both programs; not only may new evidence be taken, but also a new judgment is rendered which is wholly independent of the prior determination. There is no reason a priori to consider the second judgment superior to the first. In addition, a reversal-rate approach to the incidence of error provides no information on unappealed cases. Hence, the Court had no information on false positives, and it might easily have been induced to believe that the error rate for appealed cases was representative of the false negatives in unappealed cases—a relationship that has never been established. In short, when the Court in Goldberg and Eldridge spoke of the error-proneness of AFDC and DI initial decisions, it actually was talking about the reversal proneness of the systems—a quite different matter.

Procedural Power.—From what has been said about the relationship of reversal rates to errors, the Supreme Court’s refusal in Goldberg and Eldridge to gauge the error-prevention power of hearings by the reversal-rate statistics should be applauded. And the basic instinct to talk in functional terms about the role of various aspects of hearings (e.g., cross-examination) is similarly praiseworthy. Yet, the discussion one finds in the two cases still falls remarkably short of the information demands of a probing social-welfare calculation.

The Court dealt in stereotypes concerning the bases for termination decisions (witness testimony in AFDC cases, disinterested and routine medical records in DI cases), and evaluated the need for hearings to buttress that evidence from the perspective of the function of hearings in civil litigation. There was no attempt to evaluate the degree to which, or how often, the stereotypic evidence dominates the decision matrix in AFDC or DI termination cases. Nor was there an attempt to investigate how a technique like cross-examination, or a view of the witness-claimant, functions in those special contexts. A serious inquiry into these issues might reveal, for example, that testimonial evidence is not a common basis for AFDC terminations, and that an opportunity to view and question the claimant is considered the most important evidence in DI hearings.
In addition, this stereotypic analysis may reintroduce the confusion between reversals and errors. Much of the design of trial procedure may be related to preserving unrelated substantive values or equality between legal combatants, rather than with truth seeking. The reputed capacity of the heat of civil trial to separate precious metal from slag is more an engaging metaphor than an empirical finding.\(^2\) The conventional wisdom of the civil-trial stereotype is a lawyer's wisdom, predicated on experience concerning the power of a procedure to "turn decisions around." This experience is of dubious value when assessing the issue of accuracy made relevant by the Supreme Court's due process calculus.

**Dynamic Effects.**—Up to now, we have said little about the dynamic or systemic effects of changes in procedural rules. Justice Black, however, noted this problem in his *Goldberg* dissent. If the Court skews the system in favor of positive errors, by procedurally constraining negative decisions at one decision point, what is to prevent administrative self-correction? As Justice Black suggested, if terminations are judicially constrained, then decisions concerning initial acceptances into the program might be constrained administratively in order to maintain the acceptable level of disbursements.\(^2\) Moreover, because the Court cannot know how the balance will be reestablished, it cannot know whether the combination of error and administrative costs in the new equilibrium will be greater or less than those costs under the pre-review system.

**ATTEMPTING TO MANAGE THE INFORMATION DEMANDS OF A SOCIAL-WELFARE CALCULUS**

From what has been said, it seems clear that the Supreme Court's approach to *Goldberg* and *Eldridge* left unanswered—indeed, unasked—a number of questions that are critical to a serious social-utility calculation. It may well be the case, of course, that the task of social accounting that a thorough analysis of social costs and benefits would impose on the Court is simply too formidable. The slope of the social-welfare functions for various transfer programs cannot be determined with precision. The number and positions on those curves of positive and negative errors, even the existence of errors, cannot be conclusively established. The proce-

---

27. 397 U.S. at 279 (Black, J., dissenting).
dural power of various adjudicative techniques is unknown. The dynamic effects of procedural change are unpredictable.

But, no matter the imponderables, the Court must decide. The question, then, is whether it should face up to the information demands of its due process calculus, and if it does, what that candor implies. One possible implication is that where decisions require highly indeterminate social-welfare judgments, the Court is a poor institution for resolving competing claims. In the absence of appropriate information, a judgment about process seems to be merely an instinct about whose interests are to be preferred, rather than a judgment about aggregate social welfare. And barring a choice that invades constitutionally established procedural preferences—such as those having to do with the relatively specific constitutional protections concerning civil or criminal trials—that sort of choice is for the legislature, or for the "good faith" judgment of the legislature's administrative delegate, as the final paragraphs of the Eldridge opinion suggest.²⁸

Yet, it seems impossible to accept the notion that due process means merely whatever process the legislature and administrators devise. Whether we applaud judicial review, or merely view it as an established part of the constitutional landscape, a full-fledged retreat from due process review seems improbable. Aside from shifting to review on some radically different basis, the question is whether there are any strategies for managing the indeterminacies of the cost-minimization model without, as the Court seems to do in Goldberg and Eldridge, either (1) abjuring a full explication of the relevant costs and benefits, or (2) making wholly intuitive assertions about social valuations, procedural power, and the like. Let us return to the various problems with the Court's analysis, and see what headway can be made.

**Describing and Comparing Social-Welfare Functions**

I can make very little progress toward describing the social-welfare functions for AFDC and DI in a convincing way. It seems reasonable to believe that their shape is more like the curves in Figure 1 than those in Figure 2, but when called upon to justify the continuous structure of those curves I would have to fall back on a negative assertion: I have no good reason to introduce "kinks" in the curves (with the possible exception of peculiarly high demor-

²⁸. 424 U.S. at 347-49.
alization costs for obvious errors affecting claims at the tails of the eligibility continuum). Of course, this says nothing about heights.

Perhaps the best that can be done here is to combine traditional legal technique, judicial modesty, and game theory. The Court does not usually reason in a vacuum. As in Eldridge, it compares cases. The question, then, is whether there is any reason to believe that the social value of accuracy in a current case is greater or less than in prior, similar cases. I have already argued that there are no correct and non-intuitive grounds for either assertion.\textsuperscript{29} That being the situation, a reasonable strategy might be to treat the pervasive uncertainty of relative social values as a ground for assuming their equivalence. This is, after all, a standard technique in estimating the probability of outcomes when no information exists concerning the likelihood of any particular outcome.

\textit{The Distribution of Errors}

Assuming that the social-welfare functions are roughly the same in the AFDC and DI programs (and, for that matter, in other transfer programs), the Court must still establish the number and position of positive and negative errors on the social-welfare curve. How can this be done? First, concerning the number of errors, reversal rates are not good proxies for error rates, since other more informative data are often available.\textsuperscript{30} Moreover, I have argued elsewhere that the nonexistence of reasonably reliable error-rate data might itself constitute a due process violation.\textsuperscript{31} The critical function of error identification in a cost-minimization approach to due process supports that view. The failure to collect information necessary to both administrative and judicial evaluation of procedural adequacy seems arbitrary, absent very high collection costs. And, were the absence of error data an independent ground for invalidating administrative process, it seems likely that such data would rapidly become available.

But, even if the number of errors is identified, how is the Court to locate them on the social-welfare function? Good incidence data for administrative-quality-assurance purposes might

\begin{itemize}
  \item \textsuperscript{29} See pp. 1434-1435 supra.
  \item \textsuperscript{31} Mashaw, supra note 30, at 775-76, 807.
\end{itemize}
cast some light on the relationship of the distribution of errors to
the social-welfare function, provided that there is a specification of
the content of the "deservedness" continuum with which the char-
acteristics of erroneously adjudicated claims can be compared. In
the DI program, for example, the core concerns seem to be with
claimants' residual-functional capacity. Data concerning the posi-
tion of errors on the continuum of residual-functional capacities,
however, is necessarily inconclusive.

Nevertheless, certain aspects of the program provide reasons
to believe that termination decisions rarely introduce errors at the
tails of the social-welfare function. Objective bases for qualification
"cream" the very severely disabled at the initial stages of the deci-
sion process, and virtually none of these cases is subsequently ter-
minated on a nonobjective basis. Similarly, the fact that a person
has previously been determined to be totally disabled from work-
ing at any job in the national economy that would provide a very
modest level of self-support suggests that positive errors are un-
likely to affect a robust segment of the population.

In short, errors in the DI program are likely to occur with re-
spect to marginal cases—that is, cases in which the social costs of
error are modest. This assumes, of course, that the social-welfare
function is not very steep with respect to claims that are just to
one side of the statutory standard. That assumption seems plausible
to me. Large social-welfare costs are likely to result primarily from
widespread perceptions of either "injustice" (negative errors) or
"rip-offs" (positive errors). But these perceptions should not be ex-
pected to attend marginal cases, that is, cases where the decision is
fairly arguable either way.\footnote{32}

If this is correct, the Court might justify a refusal to upset the
DI legislative scheme on constitutional grounds with the rough
judgment that there are at most modest social-welfare gains to be
had from eliminating negative errors in the DI program. Given the
somewhat tenuous connection between procedure and accuracy
anyway, only a refusal to attempt to eliminate substantial error
costs by providing procedural protection will be considered so irra-
tional as to be "fundamentally unfair."

When one attempts to model the distribution of errors in
AFDC, however, the situation is more complex. Need is a major

\footnote{32. I must confess, however, that I am far from certain. See Mashaw, How
Much of What Quality: A Comment on Conscientious Procedural Design, 65
CORNELL L. REV. 823, 828-31 (1980).}
criterion of eligibility from the legislative perspective and a significant factor in eligibility disputes, but it does not dominate the decisional matrix the way functional capacity seems to dominate the disability decision. Factors like family composition, residency, cooperation in locating relatives, and willingness to seek employment are also critically important. What this suggests is that we cannot confidently assert that the circumstances constraining errors with respect to one aspect of eligibility would tend to confine errors to the marginal cases. Because the eligibility continuum represents a complex of factors affecting a recipient's "deservedness," and each factor must be independently satisfied, errors concerning any issue—however effective the decision process is generally concerning that issue—might affect recipients whose composite-claim strength is very high.33 Erroneous termination might affect recipients at any position on the "deservedness" continuum, including the tail. There is, thus, less reason to believe that the distribution of errors in AFDC is constrained to marginal and, therefore, low-cost cases. In the face of this level of uncertainty concerning the social costs of any particular termination, the Court might conclude that failing to provide extensive procedural safeguards is recklessly imprudent.

Problems with the Strategy

Where Is the Social-Welfare Gain from Trading Negative Errors for Positive Ones?—A revised social-welfare model, one that reflects a unitary social-welfare function for AFDC and DI payments and a guess at the distribution of errors in the two programs, appears as Figure 3. A glance at it suggests a problem. The assumptions in Figures 1 and 3, that the social-welfare function is linear and, in Figure 3, that the distribution-of-claim strength is symmetrical around the statutory criteria, imply that the imposition of pretermination hearings would, by preventing the termination of ineligibles, impose social costs from "false positives" that equal the savings from the avoidance of "false negatives." If the effect of the pretermination hearing for AFDC involves a simple trade-off of

33. Imagine, for example, 10 separate criteria for eligibility; a 1 to 10 scale of satisfaction for each criterion (which might represent either degrees of satisfaction of the criterion or degrees of certainty with respect to binary judgments); and a requirement that claimants score at least 5 on each scale to be eligible. The minimum eligibility score is thus 50, and one might imagine that a marginal case would be in the range of 40 to 60. But a claimant rating an overall 96 could be disqualified by a 2-point mistake in classification with respect to 1 factor.
equivalent costs attached to different forms of error, where is the social gain?

One answer might be that the distribution of AFDC errors is, in fact, skewed such that the Court might reasonably anticipate that high-cost negative errors would be traded for low-cost positive ones. The complex eligibility criterion—with a requirement that each condition be independently satisfied—supports an expectation that negative errors may affect any portion of the “eligible” sector of the eligibility continuum. Positive errors, however, are in principle more constrained. If we assume that the incorrectly decided grant contains an error with respect to only one aspect of eligibility, then presumably the recipient is at least marginally eligible with respect to all other criteria. And, unless the controls on positive error with respect to separate characteristics of recipients are very poor, large numbers of high-cost mistakes should not occur. In any event, the agency remains free to institute controls to pro-
tect against high-cost positive errors. Thus, it remains free to in-
sure that, by and large, the cases that remain eligible pending a
hearing are marginal cases.

Another possibility may be that the social-welfare gain results
from the shorter time period within which the social costs of nega-
tive errors will be borne. Where only the direct administrative
costs of providing hearings show up in administrative budgets, gov-
ernmental agencies may be willing to abide the social costs of nega-
tive error for substantial periods. Where the administrator faces
the costs not only of the hearing apparatus, but also of the positive
errors induced by a pretermination hearing requirement, he or she
has incentives to trade these costs at the margin. Given the usual
magnitudes of the two costs, hearing delays are likely to become
dramatically shorter under such a system. In the limit, the costs of
induced false positives will be negligible, and presumably the hear-
ings themselves will limit the costs of false negatives.

But, we might ask, does this distinguish AFDC terminations
from DI terminations? Why should the SSA not be induced to be-
have in the fashion just suggested for state AFDC administrators
faced with a pretermination hearing requirement?

An answer that builds on the foregoing analysis is that the di-
rect costs of prior hearings, including the continued payment to in-
eligible persons, would outweigh any gains from the avoidance of
false negatives that are not currently reflected in the SSA's institu-
tional-utility function. This assertion implies a relatively strong be-
lief in the limited social value of avoiding errors in DI deter-
minations and in the substantial cost of DI hearings. As we have
shown, the former belief must be premised on assumptions about
the distribution-of-claim strength that are reasonable, but hardly
conclusive. Nevertheless, an administrator or a legislature that
held this belief could certainly not be called arbitrary, and a
procedural system explicable in terms of a nonarbitrary assumption
about social costs meets the constitutional standard we have articu-
lated. Moreover, DI pretermination hearings would be quite ex-
pensive both in terms of direct administrative costs and the pro-
gram costs of continuing payments. An administrator looking at
these program costs might very easily forget that the social costs of
erroneous payments to the marginally ineligible are modest. Only
the program costs appear in the budget, and he or she may, there-

34. See p. 1441 supra.
fore, incur unwarranted (from a social-cost perspective) administrative costs to reduce them. On this analysis, the Court was right to distinguish *Eldridge* from *Goldberg*, but it did so for the wrong reasons.

The Problem of Assessing Errors.—The imponderables of error assessment are somewhat more tractable than the problems previously discussed. There is, of course, no perfect measurement. In AFDC and DI, however, there are quality-assurance data that provide some basis for assessing error rates, and independent studies that use other techniques are increasingly available. In the absence of such evidence, even a careful analysis of the inherent difficulties of decisionmaking and the structure of the current decisional effort might be more reliable than a simple reversal rate as an indication of the error-proneness of the system. Moreover, action-forcing mechanisms, such as a threat to impose procedural safeguards unless adequate information on error rates is made available, might well be an appropriate device for relieving judicial uncertainty.

Determining Procedural Power.—Like error assessment, the question of procedural power is largely soluble if sufficient investment is made in its pursuit. Certainly in cases like *Goldberg* and *Eldridge* the question can be answered. The design of a scientific investigation of the effects of hearings on accuracy is certainly within the competence of social scientists, and could probably be accomplished using existing data. After all, the claims are for a change in the timing of hearings, not for wholly untried procedures.

Other cases may, of course, call for more refined analysis of the effects of some particular procedure—better notice, oral versus written presentation, or the like—on accuracy. And the claims may be made in contexts lacking a set of historical data which can merely be analyzed. In either event, experiments would have to be designed and run at substantial expense. A serious demand for this sort of information begins to raise traditional legal issues of information costs—issues usually resolved by notions of burdens of proof.

Should we say that plaintiffs who fail to produce “good” data on procedural power lose? If so, we are very nearly saying that all plaintiffs, at least of the *Goldberg/Eldridge* sort, lose. Or should we place the burden of production on the agency, provided that the plaintiffs made some plausible showing concerning the procedural power of their requested protection? And, if the latter, what could
we mean by plausible showing other than arguments from the previously decried conventional wisdom?

For one thing, a court could demand that litigants direct their attention to effects on accuracy rather than effects on reversals. Next, it could demand that arguments take account of the peculiar features of the system under review. For instance, who are the deciders? What is their training? Within what sort of incentive structure do they function? What are the discrete mental operations necessary for a decision? What information is necessary to these operations? Where is that information located, and who has the responsibility of producing it? What are the customary informational gaps? What are the decision rules for judgments under uncertainty? In this way, a functional context might be constructed within which to analyze or predict the effects on accuracy of changing one or several of the system's procedural characteristics.

This sort of approach is certainly possible, and it avoids the usual conventional wisdom. Nevertheless, it is itself time-consuming, costly, and problematic. In addition, a nonstereotyped, functional analysis of agency decision processes will often raise as many questions as it answers. It will perhaps also suggest that modifications of the decision process, in ways that outrun the lawyer's usual procedural claims, are necessary to assure accuracy. In that degree, the inquiry broadens every judicial-review proceeding into a general, albeit unscientific, study of the agency's process, and invites all manner of novel claims concerning the decision process most appropriate to the activity under review. Finally, a highly specific inquiry into the functioning and relationship of various aspects of decision process will lead almost ineluctably to the question of how a change will affect patterns of behavior over time.

**Controlling for Dynamic Effects.**—The Supreme Court, obviously, needs some basis for believing that its "reform" in any particular area of procedure or practice will in fact have the salutary cost-minimizing effects that are asserted to attend it. Indeed, a prediction about dynamic effects is used above as a possible justification for shifting symmetrically distributed error costs from negative to positive ones in AFDC, but not in DI.

---

This or any prediction about dynamic effects will be highly problematic. Not only do we not have the facts about future states of the world within which the procedural system will operate, we do not have a good theory about the behavior of the agents who manipulate a procedural system in a well-defined universe. The prior assertion that DI administrators might overreact to budgetary costs that exceeded social costs presumed that the administrators would be concerned to constrain their budgets. Yet some explanations of administrative behavior argue that administrators are in fact concerned with maximizing or stabilizing all or some part of their budget. These theories assert that budget constraint is externally imposed; hence, our previous assumption could be supported only by a specification of the external controls applicable to particular administrators, the "utility set" of these controlling institutions, and the expected equilibrium in the bargaining process between administrators and their external controllers.

To put the question in this way is surely to suggest that it is unanswerable. There are competing theories concerning the goals that motivate administrative, legislative, and pressure-group behavior. And even if there were agreement on the bargaining positions of the parties, that agreement would not describe more than a set of possible bargains. If a unique solution is required, it will not be forthcoming without some heroic assumptions.

This is too strong a condition for judicial decisionmaking. In the ordinary affairs of life, we do not expect to be able to control and predict all dynamic effects. Moreover, it seems clear that decisions not to act (or to retain the status quo) also have unpredictable dynamic effects. We really have no choice but to choose. The question is what one can say about sensible judicial management of the dynamic effects of judicial review of procedural adequacy.

The foregoing discussion suggests at least one caveat and one technique. The caveat is that the Court should not implicitly adopt a theory of bureaucratic behavior as a basis for predicting dynamic consequences without carefully examining it. In fact, it seems to me, reviewing courts often do just that. They seem to assume that a change will be made in legal procedures and that that change will have its desired instrumental effects. Because over time ceteris is never paribus, this would occur only if subsequent dynamic changes were managed in a way that protected the goal of social-

cost minimization. But this is to assume that the relevant administrators have internalized that goal, are capable of acting on it, and accurately perceive the social context—in which case an arbitrary procedure would be inexplicable. Or, alternatively, it is to assume that the judicial decision will subsequently dominate all other forces in shaping the administrators' actions. This is, in essence, the lawyer-domination theory of bureaucratic behavior. That theory may be correct, but no one has yet demonstrated that it is. Nor can the Court content itself with the implicit adoption of this view simply because it supports the ideal of administrative regularity or the rule of law. The cost-minimization approach demands functional analysis of the efficacy of ideals.

Structural injunction is the technique suggested by the need to control dynamic effects. This is not to say that a broad structural injunction is warranted every time a court is prepared to impose any procedural innovation. Rather, it suggests that it is probably necessary to put the whole system at issue—in the way that a willingness to issue broad structural injunctions does. This would provide an incentive for the parties seriously to address the procedural system as a whole, and to develop expert opinion or consensus on questions like procedural power or the dynamic effects of proposed changes. Of course, in many cases it may be necessary to initiate simultaneously a series of related structural changes in order to achieve the basic goals of social-cost reduction. Yet, to say this is to raise in a stark form the much-rehearsed question of the appropriate role of courts in constitutional adjudication.

**SOME IMPLICATIONS OF THE ANALYSIS**

**The Hearing-Delay Cases**

An interesting and somewhat ironic implication of the foregoing analysis concerns the current controversy over hearing delays in the DI program. It has been claimed that "excessive" delays violate the due process clause. In such cases, the SSA has argued that *Eldridge* foreclosed this result. If the Supreme Court held in *Eldridge* that terminating DI benefits could be accomplished without a hearing, the SSA reasoned that surely a mere delay in providing a hearing is a fortiori not a denial of due process. Although the courts of appeals have rejected this argument, they have had

---

difficulty formulating a convincing distinction between the Eldridge prior-hearing claim and hearing delays. 39

Such a distinction is, however, quite plausible. The social costs of erroneous deprivations are incurred in each relevant time period (day, week, month, whatever). At some point in time, the cumulative social costs of erroneous deprivations will exceed the social costs of hearings, which, given Eldridge, never include continuing erroneous-program expenditures. Hence, it may be sensible to resist the imposition of the very substantial direct costs involved in the Eldridge prior-hearing claim, while imposing the more modest costs of reasonable promptness in the scheduling and disposition of cases that go to hearing. Indeed, that the claimant lost in Eldridge is very nearly an argument for, not against, the claimants in the hearing-delay cases. That leaves, of course, the difficult matter of deciding how long is too long, and raises the more general question of the implications of a thorough social-welfare analysis for the institutional position of reviewing courts.

Judicial Posture

The information demands of a social-welfare calculation make a restrained judicial posture difficult to maintain. It may be possible to avoid broad assertions of social value—such as, that AFDC payments are more valuable than DI payments—but it is not possible both to take cost-minimization seriously and to make modest demands for information about the operation, context, and consequences of procedural systems. Moreover, this “wholistic” approach to procedural revision, including the possibility of structural injunction, suggests a court sitting as super-manager of bureaucratic decision processes.

This information-demanding posture, however, is not unambiguously an objectionable form of judicial activism. That posture can be combined with judgmental restraint. As the Supreme Court has said in the substantive-review context, the inquiry may be searching, but the ultimate judgment deferential. 40 Administrators are perhaps less sanguine about the prospects for judgmental modesty after prodigious inquiry. And the prospect of such inquiry


40. See, e.g., Citizens to Preserve Overton Park Inc. v. Volpe, 401 U.S. 402, 416 (1971): “Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one.”
may itself skew administrative responses to proceduralist demands in socially nonbeneficial directions. The judiciary may intrude as a threatening presence as well as by decree.

We should not, however, be too influenced by concerns about this activist stance. The alternatives are not that compellingly attractive. Judging without the information or detailed analysis necessary for social-cost accounting may give the appearance of restraint; in fact, it is only activism coupled with ignorance or withdrawal of the promise of judicial review. Nor is it obvious that other bases for exercising review will permit a reduced factual inquiry without correspondingly greater assertions of problematic social or moral values.

Substance and Procedure

Notwithstanding the activist coloration of the approach to judicial review that has been suggested here, the more specified model of cost minimization may provide a partial answer to the assertion that the Supreme Court’s procedural review invades the legislature’s power to define substantive public policy. That argument, succinctly stated, is that in defining substantive rights and specifying or implicitly ratifying procedures for the protection of those substantive claims, the legislature both defines the substantive right and specifies its value. This is true because the degree of procedural protection accorded a claim determines the security of expectations with respect to it and thus its substantive (expected) value. When the Court adds procedural protections in due process review, it unavoidably changes the expected value of the right and thereby engages in a form of historically disparaged substantive due process.

This position may be sound insofar as it relates to what the Court has done in prior cases. Yet the foregoing discussion makes clear that the Court need not skew results in unintended directions by focusing only on protection against negative errors. The Court’s posture—as a reasonably well-specified cost-minimization model suggests—may be one of reviewing the relationship between a social-welfare goal, as specified by statute, and the decision process for realizing that goal. If this is so, then its decision—that the pro-

41. See, e.g., Arnett v. Kennedy, 416 U.S. 134, 155 (1974) (Rehnquist, J., plurality): “[T]he property interest which appellee had in his employment was itself conditioned by the procedural limitations which had accompanied the grant of that interest.”
cess can be so substantially improved that the failure to do so is arbitrary—supports, rather than changes, the substantive-policy choice. There is no reason to believe, for example, that Congress would change the definition of disability in response to information that the SSA had instituted processes by which the standard's application was improved at no additional administrative cost. A legislature that wants program X with total social value Y should still want that same program with value Y+1.

Nevertheless, the Court can obviously interfere with the legislature's basic substantive-value choices when modifying procedures. If the legislature views positive errors as significantly more costly than negative errors, and constructs a procedural system to reflect that belief, then protections that skew decisions in the direction of positive rather than negative errors directly challenge the legislative valuation. Had the legislature known that the procedures would favor generosity, it may well have wanted a stricter standard for substantive qualification. But where the statutory scheme seems neutral concerning positive- and negative-error costs, cost-effective reductions in either type of error do not negate value choices underlying substantive policy. Indeed, such invasions can be avoided while judicially imposing procedural modifications on legislatively skewed systems, provided the Court takes into account the preexisting skew.

This only partially answers the substantive due process critics, because obviously some invasion of legislative-budgetary prerogative is involved in procedural due process review, and, on a general level, judicial invasions of the majoritarian institution's prerogatives are the objectionable aspect of substantive due process. It may well be that a legislature that approves a program with cost X and social value Y would also approve one with cost X+1 and social value Y+2. But the conclusion is far from certain. The allocation of additional resources to some other program, not before the Court, might well yield greater marginal returns, and, therefore, be desirable from the social-welfare, the legislative and the political perspectives.

The power of this objection should not be overstated, however. For one thing, it is an argument having such general applicability to all forms of judicial review that it tends to prove too much. Moreover, at least in the type of programs I have been discussing, the budgetary effect may be limited to a reallocation between decision costs and transfer costs of the total program. As has been suggested, invalidating a process implies that errors are af-
fecting the eligibility of infra-marginal transferees. If so, given customary assumptions of declining marginal utility, it seems plausible to predict that a small reduction in all transfers to fund more accurate determinations will yield substantial social benefits. As Justice Black suggests in Goldberg, the “due process costs” may come out of the pockets of the plaintiff class. Provided those costs are imposed as a general “tax” on the class, rather than in the form of obstacles to eligibility, that may be perfectly reasonable as a social-welfare matter; it may also preserve the legislature’s budgetary discretion to adjust marginal expenditures across programs.

CONCLUSION

This exploration of analyzing administrative due process issues from the now-dominant social-cost accounting perspective does not provide a very substantial basis for supporting that technique’s continued use. Yet we should remember that the question of what approach to use is a comparative one. Abandoning this mode of due process analysis requires elaborating an alternative technique which may have different, but equally serious, difficulties. Finally, we should note that the information gaps involved in social-cost accounting may be more malleable at the level of legislative- and administrative-procedural design than in the context of constitutional adjudication, and the results of efforts at that level are by definition more tentative and modest. Hence, much of what we have said about the potential techniques for managing those uncertainties may be more useful in carrying forward the legislature’s constitutional function of pursuing the general welfare, than in structuring judicial review.