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FOREWORD:
SYSTEM EFFECTS AND THE CONSTITUTION

Adrian Vermeule[*]

A *system effect* arises when the properties of an aggregate differ from the properties of its members, taken one by one.[1] Familiar examples include Condorcet's paradox, in which the members of a collective choice group each have transitive preferences, yet group preferences are intransitive;[2] the "doctrinal paradox," in which logically consistent individual judgments aggregate in such a way that the group's judgments are logically inconsistent;[3] and the Prisoners' Dilemma, in which individually rational and self-interested behavior interacts so as to make all concerned worse off. Yet these examples are only the tip of the iceberg. Public law is rife with system effects that are more important and less familiar. Although such effects are sometimes recognized in local contexts, they have a common analytic structure and can profitably be analyzed in global terms.[4]

The failure to recognize system effects leads to fallacies of division and composition, in which the analyst mistakenly assumes that what is true of the aggregate must also be true of the members, or that what is true of the members must also be true of the aggregate. Examples are (1) the fallacious assumption that if the overall constitutional order is to be democratic, each of its component institutions must be democ-

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[1] This definition is adapted, with major modifications, from ROBERT JERVIS, SYSTEM EFFECTS 6 (1997).

[2] *See* MARQUIS DE CONDORCET, *Essay on the Application of Mathematics to the Theory of Decision-Making*, *in* CONDORCET: SELECTED WRITINGS 33, 52–55 (Keith Michael Baker ed., 1976).

[3] *See* Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1, 10–12 (1993).

[4] As in some other Forewords, the past Term's cases will not be the focus. *See, e.g.*, Henry M. Hart, Jr., *The Supreme Court, 1958 Term—Foreword: The Time-Chart of the Justices*, 73 HARV. L. REV. 84, 84 (1959) ("This Foreword departs from the pattern of most of its predecessors by addressing itself not to any especially noteworthy decisions or events of the past term but rather to problems of the Court's administration which are common to every term . . . .").

ratic, taken one by one; and (2) the fallacious assumption that if judges are politically biased, courts must issue politically biased rulings. In these cases and many others I will discuss, system effects are an indispensable analytic tool for legal theory.

A systemic approach to constitutional theory implies what I will call *second-best constitutionalism*. Stated abstractly, suppose that at least some of the conditions necessary to produce a given ideal or first-best constitutional order fail to hold. Even if it would be best to achieve full satisfaction of all those conditions, it does not follow that it is best to achieve as many of the conditions as possible, taken one by one. Rather, multiple failures of the ideal can offset one another, producing a closer approximation to the ideal at the level of the overall system. Although the idea is abstract, we will see that problems of second best are chronic in real-world constitutional systems, including our own, because such systems are always partly constrained by technology, economics, and politics.

The systemic approach also implies that the choices of constitutional actors are strategically interdependent: the best course of action for any given constitutional actor will depend upon what other actors do. Judges deciding how to interpret statutes and the Constitution, for example, cannot simply assume, idealistically, that it would be best for them to adopt the approach that would be best for all if adopted by all. If other judges do not adopt that approach, then the nature of the best approach for the given judge may itself change, taking others' actions as nonideal constraints.

The implication, in other words, is *second-best legal interpretation*. A judge who would think it best to be, for example, an originalist in a world of originalists must consider the possibility that it would be best to be a nonoriginalist in a world where many or most other judges are nonoriginalists. Likewise, the Thayerian judge,[5] who would favor a regime of universal deference to legislatures, might decide that Thayerism is counterproductive if her colleagues are not Thayerian themselves. Even less intuitively, a judge who values systemic diversity within the judiciary may decide that it is best to be a textualist or Thayerian precisely when, and because, most of her colleagues are *not* textualists or Thayerians.

The judge who takes system effects into account may thus change her approach in light of the behavior of her colleagues and the behavior of other institutions. Although such a judge is strategic, it does not follow that she is unprincipled. Rather, under identifiable conditions, the systemically minded judge will be a *strategic legalist* who attempts

[5] *See* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

to act, within the constraints that arise from others' behavior, so as to nudge the legal system toward the best possible state, according to her view of the law. The strategic legalist is a consequentialist, but she attempts to maximize the quality of the law rather than the satisfaction of her own policy preferences.

Indeed, under identifiable conditions, the systemically minded judge may even be a *legal chameleon* — a judge who changes her approach as the legal environment, including the behavior of other judges, changes around her, until the court as a whole reaches an equilibrium of optimal diversity. Such a course of action is psychologically demanding for an individual actor; however, the systemic benefits that the legal chameleon creates can be attained at the systemic level instead. Wise appointments by presidents and senators aiming to diversify the judiciary would mimic, in a second-best way, the diversity that a bench of legal chameleons would produce.

Part I provides a taxonomy of system effects, illustrating with examples from the social sciences and constitutional theory. Part II discusses system effects that arise from the Constitution's structure, both as originally designed and as adjusted over time. Part III discusses system effects from the standpoint of judges and the officials who appoint them, and identifies conditions that favor strategic legalism and the legal chameleon. A brief conclusion follows.

I. SYSTEM EFFECTS: A TAXONOMY

Section A defines and illustrates system effects, and also introduces two critical tools: the fallacies of composition and division. Section B analyzes two-level systems, in which individuals form an institution and multiple institutions interact; system effects can then occur at either or both levels of aggregation, with complex results. Section C explains the logical connection between system effects and the general theory of second best, a central theme in the later discussion.

A. Definitions and Tools

System effects arise either when what is true of the members of an aggregate is not true of the aggregate, or when what is true of the aggregate is not true of the members. In the first case, the antithesis of a system effect is the *fallacy of composition*: the assumption that what is true of the members must also be true of the aggregate. In the second case, the antithesis of a system effect is the *fallacy of division*: the assumption that what is true of the aggregate must be true of the members.[6] Where a group votes on a binary choice under majority rule,

[6] For formal renditions of these fallacies, with social science applications, see JON ELSTER, LOGIC AND SOCIETY 97–106 (1978). Philosophers of logic have identified several subcases, in

and its average member is somewhat inaccurate, it is a fallacy of composition to assume that the group must be equally inaccurate. Conversely, the fallacy of division occurs when it is assumed that for the voting group to be highly accurate, its individual members must themselves be highly accurate, taken one by one.

In these examples, the members of the aggregate are individuals while the aggregates are groups of individuals. But nothing requires this, and in many of the most interesting cases for public law, the members are themselves institutions.[7] A fallacy of division that I will discuss at length, for example, is the assumption that if the constitutional order is to be democratic, each lawmaking institution within that order must itself be democratically constituted, taken on its own. However, I will begin with the analytically simplest cases, in which the members are individuals and a system effect arises because the aggregate has different properties than do the individuals who compose it.

Many of the most striking insights of the social sciences and legal theory have this structure. Well-known examples, which need be stated only in their simplest forms, include the following:

1. The Invisible Hand. — In an invisible-hand mechanism, some kind of order or patterned outcome arises at the group level even if none of the individuals who comprise the group is attempting to create that order. The system-level pattern thus arises as the "result of human action, but not [of] human design."[8] As stated, the description is extremely general. The outcomes generated by the invisible hand may

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which the fallacies can rest on either semantic, conceptual, or causal mistakes. *See, e.g.*, *id.* at 98–103; William L. Rowe, *The Fallacy of Composition*, 71 MIND 87, 89–91 (1962). For the most part, my examples fall into the latter two categories; in any event, the philosophical refinements are not material for my purposes.

[7] Alternatively, although I will not pursue the issue, the primitives of the system might themselves be propositions of fact, morality, or law. In the best case, a system effect arises when a set of legal provisions has properties that differ from the properties of some or all of its individual members. It has been argued, for example, that the possibility of constitutional amendment is systematically irrelevant. The failure of the Equal Rights Amendment (ERA) made no difference, on this view, because the Supreme Court read the ERA's content into the Equal Protection Clause of the Fourteenth Amendment; the latter subsumed the former. *See* David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001). However, putting aside the possibility that would-be amendments are subsumed by provisions of the original Constitution, it is a fallacy of composition to argue that because any *given* amendment might in this fashion be shown to be irrelevant, *all* amendments can be shown to be irrelevant simultaneously. At least one amendment must be in place and be efficacious in order to subsume the others; in the example above, the Fourteenth Amendment plays that role. For a more extended treatment, see Adrian Vermeule, *Constitutional Amendments and the Constitutional Common Law*, *in* THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE 229, 231–42 (Richard W. Bauman & Tsvi Kahana eds., 2006).

[8] ADAM FERGUSON, AN ESSAY ON THE HISTORY OF CIVIL SOCIETY 119 (Fania Oz-Salzberger ed., Cambridge Univ. Press 1995) (1767).

be benign or malign from the standpoint of the group involved, and also benign or malign from the standpoint of the wider society.

Starting with Bernard Mandeville's demonstration that private vices might aggregate and interact to create public virtues,[9] a central line of thought in economics and political economy has focused on *benign invisible-hand mechanisms*, especially market competition. Models of this sort are explicitly designed to dispel the belief that if none of the participants in the market is attempting to serve the public interest, the overall effects of the market must also be harmful to the public interest. As against this argument, Adam Smith offered his famous rejoinder:

> As every individual . . . by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention. . . . By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it.[10]

As we will see, Madison attempted to transpose this major theme of the Scottish Enlightenment to the arena of constitutional design.

2. The Logic of Collective Action. — The flip side of Smith's argument is the *malign invisible-hand mechanism*, usually discussed under the rubric of collective action.[11] That each member of a group has an interest in a collective good does not mean the group will pursue that interest or produce that good, because of mutual free-riding. It is a straightforward fallacy of composition to assume that where each member would produce the good if acting alone, because the private benefits of doing so would exceed the private costs, it follows that all will do so if acting collectively, because the collective benefits exceed the collective costs. Conversely, it is a fallacy of division to assume that because the group has a collective interest in a given outcome, it must be in the interest of each member of the group to contribute her individual share to the collective good.[12]

The standpoints of the group and of the wider society may diverge, so that a malign system-level outcome from the standpoint of the group may be a benign outcome from the standpoint of society. The inability of a producer cartel to cooperate in order to restrict output and raise prices above marginal cost, with a consequent reduction in

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[9] *See* BERNARD MANDEVILLE, THE FABLE OF THE BEES AND OTHER WRITINGS (E.J. Hundert ed., Hackett Publ'g Co. 1997) (1723).

[10] ADAM SMITH, THE WEALTH OF NATIONS: BOOKS IV–V 32 (Andrew Skinner ed., Penguin Books 1999) (1776).

[11] *See generally* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1971).

[12] Russell Hardin, *The Free Rider Problem*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2003), http://plato.stanford.edu/archives/fall2009/entries/free-rider.

overall social welfare, is a collective action "problem" from the standpoint of the cartel, but from the standpoint of society it is the benign working of the invisible hand. There is an analogous issue in the political domain. When, for example, legislators are unable to overcome the logic of collective action and cooperate on protecting legislative prerogatives, this outcome may be bad for legislators but may be bad, indifferent, or even positively desirable from the standpoint of social welfare.

3. Aggregation of Preferences. — The free-rider problem arises when decisions about how much to contribute to the collective interest are themselves made individually, and are thus decentralized. One standard means for coping with the problems of collective action is to move from decentralized decisionmaking to collective choice, in which voting or some other aggregation mechanism is used to allow all concerned to make choices binding on all concerned. However, the move to genuinely collective choice does not obviate system effects.

In the most familiar example, Condorcet's Voting Paradox, a voting cycle arises when three or more voters (1, 2, and 3) have preferences over three or more choices (A, B, and C), ordered as follows: voter 1 ranks the choices $A > B > C$, voter 2 ranks the choices $B > C > A$, and voter 3 ranks the choices $C > A > B$.[13] In pairwise voting under majority rule, A would beat B would beat C would beat A, by shifting majorities at each step. The consequence — the system effect — is that the group's collective preferences are intransitive even though each individual's preferences are transitive. Because transitivity is often said to be a minimum necessary condition of rationality, one might then see the group's preference ordering as being irrational despite the assumed rationality of all members of the group. This personifies the group, however, so a less freighted description of the problem is just that the group's *choice* is indeterminate under majority rule. In particular, an agenda setter can determine which result will be chosen by ordering the votes in a particular sequence and then applying an arbitrary stopping rule.[14]

Condorcet's Voting Paradox was later generalized into Arrow's Theorem, which holds roughly that for at least three voters and three choices, there is no collective choice mechanism that can simultaneously satisfy a minimal list of desiderata: it should not make any individual a dictator, should be universal in the sense that it admits any preference ordering by any voter and generates a determinate social choice, should ignore alternatives that are not before the group, and

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[13] *See* CONDORCET, *supra* note 2, at 52–56.

[14] *See* Saul Levmore, *Public Choice Defended*, 72 U. CHI. L. REV. 777, 784 (2005) (reviewing GERRY MACKIE, DEMOCRACY DEFENDED (2003)).

should prefer a certain option if every member of the group does so.[15] For my purposes, however, Condorcet's original paradox suffices to bring out the system effects of preference aggregation and the important idea of preference cycles, so I need not explore the generalized version here.

4. Aggregation of Beliefs and Judgments. — Condorcet's paradox arises among voters with different preferences. However, system effects may also arise among voters with different factual beliefs or normative judgments. Three examples are especially useful: the miracle of aggregation, the Condorcet Jury Theorem, and the "doctrinal paradox" or "discursive dilemma."

(a) The Miracle of Aggregation. — Even if almost all voters are ignorant or biased, it is a fallacy of composition to assume that the group will be ignorant or biased. Originally developed for mass elections, the idea of the miracle of aggregation is that collective choice might be far superior to the choices of the vast number of voters in the collective, *if* those voters' mistakes are distributed in the right way.[16] Suppose an election between two candidates, *A* and *B*, and an electorate of 100. Suppose that *A* is a much better candidate than *B* (however "better" is defined), but that ninety-six percent of the electorate are blind partisans who ignore the quality of the candidates. Of the ninety-six percent, half are blind *A*-partisans who will vote for *A* no matter what, and half are blind *B*-partisans who will vote for *B* no matter what. Fortunately, however, the remaining four percent of the electorate are highly informed independents who care only about the quality of candidates, not their party, and thus vote for the better candidate with one hundred percent probability. Candidate *A* wins by a vote of 52–48. The electorate as a whole is certain to pick the better candidate even though ninety-six percent of voters are maximally biased, because the biases of the ninety-six percent offset one another.

The miracle is powered by a statistical trick or principle, the Law of Large Numbers: as the size of a sample group increases, the expected frequency of an event and the actual frequency of its occurrence will tend to converge.[17] Suppose that the ninety-six percent are not blind partisans, but vote randomly, perhaps by flipping a fair coin. The larger the number of voters, the more likely it is that the coin flips converge on an even split, forty-eight percent to forty-eight percent.

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[15] *See* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 24–31, 51–59 (1st ed. 1951).

[16] *See* Philip E. Converse, *Popular Representation and the Distribution of Information*, *in* INFORMATION AND DEMOCRATIC PROCESSES 369, 381–82 (John A. Ferejohn & James H. Kuklinski eds., 1990).

[17] *See* 1 WILLIAM FELLER, AN INTRODUCTION TO PROBABILITY THEORY AND ITS APPLICATIONS 245 (3d ed., rev. prtg. 1968).

When the convergence is sufficiently close, exactly the same result holds as in the case of the biased voters, and the miracle goes through.

(b) Condorcet's Jury Theorem. — Given its basis in the Law of Large Numbers, the miracle of aggregation is a mathematical relative of the Marquis de Condorcet's famous Jury Theorem, which is also powered by the Law. In the simplest possible form, the Theorem states that where a group votes sincerely on two alternatives, one of which is correct, and the members of the group are even slightly more likely to be right than wrong, then as the number of members in the group increases, the probability that a majority vote of the group is correct tends toward certainty.[18] Although the Theorem can be extended in many directions, the only one I will mention is that it can hold if the members of the group have dissimilar chances of getting the answer right, so long as the mean competence is better than random.[19]

The system effect here is that a majority of the group will, given the other conditions of the Theorem, necessarily prove more competent than the average individual and perhaps even more competent than the most competent individual. The other edge of the sword is that if the group's average competence is lower than random, the same amplification occurs in the other direction, and the performance of the group tends downwards.[20] In either case, it is fallacious to assume that smart (dumb) groups must have equally smart (dumb) members; group performance diverges from the performance of (average) individuals.

Importantly, it is also a fallacy of division to assume that unbiased groups must have unbiased members; one of the principal surprises of the Theorem is that the degree to which members' errors are correlated is as important to group performance as is group competence.[21] So long as the biases of members are uncorrelated or negatively correlated and thus point in different directions, they will tend to wash out in the aggregate.[22] This is, of course, the miracle of aggregation; as we will see, this possibility undermines the large recent literature on the political biases of judges on multimember courts.[23]

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[18] *See* CONDORCET, *supra* note 2, at 48–49.

[19] In fact, so long as the distribution of competence is symmetric around the mean in a group with three voters, the Theorem can hold so long as the average chance of getting the right answer is greater than 0.471. *See* Bernard Grofman et al., *Thirteen Theorems in Search of the Truth*, 15 THEORY & DECISION 261, 271 (1983).

[20] *See* CONDORCET, *supra* note 2, at 49.

[21] *See* SCOTT E. PAGE, THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES 208–09 (2007); Krishna K. Ladha, *The Condorcet Jury Theorem, Free Speech, and Correlated Votes*, 36 AM. J. POL. SCI. 617, 625–30 (1992).

[22] *See* Ladha, *supra* note 21, at 625–30.

[23] For a survey of the literature, see generally Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831 (2008).

(c) The Doctrinal Paradox (or Discursive Dilemma). — While the miracle of aggregation and the Jury Theorem address the ability of groups to produce correct answers, a separate issue involves the ability of groups to achieve coherent answers. In the "doctrinal paradox" or "discursive dilemma," a group whose members' judgments are coherent in the minimal sense of logical consistency may not display logical consistency at the group level. Consider the following profile of judgments on the truth of propositions p and q and the conditional "if p then q":

TABLE 1. A MAJORITARIAN INCONSISTENCY[24]

	p	"if p then q"	q
Individual 1	True	True	True
Individual 2	True	False	False
Individual 3	False	True	False
Majority	True	True	False

Just as shifting majorities may cause preference cycling, so too they may cause the group to hold illogical collective judgments even if all the group's members are entirely logical. Here too, however, a less provocative way of stating the problem is in terms of indeterminacy rather than incoherence: a given profile of judgments will yield different collective judgments under different aggregation procedures. Given the foregoing profile of judgments, for example, there is an important choice between two procedures: (1) a direct majority-rule vote on the truth of q, or (2) a premise-based procedure that takes majority votes on p and on "if p then q" and then automatically determines that the conclusion q is true if a majority approves of both premises. The first procedure yields a group judgment that q is false, the second that it is true.

Standard illustrations of the doctrinal paradox involve majority rule in courts, about which the paradox was originally developed.[25] However, nothing inherent in the logic of the problem is restricted to (1) majority rule, (2) doctrinal judgments as opposed to other sorts of judgments, or (3) courts as opposed to other institutions. A general impossibility result, comparable to Arrow's Theorem, shows that no aggregation procedure can guarantee collective coherence while satis-

[24] Christian List, *Collective Wisdom: Lessons from the Theory of Judgment Aggregation*, *in* COLLECTIVE WISDOM (Hélène Landemore & Jon Elster eds., forthcoming) (manuscript at 6 tbl.2), *available at* http://personal.lse.ac.uk/LIST/pdf-files/CollectiveWisdom19Oct.pdf.

[25] *See* Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82, 102–05 (1986).

fying a minimal list of attractive criteria.[26] Moreover, even within courts, the logic of the problem can be generalized from judgments about outcomes in particular cases to judgments about the rules of law that should be used to generate those outcomes.[27] This "generalized doctrinal paradox"[28] is important but largely unexplored terrain.

B. Two-Level Systems

So far the discussion has been confined to one-level systems, in which the relevant aggregate is composed of individuals. However, many of the cases of greatest interest to constitutional theory involve two-level systems. Institutions are systems that aggregate the desires, beliefs, and choices of individuals, and those institutions may have very different properties than do the individuals who compose them. Furthermore, the interaction among institutions itself creates a system at the second level, one that may have very different properties than do the institutions that compose it. Hence constitutionalism is a *system of systems*. System effects can arise at the first level, the aggregation of individual properties into institutional outcomes; at the second level, the aggregation of institutional properties into an overall constitutional order; or at both levels.

Here is an illustration. Drawing on the Condorcet paradox and its generalization in Arrow's Theorem, public choice theorists developed models of preference cycling and applied them to legislatures and courts. In the latter case, it was shown that the Supreme Court might in principle rule intransitively, favoring legal claim *A* over *B* over *C* over *A*, even though all of the Court's members had transitive preferences.[29] Even if the cycle remained implicit and thus not actually observed, the need for an arbitrary stopping rule would render the outcome highly sensitive to the order in which cases arose, and would thus give great power to whoever set the Court's agenda.[30]

Roughly simultaneously, libertarian critics of democracy invoked Arrow's Theorem to impeach the outputs of legislatures, arguing that the same phenomena of implicit but unavoidable cycles, arbitrary stopping rules, path dependence, and agenda-setting cut the link be-

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[26] *See* Christian List & Philip Pettit, *Aggregating Sets of Judgments: An Impossibility Result*, 18 ECON. & PHIL. 89, 96–100 (2002) (considering procedures that meet the following criteria: universal domain, anonymity, and systematicity).

[27] *See* Dimitri Landa & Jeffrey R. Lax, *Legal Doctrine on Collegial Courts*, 71 J. POL. 946, 957–58 (2009).

[28] *Id.*

[29] *See* Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 815–17 (1982).

[30] *See id.* at 817–21 ("Majority voting plus stare decisis is thus a formula under which the Court may produce any outcome favored by any number of Justices, however small, even though a majority of Justices would reject that rule . . . on the basis of first principles." *Id.* at 819.).

tween legislative inputs — the preferences of the legislators — and legislative outputs, and thus severed the transmission belt of representative democracy. Theorists of this stripe advocated reducing the scope of government and transferring power to the courts.[31]

In both cases, theorists pointed to system effects arising when individual preferences are aggregated into institutional decisions. Both sets of analysts were, quite correctly, exposing a traditional fallacy of composition: the assumption, common to both traditional legal theory and to traditional democratic theory, that well-behaved preferences on the part of individual members of legislatures or courts would translate into well-behaved collective decisionmaking. However, putting the two results together created a conundrum: If the model of preference cycling applied just as much to courts as to legislatures, it was not obvious that the libertarian critics of legislation were entitled to their conclusions. The arbitrariness of legislation would be compounded, or at least would not be improved, by the arbitrariness of courts.[32]

This conundrum turned out to be illusory, once it was observed that cycling in both institutions might result in less, not more, cycling in the system overall.[33] In a lawmaking system composed of both legislatures and courts, cycles triggered by different circumstances in the two institutions might offset one another, resulting in less arbitrariness at the level of the system than at the level of any of the component institutions, taken one by one. Here the fallacy of composition is the assumption that if two institutions cycle, their interaction in a system of joint lawmaking must display all the more instability and arbitrariness.[34] Somewhat similarly, an important defense of legislative bicameralism is that dividing the legislature into two parts may reduce the ability of agenda setters to exploit majority cycles:

> [Because] the agenda setter's best strategy is to manipulate the order of consideration so that the preferred alternative is considered later rather than earlier, [then] to the extent that a second chamber begins deliberation by considering the other chamber's proposal, the first chamber's agenda

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[31] *See, e.g.*, WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM (1982).

[32] *See* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE 55 (1991) (stating that the libertarian thesis "tells us to be equally suspicious of *all* sources of law").

[33] *See* MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING 54 (2000).

[34] *See id.* at 53. Stearns's definition of the fallacy — as "the assumption that if phenomenon X produces result Y, more of phenomenon X will necessarily produce more of result Y," *id.* — is nonstandard, and would be more apt as a definition of an increasing function. However, the substance of Stearns's point holds straightforwardly, given the definition used here.

> setter . . . will be at the mercy of the order of consideration in the other chamber.[35]

Although in this example the first-level and second-level system effects were discovered in chronological sequence, a two-level system arises through analytic steps, in whatever historical fashion those steps are discovered or taken. First, the primitives of the system, here individuals, are aggregated into an institution, whose properties may or may not track the properties of its components. Second, at least two such institutions form a system, whose properties may or may not track the properties of its components.

C. System Effects and the Second Best

1. The General Theory of the Second Best. — There is a close logical connection between the logic of system effects on the one hand, and the *general theory of second best* on the other.[36] The general theory of second best holds that where it is not possible to satisfy all the conditions necessary for an economic system to reach an overall optimum, it is not generally desirable to satisfy as many of those conditions as possible.[37] Rather, the failure to satisfy optimality conditions on one variable means that other variables must take on suboptimal values as well, in order to compensate for the initial failure.[38] The idea can apply to a part or sector of the economic system as well as to the whole. It is desirable that a given industry be both competitive and nonpolluting, but if excessive pollution is inevitable, then a monopoly might be best; competition would increase the number of firms and make pollution even worse, inflicting harm that could exceed the increased consumer surplus from competition.[39]

The logical connection between the general theory of second best and the idea of system effects is that the theory explains the consequences of systemic interaction among multiple institutional variables. It is tempting to think that if it would be best for all variables in an institutional system to take on their optimal values, then it would be best for each variable to take on its optimal value, considering the variables one by one.[40] The general theory of second best, however,

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[35] Saul Levmore, *Bicameralism: When Are Two Decisions Better than One?*, 12 INT'L REV. L. & ECON. 145, 147 (1992).

[36] *See generally* R.G. Lipsey & R.K. Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11 (1956).

[37] *Id.* at 11–12.

[38] *Id.*

[39] For a similar example, see Thomas S. Ulen, *Courts, Legislatures, and the General Theory of Second Best in Law and Economics*, 73 CHI.-KENT L. REV. 189, 204–07 (1998).

[40] The general theory of second best also shows that it is not necessarily best for the relevant variables to approach their optimal values as closely as possible, assuming that at least one such variable does not reach the optimum. This mistake has been called the "approximation assump-

exposes this idea as a fallacy of division. Because the variables interact, a failure to attain the optimum in the case of one variable will necessarily affect the optimal value of the other variables. Conversely, even if some or even all the variables in the system take on suboptimal or nonideal values, it is a fallacy of composition to think that the system overall must be suboptimal or nonideal. The interaction between several nonideal elements can produce an overall system that is as close as possible to the ideal.

2. The Second Best in Politics and Law. — Originally developed in economics, the general theory of second best generalizes easily to any legal or political theory that takes the consequences of legal structures or policy choices into account:[41]

- Discussing the unwritten "mixed" constitution of the Roman Republic, Polybius argued that its long-term equilibrium arose from offsetting departures from the political ideal: the excessive power of the consuls was balanced by the Senate's ability to use corrupt means, such as government contracts, to ensure the dependence and adherence of the people.[42]
- Alexis de Tocqueville argued that the uncheckable power of the French monarchy before 1789 was hobbled by the monarch's own greed: the Crown sold so many offices that it had to channel its administrative decrees through a highly inefficient bureaucracy.[43] A similar idea has been applied to many other systems: both the Russia of the tsars and the indigenous monarchies of India have been described as despotism tempered by corruption.[44]
- In a counterpoint to Polybius and Tocqueville, David Hume explained the balance of the unwritten British constitution as a byproduct of executive corruption. Although the power of

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tion." Avishai Margalit, *Ideals and Second Bests*, *in* PHILOSOPHY FOR EDUCATION 77, 77 (Seymour Fox ed., 1983).

41 For illuminating discussions of the second best in legal theory, see Lawrence B. Solum, *Constitutional Possibilities*, 83 IND. L.J. 307, 311–12, 327–28 (2008); and Ulen, *supra* note 39, at 208–19. For illuminating discussions of the second best in political theory, see JON ELSTER, EXPLAINING SOCIAL BEHAVIOR 439–42 (2007); Bruce Talbot Coram, *Second Best Theories and the Implications for Institutional Design*, *in* THE THEORY OF INSTITUTIONAL DESIGN 90, 90–95 (Robert E. Goodin ed., 1996); and Robert E. Goodin, *Political Ideals and Political Practice*, 25 BRIT. J. POL. SCI. 37, 52–55 (1995).

42 POLYBIUS, THE RISE OF THE ROMAN EMPIRE 312–18 (Ian Scott-Kilvert trans., Penguin Books 1979).

43 ELSTER, *supra* note 41, at 440.

44 A.P. THORNTON, IMPERIALISM IN THE TWENTIETH CENTURY 156 (1977); ADAM B. ULAM, THE BOLSHEVIKS: THE INTELLECTUAL AND POLITICAL HISTORY OF THE TRIUMPH OF COMMUNISM IN RUSSIA 124–25, 137 (Harvard Univ. Press 1998) (1965); *see also* ELSTER, *supra* note 41, at 440 (describing the rule of the Ottomans, the tsars in Russia, Mussolini in Italy, and Franco in Spain as "despotism tempered by incompetence" (internal quotation marks omitted)).

Parliament had swelled beyond all control after 1688, the Crown managed to maintain the balance by exploiting collective action problems among legislators, offering government sinecures and other forms of bribery to induce a decisive bloc of legislators to sell their votes on the cheap.[45] I explain these divide-and-conquer tactics in more detail in section II.B.

- Hume also argued that the first-best constitutional design would contain, inter alia, an executive who was (1) elected (2) at regular intervals. However, Hume continued, suppose that some political constraint mandated that the executive must serve for life. In that case, the best second best would be a hereditary monarch rather than what is, in effect, an elected monarch. "[A] crown is too high a reward ever to be given to merit alone, and will always induce the candidates to employ force, or money, or intrigue, to procure the votes of the electors."[46]
- Bernard Mandeville suggested that the excessive mutability of the laws, which change at the same rate as fashions, compensates for the inability of legislators to anticipate the problems of the future.[47] The first-best regime would have laws that are both perfectly farsighted and enduring; given the inevitable limits of legislative foresight, however, the second-best regime both enacts myopic laws and quickly alters them.
- Commenting on the elaborate technical rules governing criminal indictments at English common law, Sir James Fitzjames Stephen argued that although the rules were farcical in themselves, "they did mitigate, though in an irrational,

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[45] *See* DAVID HUME, *Of the Independency of Parliament*, *in* ESSAYS: MORAL, POLITICAL, AND LITERARY 42, 44–45 (Eugene F. Miller ed., Liberty Fund 1985) (1777).

[46] DAVID HUME, *That Politics May Be Reduced to a Science*, *in* ESSAYS: MORAL, POLITICAL, AND LITERARY, *supra* note 45, at 14, 18. The substance of Hume's reasoning is flawed, because in a hereditary monarchy the prospect of a crown may induce attempts to overthrow the reigning family through intrigue or violence.

[47] "Their Laws and Clothes were equally
Objects of Mutability;
For, what was well done for a time,
In half a Year became a Crime;
Yet while they alter'd thus their Laws,
Still finding and correcting Flaws,
They mended by Inconstancy
Faults, which no Prudence could foresee."
MANDEVILLE, *supra* note 9, at 28.

> capricious manner, the excessive severity of the old criminal law."[48]

The application of the theory of second best to written constitutions is straightforward. In principle, constitutions are package solutions that must be evaluated and reformed as total systems. In reality, short of a revolutionary situation, some parts of any constitution are fixed at any given time, and even after revolutionary situations, constitutional designers face political and economic constraints that mandate or exclude certain constitutional features.

Here are some brief examples of second-best arguments in American constitutional theory, from the many that could be chosen (and I will explore many other examples in the later discussion):

- It has been argued that the first-best understanding of the American Constitution would prohibit both delegation of excessive authority to the President and also the legislative veto. However, "a world with both delegations and legislative vetoes is closer to the correct constitutional 'baseline' than is a world with only delegations."[49] Similar arguments have been made for other checks on delegated authority.[50]
- Suppose that the constitutional first best would be a lawmaking system in which Congress rolls no logs and the executive is put to the choice of either vetoing or approving bills as a whole. Suppose also, however, that congressional logrolling and omnibus legislation are ineradicable; instead or in addition, suppose that collective action problems within Congress cause legislators to enact more pork-barrel spending than even legislators themselves would want. In such cases, the President's veto power might be interpreted, on strictly functional grounds, as authorizing a line-item veto — a form of compensating adjustment that approximates the first-best regime.[51]
- If the constitutional first best is a parliamentary system with proportional representation, it does not follow that propor-

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[48] 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 284, 293 (London, MacMillan & Co. 1883).

[49] Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1252–53 (1994) (citing Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 CORNELL L. REV. 1, 30–39 (1994)).

[50] *See* Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1828–39 (1996); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 155 (1994).

[51] *See* Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 78–81 (1995); Robert Justin Lipkin, *The New Majoritarianism*, 69 U. CIN. L. REV. 107, 121–22 (2000).

tional representation is still desirable in a system with an independently elected executive. The risk in such a system is that a powerful President will dominate a legislature fractured among many small parties.[52] A first-past-the-post electoral system, whatever its intrinsic defects, might be desirable for its tendency to produce two consolidated major parties,[53] which can more successfully resist executive encroachments.

- James Landis argued that independent administrative agencies were a compensating adjustment that offset the power of the presidency, restoring something like the original Madisonian system of checks and balances in a world where legislative and judicial checks on the executive proved inadequate. "[P]aradoxically enough, though [the creation of administrative power] may seem in theoretic violation of the doctrine of the separation of power, it may in matter of fact be the means for the preservation of the content of that doctrine."[54]
- The converse of Landis's argument is the claim that the Constitution should be read to establish a "unitary executive," even though originally it did not.[55] On this view, a departure from the original understanding is necessary because administrative business is more political and less technical today than it was in the founding era; the unitary executive is an adjustment designed to ensure that a politically accountable official, the President, can oversee the discretionary action of the bureaucracy in a highly politicized world.[56]
- It can be argued that although judicial review would be desirable in a system of mutual checks and balances between legislature and judiciary, it would be undesirable if the power of the judiciary were essentially unchecked.[57] In such

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[52] *See* Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 656–57 (2000). There are significant scholarly controversies about whether presidentialism makes democracy unstable and whether proportional representation or fragmentation of parties also plays a role. *See, e.g.*, JOSÉ ANTONIO CHEIBUB, PRESIDENTIALISM, PARLIAMENTARIANISM, AND DEMOCRACY (2007). For present purposes, the substance of these controversies is irrelevant; what matters is the structure of the second-best argument described above.

[53] This is Duverger's Law. *See* MAURICE DUVERGER, POLITICAL PARTIES: THEIR ORGANIZATION AND ACTIVITY IN THE MODERN STATE 217 (Barbara North & Robert North trans., John Wiley & Sons 3d Eng. ed., rev. 1963) (1951).

[54] JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 46 (1938).

[55] *See* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2–3 (1994).

[56] *Id.* at 81–87, 97–101.

[57] ELSTER, *supra* note 41, at 439.

a case, legislative supremacy over constitutional matters might be the best second best.

- Suppose that government officials have incentives to classify too much information, in part because they do not bear the full costs to democratic government of doing so. Suppose also, however, that journalists have incentives to report too much classified information, in part because they do not bear the full costs to national security of doing so. Under optimistic assumptions, these two sets of skewed incentives create an "unruly contest"[58] between officials and journalists that might produce a socially optimal level of disclosure overall.[59]
- Suppose that the first-best system of criminal procedure would be inquisitorial, with a well-informed magistrate playing the roles of prosecutor, judge, and jury. However, given positive information costs, which may be relatively higher for magistrates than for the parties themselves, the second best might be an adversarial system of procedure. Although no party will be motivated to seek and produce the whole truth, competition between parties with private information may produce more total information than a poorly informed magistrate could obtain, and may thus yield the closest possible approximation to truth overall.[60]
- As I will discuss at length in Part III, second-best arguments can also apply to judicial interpretation of written constitutions. Justice Scalia initially argued for originalism on second-best rather than first-best grounds: even if the first-best interpretive regime would license judges to update constitutional law as circumstances change, judges would systematically err by imposing current values too frequently.[61] Originalism creates a drag on this tendency, resulting in a closer approximation to an optimal rate of judicial updating. Originalism is thus akin to "the librarian who talks too softly."[62]

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[58] ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 87 (1975). For an illuminating critique, see Note, *Media Incentives and National Security Secrets*, 122 HARV. L. REV. 2228 (2009).

[59] This seems to be Bickel's implicit argument. *See* BICKEL, *supra* note 58, at 81–87.

[60] *See* JAMES FITZJAMES STEPHEN, A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND 166 (London, MacMillan & Co. 1863) (arguing that although "the inquisitorial theory of criminal procedure is beyond all question the true one," nonetheless "it may be, and probably is, the case, that in our own time and country, the best manner of conducting such an inquiry is to consider the trial mainly as a litigation, and to allow each party to say all that can be said in support of their own view").

[61] *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989).

[62] *Id.*

- An important special case of second-best constitutionalism is translation theory — the idea that as circumstances change, the original meaning of the Constitution's structure might best be preserved by departures from the specific original understandings of the founding generation.[63] On this view, "to be faithful to the constitutional structure, the Court must be willing to be unfaithful to the constitutional text."[64] Translation is a special case along two dimensions: it is addressed to constitutional interpreters, rather than constitutional designers, and it is best understood as a version of purposivism that tries to map original understandings onto changed circumstances by boosting the level of generality at which those understandings are defined.

II. SYSTEM EFFECTS AND CONSTITUTIONAL STRUCTURE

This Part examines system effects that arise from the constitutional structure, both as originally designed and as adjusted over time. In the next Part, I turn to the standpoint of judges and the officials who appoint judges. A few introductory cautions, applicable both to this Part and the next, are appropriate.

I do not claim that a systemic analysis can by itself provide substantive conclusions to any of the questions I shall discuss. Alertness to the fallacies of composition and division can tell us whether an argument is valid, but not whether its conclusions are true. Accordingly, I provide a series of possibility theorems, intended to show that system effects are analytically inescapable[65] and that many standard problems must be analyzed in different terms once latent system effects are brought to the surface. A major source of confusion is that constitutional law is a system of systems, which means that constitutional analysts must take account of the complexities and counterintuitive possibilities inherent in two-level systems.

This analytic enterprise does not depend upon the theory that is used to evaluate constitutional and legal rules. In the arguments I will examine, the first-best criterion for evaluating those rules may be overall welfare, or instead satisfaction of the preferences of current

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[63] *See* Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1171–73, 1189–92 (1993).

[64] Lawrence Lessig, *Translating Federalism:* United States v. Lopez, 1995 SUP. CT. REV. 125, 193.

[65] At least if we bracket the possibility that the analyst is engaged in what David Estlund calls "hopeless aspirational theory." Such analysts, Estlund argues, can ignore problems of the second best. *See* David Estlund, Utopophobia (Feb. 9, 2009) (unpublished manuscript, on file with the Harvard Law School Library). I will put aside the possibility of hopeless theorizing in what follows.

majorities, or instead some more complex conception of democracy, all of which may be different. In any given setting I will attempt to specify clearly which first-best criterion is in play, but my aim is precisely not to choose among those theories. Rather, it is to show that system effects and problems of second best are ubiquitous and are not theory-dependent.

Finally, the claim that system effects are inescapable for the constitutional *analyst* does not imply that they will or must always be considered by constitutional *actors* within the system. As I will illustrate in Part III, constitutional actors may sometimes decide that the complexity, uncertainty, and strategic indeterminacy inherent in a systemic perspective create burdens of judgment or decision costs so great that it is best to behave as though the actor exists in splendid isolation, rather than within a larger interdependent system. I believe that this form of sophisticated naïveté is very different than the genuine naïveté of the actor who is oblivious to system effects, even if the resulting behavior is observationally equivalent; the two actors take different stances toward system effects and do not use the same decision rules to choose their common behavior. In any event, sophisticated naïveté about system effects stems from the decision costs facing constitutional actors who must act in real time with limited information, unlike external analysts of the constitutional order, whose goal is understanding rather than action. The constitutional analyst thus has no warrant for naïveté, whether sophisticated or simple-minded.

A. Checks, Balances, and the Invisible Hand

I begin with what may be James Madison's most famous idea in constitutional theory, the idea in *The Federalist No. 51* that:

> [T]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defence must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition.[66]

Madison is best understood to offer here a *benign invisible-hand account of checks and balances*, one heavily influenced by the general ideas of the Scottish Enlightenment,[67] whose major figures — Adam Ferguson, David Hume, and Adam Smith — all employed benign in-

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[66] THE FEDERALIST NO. 51, at 318–19 (James Madison) (Clinton Rossiter ed., 1999).

[67] For analyses of Adam Smith's influence on Madison, see Samuel Fleischacker, *Adam Smith's Reception Among the American Founders, 1776–1790*, 59 WM. & MARY Q. 897 (2002); and David Prindle, *The Invisible Hand of James Madison*, 15 CONST. POL. ECON. 223 (2004).

visible-hand reasoning in more or less detailed forms.[68] On this view, Madison's basic idea in the domain of constitutional design has the same structure as Smith's basic idea in the domain of political economy.[69] Just as it is fallacious to think that the market can only promote the public interest if its participants aim to benefit the public, so too it is a fallacy of division to think that the public interest can only be attained, in a system of separated powers, if each of the component institutions itself aims to promote the public interest.

Analytically, this is in substance, and almost in terms, a second-best argument. The first best would be to have governing officials who are motivated to pursue the public interest: "If angels were to govern men, neither external nor internal controls on government would be necessary."[70] Failing this, the best second best is to ensure an array of institutions, each of which promotes its own institutional ambitions.

As the theory of second best indicates, however, if universal public-spiritedness is ruled out, it would *not* necessarily be desirable to approach as close as possible to the institutional ideal of public-spirited motivation. It is at best unclear that the Madisonian system would work as intended should some, but not all, of the institutions in the system be focused on the public interest while others solely pursue their institutional ambitions. In the worst possible case, public-spirited officials in (say) the legislature would consider both the legitimate institutional interests of the legislature and the legitimate institutional interests of the executive, while executive officials strictly interested in aggrandizing executive power would consider only their own institutional interests. The interests of the executive would then be double-counted. Madison's systemic paradox, whose radicalism often goes unappreciated, is that the invisible hand of checks and balances requires multiple and offsetting institutional ambitions[71] in order to mimic the first-best case of universal public-spiritedness.[72]

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[68] Edna Ullmann-Margalit, *The Invisible Hand and the Cunning of Reason*, 64 SOC. RES. 181, 182 (1997).

[69] Prindle, *supra* note 67, at 231–34.

[70] THE FEDERALIST NO. 51 (James Madison), *supra* note 66, at 319.

[71] However, it is not necessary that *all* institutions act to promote their institutional ambitions. If (say) the President and the Congress are relentlessly self-promoting as institutions, while the Court decides on the merits of particular cases, then the ambitions of the first two institutions may cancel each other out, allowing the public interest to emerge. The general theory of second best does not entail that lack of universal public-spiritedness must necessarily yield bad results, only that it can do so. (This example is structurally analogous to the miracle of aggregation, discussed *supra* section I.A.4(a), pp. 12–13)

[72] Structurally similar puzzles arise in many other legal contexts in which invisible-hand reasoning is invoked. To mention only one example, an adversarial system of litigation is often justified on the ground that biased presentation by competing parties is the best mechanism for producing truth overall. *See* STEPHEN, *supra* note 60, at 166. In criminal litigation, however, it is also a legal shibboleth that the prosecutor's obligation is to "seek[] truth and not victims." Robert

However, there are two analytic flaws in the Madisonian argument. To identify these flaws, we must note that the argument implicitly has a two-level systemic structure. First, the ambitions of individual officials must be aggregated within the separate institutions they staff in order to promote the ambitions or interests of those institutions. Second, the institutions must interact in such a fashion that, by each institution promoting its own ambition, the overall optimum of checks and balances is attained.

Madison's argument is vulnerable at both levels. As to the first level, in which individual ambitions are aggregated into institutional behavior, nothing guarantees that the interests of individual officials will be aligned with the institutional ambitions or interests of the institutions they staff.[73] Madison seems to have assumed, casually, that "[t]he interest of the man" not only would, but must, be "connected with the constitutional rights of the place."[74] However, the individual ambitions or interests of the members of institutions might not aggregate so as to ensure that the institution pursues its interests, however such interests are defined. At this level Madison implicitly fell prey to the fallacy of composition by supposing that the pursuit of individual ambitions by officials would ensure the pursuit of institutional ambition at the institutional level.[75] Madison in essence overlooked the logic of collective action, assuming instead that within a given institution each official would do what is in the interest of all.

There are two possible responses to this critique. First, mechanisms of psychological identification might align individual and institutional interests, under particular conditions.[76] But those mechanisms must be specified and investigated in particular cases; their existence cannot be assumed. Another response is the second-best possibility that *divergences between individual and institutional interests across branches might offset one another*. If individual legislators have imperfect incentives to promote the institutional interests of Congress, and if the same is true of individual presidents and judges for their re-

H. Jackson, The Federal Prosecutor, Address at the Second Annual Conference of United States Attorneys (Apr. 1, 1940), *in* NAT'L COLL. OF DIST. ATT'YS, ETHICAL CONSIDERATIONS IN PROSECUTION 2, 4 (John Jay Douglass ed., 1977). Yet if the prosecutor seeks truth while the defendant pursues adversarial advantage, the defendant's interests may in effect be double-counted. This asymmetric role morality can be justified, if at all, only on extrinsic grounds. For a discussion of such problems, see Adrian Vermeule, The Invisible Hand in Legal Theory (2009) (unpublished manuscript, on file with the Harvard Law School Library).

[73] *See* Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 923–37 (2005).

[74] THE FEDERALIST NO. 51 (James Madison), *supra* note 66, at 319.

[75] *See* Levinson, *supra* note 73, at 920.

[76] For some conjectures on how such alignment occurred in Eastern Europe, see Jon Elster, *The Role of Institutional Interest in East European Constitution-Making*, 5 E. EUR. CONST. REV. 63 (1996).

spective branches, then the overall result of the system of imperfect competition might approximate the same equilibrium of power that would arise if individual and branch incentives were perfectly aligned in all institutions.

To bracket the foregoing issues, let us assume a perfect alignment between individual and institutional interests. Even in that case, Madison's argument is still vulnerable at the second level of interaction *among* institutions. The argument lacks any mechanism to ensure that competition among institutions promoting their interests or ambitions will promote a state of affairs that is both patterned and desirable overall, such as the optimal mutual checking by government institutions that Madison desired. Institutions will bear costs and enjoy benefits from checking the ambitions of other institutions, but nothing necessarily aligns those institutional costs and benefits of checking with social costs and benefits. Madisonian institutional competition might just as well produce too little mutual checking or too much, and if it happened to produce optimal checking somehow defined, that would be merely a happy coincidence, not likely to remain stable over the long run.

At both levels, the common problem is that there is no valid analogy to the case of markets. Adam Smith's benign invisible-hand argument, that self-interested behavior in the market would create public benefits,[77] was later elaborated and shown to rest on a well-specified mechanism: the price system, which in principle ensures allocative and productive efficiency in perfectly competitive markets and in that sense aligns individual and social interests. By contrast, there is no robust mechanism, analogous to prices, that could even in principle align the individual ambitions of officials with the interests of the institutions they staff, or align the interaction of institutions with the public interest somehow defined. Madison's is thus an *ersatz invisible-hand argument*, one that has the form but not the substance of Smith's.[78]

This point is missed by modern scholars who describe the separation of powers as a system of "spontaneous order."[79] Absent a regulating mechanism such as the price system, the separation of powers is certainly decentralized, but it need not generate any kind of patterned order, let alone a socially beneficial one. Rather it will produce hap-

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[77] *See* SMITH, *supra* note 10, at 32.

[78] *See* Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 1032–33 (2008).

[79] *E.g.*, John O. McGinnis, *Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers*, LAW & CONTEMP. PROBS., Autumn 1993, at 293, 303; John O. McGinnis, *The Spontaneous Order of War Powers*, 47 CASE W. RES. L. REV. 1317, 1326 (1997).

hazard results that vary with the contingencies of politics. Spontaneous orders arise as a result of decentralized interactions in a system, but not all decentralized interactions in a system result in spontaneous orders, let alone benign ones.

B. The Legislature and the Executive

In many cases, the interaction between the executive and legislature or between the houses of a legislature tends to produce problems of composition and division, because of the collective character of legislatures (at the first level of aggregation) and because of the system effects of institutional interactions (at the second level of aggregation). I will give three examples.

1. Executive Vote-Buying and the Divide-and-Conquer Strategy. — As indicated above,[80] Hume argued that although Parliament taken as a collective body was far stronger than the Crown, the Crown could maintain itself by divide-and-conquer tactics,[81] exploiting collective action problems among the members.[82] "[T]he interest of the body is here restrained by that of the individuals[.] . . . [T]he house of commons stretches not its power, because such an usurpation would be contrary to the interest of the majority of its members."[83] Although Hume is vague on the details, we may interpret the story according to modern economic models of the externalities involved in vote-selling.

Two interpretations are possible. In the first,[84] the Crown offers a cheap bribe to each legislator for voting in its favor. Suppose there is a private cost to each legislator of voting with the Crown when other legislators do not; perhaps the legislator is then conspicuously exposed to the slings and arrows of good-government critics, whereas a mass vote in the Crown's favor provides each legislator with political cover. Two equilibria are possible in pure strategies: if legislators expect that other legislators will vote with the Crown, then they will do so as well in order to obtain the small bribe on offer, but they will not do so if they expect that other legislators will vote against the Crown. The implication is that if legislators do vote with the Crown, they will sell out for an aggregate bribe less than the total benefits to the Crown of the enactment: "[D]emocratic legislators may refuse to sell a statute at

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[80] *See supra* pp. 18–19.

[81] For an analysis of divide-and-conquer tactics, see Eric A. Posner, Kathryn E. Spier & Adrian Vermeule, *Divide and Conquer* (Univ. of Chi., John M. Olin Law & Econ. Working Paper No. 467, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1414319. A version of the following discussion is included in that paper.

[82] HUME, *supra* note 45, at 44.

[83] *Id.* at 45.

[84] This interpretation applies Eric Rasmusen & J. Mark Ramseyer, *Cheap Bribes and the Corruption Ban: A Coordination Game Among Rational Legislators*, 78 PUB. CHOICE 305, 309–13 (1994).

all (a Nash equilibrium), or they may sell it cheap (another Nash equilibrium), but they will not sell it dear."[85] In this model, the same bribe is offered to each legislator. In a variant that allows discriminatory offers, the Crown can exclude the unfavorable equilibrium of rejection by all legislators by offering a small bribe to just a decisive majority.[86]

A second interpretation[87] drops the assumption that there is a private cost to legislators of voting with the Crown when other legislators do not, and assumes instead that all legislators dislike the Crown's policy and thus incur some private cost if the Crown's policy is enacted, regardless of what other legislators do.[88] Here the Crown has a neat trick: it may offer each legislator a large amount[89] for providing the pivotal vote in the Crown's favor, a token amount for a nonpivotal vote in the Crown's favor, and nothing for a vote with the opposition.[90] Any given legislator then reasons that whether a majority of others vote either for or against, he does best by voting with the Crown, and if he is pivotal, he does best by voting with the Crown.[91] However, because all legislators reason this way, all vote with the Crown, *none* provides the pivotal vote, and the Crown obtains a decisive bloc of votes in its favor while paying each of its voters a token amount.[92]

Here legislators are in a multilateral Prisoners' Dilemma, in which all are made worse off by aiming for individual advantage. In effect, the vote-buyer in this scenario both creates and exploits a fallacy of composition by treating each seller as nonpivotal taken individually, despite the fact that it is logically impossible for all voters to be nonpivotal; one seller must make the decisive contribution by providing the pivotal vote necessary to make a majority. However, the trick fails

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[85] *Id.* at 313. For similar models of divide-and-conquer tactics in other settings, see Ilya Segal, *Contracting with Externalities*, 114 Q.J. ECON. 337, 343 (1999); Ilya Segal, *Coordination and Discrimination in Contracting with Externalities: Divide and Conquer?*, 113 J. ECON. THEORY 147, 153–55 (2003); and Yeon-Koo Che & Kathryn E. Spier, *Exploiting Plaintiffs Through Settlement: Divide and Conquer* (John M. Olin Ctr. for Law, Econ., & Bus., Harvard Law Sch., Discussion Paper No. 591, 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1009360.

[86] This feature of discriminatory vote-buying offers tracks the logic of divide-and-conquer models in other areas, in which discriminatory offers allow the single party on one side of the transaction to exclude equilibria in which the multiple parties on the other side of the transaction coordinate for mutual gain.

[87] This interpretation applies the ingenious model in Ernesto Dal Bó, *Bribing Voters*, 51 AM. J. POL. SCI. 789, 791–95 (2007).

[88] *See id.* at 793.

[89] More specifically, a sum equal to the individual costs to the pivotal voter if the Crown's proposal is enacted plus a token amount, in order to make the pivotal voter prefer that it be enacted. *See id.* at 794.

[90] *See id.* at 793–94.

[91] *See id.* at 792.

[92] *See id.*

if the vote-buyer cannot condition its offer to any given voter on the decisions of other voters, or if voters can secretly collude amongst themselves to arrange for a bare minority to vote nay. In the latter case, a pivotal vote will (apparently) be cast, the Crown will have to pay out a large sum, and the colluding parties can divide up the gains.

In either model, the Crown exploits the logic of collective action for its own advantage, which may or may not be to the advantage of society. Legislator-sellers could benefit if they commit to sell their votes only as a group, in which case legislators could extract the full aggregate value of their votes from the Crown. But the larger the number of legislators, the more costly coordination becomes. Divide-and-conquer tactics that will not work on a small committee of decision-makers can work in a larger modern legislature or a mass election. Moreover, vote-selling is corrupt behavior condemned by public norms, so the mutual transparency needed for coordination is lacking; each legislator sells his vote in the shadows and all legislators suffer by doing so. The overall result is that, as Hume wrote in a related context, "much less property in a single hand [i.e., that of the Crown] will be able to counterbalance a greater property in several; not only because it is difficult to make many persons combine in the same views and measures; but because property, when united, causes much greater dependence, than the same property, when dispersed."[93]

2. Representation. — Another example involves the question whether the President or Congress is more representative of the people's will. In a presidentialist trope that has been standard at least since Andrew Jackson, the President is said to be more representative of the nation as a whole because he is elected from a national constituency. Legislators, by contrast, are elected from local constituencies, which gives them a parochial perspective, according to the presidentialist logic.[94] The implicit benchmark of representation in this argument is something like the median voter in the nation as a whole.

It has been pointed out, however, that this trope rests on a fallacy of composition.[95] Taking the median-voter benchmark as given, the proper comparison is not between the President and any individual legislator, but between the President and the Congress overall. The whole legislative body may be more representative than any legislator taken individually, because the aggregation of numerous local constituencies in a majoritarian body tends to wash out extreme preferences and beliefs. Conversely, the role of the Electoral College in presiden-

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[93] DAVID HUME, *Whether the British Government Inclines More to Absolute Monarchy, or to a Republic*, *in* ESSAYS: MORAL, POLITICAL, AND LITERARY, *supra* note 45, at 47, 48.

[94] *See, e.g.*, JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE 152 (1997).

[95] *See* Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1221, 1231–42 (2006).

tial selection means that would-be presidents cater to a relatively narrow electoral base, plausibly narrower than that of the median member of Congress.[96] Put another way, presidential elections are highly bundled; a majority may support one candidate over another, because it prefers the winner's bundle of issue positions to the loser's, yet a different majority might prefer the loser's position on any particular issue. If Congress considers the issues one by one, it may be able to more closely approximate majority preferences.

This point considers only the first level of aggregation, from individual legislators to Congress, on the one hand, and from individual voters to the Electoral College, on the other. At the second level of aggregation, one must also consider the interaction between a President and a Congress who are both somewhat unrepresentative, relative to the benchmark of the median national voter. Here, it is a second-level fallacy of composition to overlook that the interaction between two unrepresentative institutions can result in policies that are more representative, on average, than the policies that either institution in the system would produce taken separately.

In one illuminating model, in which voters can only imperfectly discipline an elected executive, overall social welfare can be increased by adding an elected legislature that is also subject to imperfect discipline, so long as the two imperfectly representative institutions must jointly agree on decisions.[97] Roughly, the mechanism is that because joint agreement is required, the two institutions must share the gains from diverting resources to personal rather than social benefit, and this reduces the incentives of either institution to do so. In this way, the structure of interaction increases the relative gains to both institutions of implementing the voters' preferences in order to be able to stay in office, with the prospect of obtaining more benefits in the future.[98] A properly structured interaction between two imperfect representatives can do better, from the voters' standpoint, than either representative would do alone.

3. Bicameralism. — The model described above abstracts from the first level of aggregation, in the sense that both institutions in the model are directly elected by the voters in the same manner. In this sense, it could apply with equal force not only to two institutions labeled "President" and "Congress," but also to the two houses of a bicameral legislature elected on the same basis, or to two committees in a unicameral legislature. In general, splitting up policymaking between two institutions with identical composition and structure can,

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[96] *See id.* at 1235–42.

[97] *See* Torsten Persson, Gérard Roland & Guido Tabellini, *Separation of Powers and Political Accountability*, 112 Q.J. ECON. 1163, 1179–83 (1997).

[98] *See id.* at 1182–83.

somewhat counterintuitively, improve results compared to a unitary institution with the same total number of members and the same basis of selection. As we have seen, an ingenious argument for legislative bicameralism is that the bare existence of two different voting bodies dampens the power of agenda setters to exploit cycling majorities.[99]

A related point arises when two or more institutions that must jointly agree to accomplish action are elected under *different* systems. Here, the different bases of representation in the two institutions can, through interaction, produce better results than either institution could produce alone. The classic case involves the large subset of bicameral legislatures in which the two houses are selected on different bases. In a unicameral legislature using majority rule and elected under a first-past-the-post system, just over a quarter of the electorate can set policy for the whole.[100] If, however, the legislature is bicameral, the two houses must jointly agree on policies, and a different basis of representation is used in the second chamber, then a larger electoral majority is needed to control outcomes in the legislature overall.[101]

As the requisite majority grows toward one-half, bicameralism can be justified as a device that safeguards against the tyranny of the minority and, in that sense, makes the lawmaking system more representative.[102] When the requisite majority exceeds one-half of the electorate, the justification must be that bicameralism is a safeguard against the tyranny of the majority. In the latter case, bicameralism is a functionally equivalent substitute for a supermajority voting rule in a unicameral legislature.[103]

C. Emergent Democracy[104]

Let me now generalize the discussion in the last section to address a large question: is the federal Constitution undemocratic? Eminent political theorists and scientists have thought so, perhaps most famously Robert Dahl.[105] More recently, Sanford Levinson has charged

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[99] Levmore, *supra* note 35, at 147–48.

[100] *See* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT (1962), *reprinted in* 3 THE COLLECTED WORKS OF JAMES M. BUCHANAN 220 (1999).

[101] *See id.* at 233–34, 239–40.

[102] *Cf.* Loving v. United States, 517 U.S. 748, 757–58 (1996) (describing bicameralism as a feature of Congress that makes for "responsive" lawmaking).

[103] *See* BUCHANAN & TULLOCK, *supra* note 100, at 233–34.

[104] Parts of this section are adapted, with modifications, from Adrian Vermeule, *Second-Best Democracy*, 1 HARV. L. & POL'Y REV. ONLINE (2006), http://www.hlpronline.com/2006/11/vermeule_01.html.

[105] *See generally* ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? (2002).

that the Constitution is undemocratic root and branch, and should be revised in a new constitutional convention.[106]

In Levinson's work, the structure of the argument is to proceed piecemeal through the institutions of the national government and to show that each is undemocratic, taken one by one. The Senate is hopelessly malapportioned;[107] the Electoral College encourages presidential candidates to cater to small segments of the national electorate from battleground states;[108] and the Supreme Court is somewhat disciplined by electoral majorities, but imperfectly, and only with significant lag.[109] In short, each institution is undemocratic because it fails to implement the preferences or judgments of current national majorities.

One question involves the benchmark theory of democracy used in this critique, which equates democracy with current majoritarianism.[110] Needless to say, the equation is highly controversial. My suggestion, however, is that even accepting that theoretical benchmark, there is another serious issue: the neglect of system effects. Levinson's argument overlooks that the overall constitutional system may be more democratic than the sum of its parts, even defining democracy according to the very benchmark used in the critique.

In this setting, it is a fallacy of composition to assume that because each lawmaking institution is undemocratic, taken individually, therefore the overall system that arises from their interaction must be undemocratic. Conversely, it is a fallacy of division to assume that if the overall constitutional system is democratic, then each or even any of the participant institutions must be democratic, taken one by one. In either case, the inference is flawed because it misses the possibility of interaction effects. Lawmaking institutions may interact in ways that generate a kind of *emergent democracy* at the system level, even if the components are not themselves democratic in isolation.[111]

How exactly might institutional interactions produce system-level democracy? The basic mechanism involves *offsetting failures of democracy*. A departure from the democratic benchmark by one institution might compensate for a departure from the democratic benchmark by another institution, in a different direction. What is important is that the failures of democracy across the array of institutions should be uncorrelated or negatively correlated, running in dif-

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106 SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION 172–73 (2006).

107 *Id.* at 50–51.

108 *Id.* at 87–88.

109 *Id.* at 125, 136–37.

110 *See id.* at 8–9, 27–29, 49.

111 I use "emergent" strictly in the philosophical sense of an emergent property. I do not mean to connote the very different idea that legal and political institutions *evolve* toward democracy.

ferent and perhaps even opposed directions. The broad distribution of undemocratic power may produce a tolerable approximation of democracy at the systemic level, by allowing many groups a privileged forum in which to express their grievances, or by forcing all holders of democratically objectionable legal powers and entitlements to come to the bargaining table.

On this account, even if it is true that "none of the great institutions of American politics can plausibly claim to speak for the majority of Americans, even though all assert such claims,"[112] those institutions do not all depart from the majoritarian ideal in the same way, or in the same direction. The Senate favors small states;[113] the Electoral College favors groups with influence in battleground states,[114] which may or may not be small states;[115] the administrative state favors groups who can organize to influence agencies and congressional committees; the prestige and power of the Supreme Court benefit the legal elites who feed in the Court's wake. However, there is no one group or interest that is uniformly favored by each of these undemocratic institutions.[116] Here the quadricameral lawmaking system — House, Senate, President, and Supreme Court — does useful service by forcing many of these groups, each with power that is by hypothesis undemocratic in some domain, to argue or bargain together in order to jointly agree on national policy in some cases. As we have seen, a multiplicity of agents, each imperfectly constrained by democratic politics, may produce higher welfare for the voting majority than does a single agent, so long as joint agreement among the agents is required to set policy.[117]

In general, the democratic critics have inconsistent and offsetting concerns, like the man with a terminal illness who worries about saving for retirement. Consider two main features of the post-1937 constitutional order: the status quo bias of the congressional lawmaking process and the massive delegation of power to the executive. As to the first, democratic critics of the Constitution claim that the many vetogates in the quadricameral legislative process excessively frustrate the ability of current majorities to translate their wishes or judgments into law.[118] As to the second, the same critics claim that delegation to

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[112] LEVINSON, *supra* note 106, at 49.

[113] *See id.* at 50–52.

[114] *See id.* at 88–89.

[115] *See* Andrew Gelman et al., *The Mathematics and Statistics of Voting Power*, 17 STAT. SCI. 420, 426–28 (2002).

[116] Unless the relevant interests are defined in excessively general terms, such as "the powerful" or "the wealthy."

[117] Persson, Roland & Tabellini, *supra* note 97, at 1179–83.

[118] *See, e.g.*, LEVINSON, *supra* note 106, at 52.

the executive makes policymaking undemocratic.[119] The President, they suggest, is often elected by national minorities because of the structure of the Electoral College,[120] and does not enjoy the democratic qualities of deliberation, multiple perspectives, and participation by all affected interests that Congress possesses[121] — a view that flips around the presidentialist arguments recounted in section II.B.2.

Yet these two departures from the democratic benchmark — excessive supermajoritarianism in the lawmaking process and excessive delegation to the executive — may be uncorrelated or even negatively correlated; their effects may run in different and even opposing directions. Indeed, the massive increase in delegation to the executive during the Progressive Era and the New Deal was in part intended to be, and was itself defended as, the cure for the disease of excessive status quo bias in lawmaking.[122] The combination of legislative, executive, and judicial functions into the same hands — either the President acting through executive agencies, or the independent agencies — was in part designed to speed the government's reaction to changing economic and policy conditions and to increase its responsiveness to majoritarian sentiment.[123]

The upshot is that large-scale delegation can itself be justified, in part, as a compensating systemic adjustment whose intended effect was to unblock the vetogates of the national lawmaking process. From the standpoint of majoritarian democrats who criticize the Constitution in a piecemeal fashion, the first best would be to eliminate both excessively cumbersome lawmaking and excessive delegation to the executive. Given cumbersome lawmaking, however, delegation can push the whole system closer to the democratic critics' ideal of responsiveness to current majorities. Piecemeal democratic criticism of status quo bias and delegation misses this interaction effect and thus ranks the possible regimes incorrectly.

On a smaller scale, analogous points have been made in many other settings at the intersection of democratic theory and law. Many democrats criticize gerrymandering that results in noncompetitive electoral districts.[124] Taken one by one, such districts depart from some benchmark ideal of democracy, or so let us assume. However, at the systemic level, it is possible that multiple noncompetitive dis-

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119 *See, e.g.*, *id.* at 109–16; *id.* at 167 (listing "[e]xcessive presidential power" as a "grievous defect[]" of the Constitution).

120 *See, e.g.*, *id.* at 89–91.

121 *See, e.g.*, DAHL, *supra* note 105, at 68–72.

122 *Cf.* LANDIS, *supra* note 54.

123 *See id.* at 1 ("[T]he administrative process springs from the inadequacy of a simple tripartite form of government to deal with modern problems.").

124 *See, e.g.*, Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 617–30 (2002).

tricts promote greater competition overall.[125] In the case of bipartisan gerrymanders:

> When the parties divide a state into politically homogeneous constituencies, the composition of the legislature is more reflective of the underlying partisan composition of the electorate. In contrast, a districting scheme that seeks to maximize district-level partisan competition could lead to a legislature wildly unrepresentative of the partisan preferences of the state's population.[126]

When aggregated at the level of the legislature, in other words, districts that are noncompetitive in different directions may have the overall property of "second-order diversity."[127]

Likewise, political parties have long been an object of suspicion from republican-democratic theorists who see parties as a type of pernicious political "faction." But it is a fallacy of composition to assume that if one faction is bad, multiple factions are worse. The cure for parties may be more parties; at the systemic level, pluralist competition among political parties helps to promote democratic values of participation, inclusion, and deliberation.[128] In such cases, a kind of democracy emerges from the interaction of institutions that are undemocratic, taken one by one.

Emergent Democracy and Constitutional Reform. — These points cast doubt on the majoritarian democrats' proposals for a constitutional convention. As the general theory of second best indicates, unless *all* of the critics' prescriptions are adopted simultaneously — and surely at least some will be ruled out by politics — then even a committed majoritarian democrat might prefer the current constitutional order. If, for example, the convention reins in executive lawmaking but leaves the quadricameral lawmaking process unchanged, status quo bias will strangle current majorities. In general, because of the causal forces that operate in politics, constitutional changes must be effected through "interdependent packages."[129] If so, then simply urging as many piecemeal majoritarian changes as possible may produce far worse results, even on majoritarian grounds, than would the constitutional status quo.

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[125] *See* Nathaniel Persily, *Reply: In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 668 (2002).

[126] *Id.*

[127] Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1117–18 (2005).

[128] *See* NANCY L. ROSENBLUM, ON THE SIDE OF THE ANGELS: AN APPRECIATION OF PARTIES AND PARTISANSHIP 456–57 (2008).

[129] *See* Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223, 226, 272–79 (2001); *see also* MIKHAIL FILIPPOV, PETER C. ORDESHOOK & OLGA SHVETSOVA, DESIGNING FEDERALISM 300–01 (2004) (emphasizing that, because institutions are interdependent, the constitutional designer cannot evaluate them piecemeal). Thanks to Mark Tushnet for these references.

This caution itself has two limits. First, it does not show that bad consequences will always result from piecemeal reform; all it shows is that piecemeal reform is not always best, because approximating the good as closely as possible can sometimes produce the worst possible outcomes. It then becomes necessary to go beyond the democratic critiques by offering a detailed systemic analysis of the conditions of American constitutional democracy to see whether the interaction among particular reforms will improve matters. Second, the possible adverse consequences of piecemeal reform apply just as much to judicial updating of the Constitution through "interpretation" as to the output of constitutional conventions.[130] Whichever process is used to effect constitutional reform, an understanding of system effects and of the general theory of second best is indispensable.

D. The "Countermajoritarian Difficulty"

The previous section discussed a piecemeal critique of national lawmaking institutions by majoritarian democrats. An important special case of this is the critique of the Supreme Court's power of constitutional judicial review, also made by majoritarian democrats. The "countermajoritarian difficulty" arises from the claim that the Supreme Court's power to overturn statutes on constitutional grounds is inconsistent with the constitutional order's deep commitment to majoritarian democracy.[131] The phrase itself originated with Alexander Bickel, but it has a long history and periodically reappears, in changing and ever more sophisticated forms.[132]

Rather than repeating my views on the substance of this critical problem,[133] I will briefly point out some analytic pitfalls. It is a fallacy of division to assume that if the overall constitutional order is to be democratic, the Supreme Court must itself be democratic. Conversely, it is a fallacy of composition to assume that if the Supreme Court is undemocratic, then the constitutional system will be undemocratic overall. An undemocratic Court may be necessary to produce a constitutional order that is democratic overall, because it is needed to offset

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[130] *See* ADRIAN VERMEULE, LAW AND THE LIMITS OF REASON 170–71 (2009); Heather K. Gerken, *The Hydraulics of Constitutional Reform: A Skeptical Response to* Our Undemocratic Constitution, 55 DRAKE L. REV. 925, 927 n.14 (2007).

[131] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16 (2d ed. 1986).

[132] *See generally* JEREMY WALDRON, LAW AND DISAGREEMENT (1999); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006). For an important line of critique, see Frank B. Cross, *Institutions and Enforcement of the Bill of Rights*, 85 CORNELL L. REV. 1529, 1550–76 (2000); and Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693 (2008).

[133] *See* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 230–88 (2006). *See generally* VERMEULE, *supra* note 130.

legislative failures, according to the very democratic benchmark the critics use. In other words, an undemocratic Court might be indispensable to the workings of democracy, either because it polices the processes of democratic lawmaking, as in John Hart Ely's theory of judicial review;[134] because an undemocratic Court contributes to a desirable overall package of supermajoritarianism;[135] or because the Court produces errors that are negatively correlated with those of the legislative process, a possibility I will discuss below. Whether judicial review can indeed be justified on such grounds, as a substantive matter, is a question with substantial empirical and prescriptive components as well as normative ones.[136] But it is an analytic mistake, rather than an empirical one, to argue from the premise that the overall constitutional order should be democratic to the conclusion that an undemocratic Supreme Court must be undesirable.

A more subtle version of the problem can be discerned in a recent and important defense of judicial review.[137] This defense begins with the acute observation that the Supreme Court's constitutional agenda[138] — the number and type of constitutional cases the Court hears — is much smaller than the nation's agenda, or the number and type of public issues that are of national concern at any given time. The Court intervenes to override democratic outcomes in only a small subset of the overall space of issues, due to constraints of politics and institutional capacity. The implication is that the countermajoritarian difficulty is overstated. On this view, "the distance between the Court's activities and the public's major concerns — the relatively small number of decisions the Court actually removes from what the public would desire to control directly — calls into question much of the contemporary and not-so-contemporary angst about the countermajoritarian or antidemocratic behavior of the Court."[139] Hence, "the judicial incursion on democracy — if an incursion it is — is quite a bit smaller in quantity and aggregate consequence than might be thought."[140]

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[134] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 73–104 (1980).

[135] *See* Cross, *supra* note 132, at 1550–76; Fallon, *supra* note 132, at 1718–28.

[136] I believe that robust judicial review cannot, in fact, be justified in such terms, *see* VERMEULE, *supra* note 133, but that is a separate question.

[137] *See* Frederick Schauer, *The Supreme Court, 2005 Term—Foreword: The Court's Agenda — And the Nation's*, 120 HARV. L. REV. 4 (2006).

[138] Schauer also briefly discusses the Court's statutory agenda, but the main implications he elicits are addressed to constitutional theory, *see id.*, so I shall focus on his discussion of the Court's constitutional agenda.

[139] *Id.* at 50.

[140] *Id.* at 53.

However, this argument risks committing a fallacy of division. Even if constraints of politics and of institutional capacity ensure the Court cannot and does not intervene *everywhere*, it might still be the case that the Court can intervene *anywhere*. The countermajoritarian difficulty would then retain a valid core, stated at the level of the Court's unbounded potential to intervene rather than the actual deployment of its resources. That unbounded potential generates legal uncertainty and shapes the anticipated reactions of other institutions, creating the kind of "judicial overhang"[141] that democratic critics of the Court find debilitating. It remains true that the judicial incursion on democracy is quantitatively limited, but the "aggregate consequence[s]"[142] are amplified by uncertainty about where the incursion will take place.

Until recently, it had been argued and widely assumed that the Court would not intervene to invalidate executive action clearly authorized by statute that implicated military matters and foreign policy during a time of war. That idea went by the boards when the Court decided *Boumediene v. Bush*,[143] which dismissed any suggestion that de facto sovereignty over nominally foreign territory, held and used for military purposes, would pose a political question not justiciable by the courts, and which then went on to invalidate the statute authorizing executive action as a deprivation of the privilege of habeas corpus — the first such invalidation in the nation's history. The seeming lesson of *Boumediene* is that legal doctrine places few, if any, remaining constraints on the Court's potential to intervene on any issue that a majority of the justices see as posing constitutional questions. That the Court's resources are limited ensures that universal government by judiciary is impossible; but it does not follow that government by judiciary is impossible in any particular area.

E. Judicial Bias

I turn now to the structure of the courts and of judicial decisionmaking, focusing especially on the question of judicial "bias." Here two levels of system effects are important. First, at the level of multimember judicial panels such as the Supreme Court, the court as a whole can constitute a system whose behavior differs from the behav-

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141 I take this phrase from Mark Tushnet, who uses it in a somewhat different sense, although a related one. *See* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 57 (1999).

142 Schauer, *supra* note 137, at 53. Schauer limits his argument by saying that the Court should intervene primarily on "low-salience" questions. *See id.* at 36–62. This limitation partially but not wholly avoids the problem noted in the text, because it will be uncertain ex ante when the limitation applies.

143 128 S. Ct. 2229 (2008).

ior of the individual judges who sit on the court. If the biases of individual judges cut in different directions, the court as a whole can behave as though all the judges are principled law-followers. Second, the interaction between the judiciary and other branches can constitute a system whose behavior differs from that of the institutions that are components of the system. Here the biases of the judiciary, on the one hand, and of the legislature, on the other, can offset each other and thereby ensure that the system as a whole maximizes welfare.

1. The Judicial Miracle of Aggregation. — Suppose that many or most Justices are "biased" in the first-order political or partisan sense.[144] Their votes tend to track the party platforms or the policy preferences of appointing presidents. In cases of constitutional and statutory interpretation and administrative law, these Justices tend, in a statistically significant fashion, to vote consistently for conservative or liberal policies as the case may be. Many studies have shown something of the kind; although longstanding, and ever-growing, this body of work has recently been dubbed "the New Legal Realism."[145]

But through a systemic lens, it is apparent that widespread judicial bias has unclear implications. First, widespread biases among the *Justices* need not mean that the *Court* makes biased decisions; everything depends upon how those biases are distributed. Under certain conditions, we might witness a *judicial miracle of aggregation*, in which highly biased Justices interact in such a way that the Court as a whole acts as though unbiased. Suppose that the Court has nine members, and that eight out of nine are thoroughgoing partisans who always vote their first-order partisan preferences. One Justice, however, is a sincere legalist who always votes for the correct legal answer with perfect accuracy. (This assumption is merely for simplicity; the point holds so long as the legalist justice votes with even a slight bias toward the correct answer). Suppose also that there is always a correct legal answer, even in the hard cases that reach the Court, but that the eight partisans will vote randomly from the standpoint of identifying the correct answer; partisan views are intrinsically uncorrelated with the legally correct approach and from a legal standpoint the partisans do not systematically err in any particular direction. Under majority rule, with a binary choice, the average competence of the Court's members will be .56,[146] and the Court as a whole will vote for the correct answer with an approximate probability of .64.[147]

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144 I will ignore "personal" bias, which arises when rulings are based on bribery or family connections.

145 Miles & Sunstein, *supra* note 23, at 831.

146 $((8 \times .5) + 1)/9 \approx .56$.

147 This is calculated according to the following formula: probability = (number of scenarios in which 4, 5, 6, 7, or 8 partisan justices vote correctly)/(total number of scenarios) = $({}_8C_4 + {}_8C_5 + {}_8C_6$

This implies nothing at all about the desirability of vesting issues in the Court. For one thing, the swing Justice might vote sincerely but incompetently. If (but only if) she votes worse than randomly,[148] then the Court as a whole will display a bias toward error. Moreover, I have said nothing yet about the comparative epistemic competence of the Court and other institutions, or about the Court's marginal contribution to the overall epistemic system. The point of interest is just that overwhelming and easily detected partisan bias among the Justices is perfectly compatible with a bias toward legal accuracy at the level of the Court as a whole.

2. A Nightmare of Aggregation. — However, exactly the same logic might work in reverse, causing the Court as a whole to behave in a politically biased fashion even though the vast majority of its members follow the law. Suppose that eight of the nine Justices always vote according to their best understanding of the relevant law, and that this best understanding is random with respect to the liberal-conservative spectrum. Suppose also, however, that one Justice is a crude political partisan who always votes his, or his party's, first-order policy preferences. Because the eight legalist Justices are random with respect to ideology, they will sometimes split their votes four to four in hard cases, where there are reasonable legal arguments cutting both ways — the sort of case that dominates the Court's docket. Then, in a kind of nightmare of aggregation, the partisan Justice will occupy the swing position, thereby determining outcomes for the Court as a whole. The Court will behave as a highly partisan institution even though almost all of its members are legalists.[149]

3. The Current Court. — Do we in fact see a judicial miracle of aggregation on the current Court? Or perhaps a nightmare scenario? The Court routinely splits five to four in cases of political import, with Justice Kennedy as the swing voter. And Justice Kennedy may well be the least partisan Justice on the current Court. In administrative law, for example, he is equally likely to vote to invalidate conservative and liberal agency decisions.[150] Plausibly, Justice Kennedy votes sincerely, in the sense that he votes without political bias.

$+{}_8C_7 + {}_8C_8)/(2^8) = (70 + 56 + 28 + 8 + 1)/256 \approx .64$. Thanks to Joanna Huey and John Polley for this calculation.

[148] People are sometimes confused by the idea that someone can vote worse than randomly; doesn't that mean the swing Justice could improve her competence by flipping a coin? But this confuses the standpoint of the analyst with the standpoint of the actor. The swing Justice might not perceive the cognitive limitations that reduce her competence below that of a coin flip.

[149] This assumes that all the Justices vote sincerely, not strategically, although one votes based on political attitudes while the others vote based on their best understanding of the relevant law.

[150] Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823, 834 (2006). This study does not include Chief Justice Roberts or Justices Alito and Sotomayor.

This does not at all exclude the possibility that the Court as a whole behaves with low aggregate competence, despite the sincerity of its swing voter. Justice Kennedy's relative lack of partisan bias does not at all guarantee that his legal theories are good ones, or that they track the truth about what the law really holds, or anything of that sort. However, it does exclude the nightmare of aggregation described above, in which the presence of a partisan swing Justice causes the Court as a whole to behave in a highly partisan fashion even though most of its members are sincere legalists.

4. Offsetting Biases in the Lawmaking System. — So much for the first-level system effect that arises when the votes of individual judges are aggregated into the behavior of a court. In order to isolate the second-level system effect that arises when courts interact with other institutions, let us assume that the Court as a whole behaves in a highly biased fashion. For simplicity, we may also assume that what is true of the Court is true of the whole federal judiciary, ignoring that the Court only partially controls what the federal judiciary does. I assume here, in other words, that "the judges" as a cadre show a discernible and systematic bias in a particular direction. Currently, the federal judiciary plausibly shows an overall bias in a conservative direction; some sixty percent of current federal appellate judges were appointed by Republican presidents.[151]

As important recent work has emphasized, however, aggregate judicial bias does not at all guarantee that the lawmaking system as a whole will reach biased results, even if the judges have the last word through constitutional judicial review.[152] Indeed, the lawmaking system will not necessarily behave in a biased fashion even if both Congress and the judiciary are biased, so long as their biases run in offsetting directions.[153] In the simplest version,[154] suppose that Congress enacts two types of statutes: some create public goods that make all better off, while others allocate rents to constituents of the dominant political party in ways that reduce overall welfare. The judiciary reviews all statutes on constitutional grounds and is able to discern which category each statute falls into. The judges, whose biases run in favor of the constituents of the legislative minority, and thus run

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151 *See* Charlie Savage, *Appeals Courts Pushed to Right by Bush Choices*, N.Y. TIMES, Oct. 29, 2008, at A1.

152 *See* Eric A. Posner, *Does Political Bias in the Judiciary Matter?: Implications of Judicial Bias Studies for Legal and Constitutional Reform*, 75 U. CHI. L. REV. 853, 858–68 (2008). *See generally* James R. Rogers & Georg Vanberg, *Resurrecting* Lochner*: A Defense of Unprincipled Judicial Activism*, 23 J.L. ECON. & ORG. 442 (2007).

153 *Cf.* Posner, *supra* note 152, at 855 ("[J]udicial bias (within limits) does not matter at all and could even be beneficial in a system . . . where judges are expected to block or restrict government actions . . . that are themselves likely to reflect 'bias.'" (emphasis omitted)).

154 *See id.* at 879.

against the biases of the legislative majority, give deference to the statutes creating public goods but give heightened scrutiny to the rent-allocating statutes, validating the former but invalidating the latter. In this case, the overall lawmaking system will tend to weed out welfare-reducing statutes while enacting statutes that create public goods.

In this example, it is not that the judges are attempting to promote overall welfare. The judiciary is just as biased as the legislature; if the legislature had different biases, and were to enact welfare-reducing statutes allocating rents to the constituents favored by the judges, the judges would validate those statutes. The trick that makes the judges behave as though motivated to promote overall welfare, and that therefore makes the lawmaking system welfare-enhancing overall, is that the pool of statutes that the legislature enacts is itself tilted against the judiciary's biases. Lacking any ability to change the composition of the pool, the biased judiciary can do no better than to weed out, on partisan grounds, the statutes that are welfare-reducing.

This point underscores the second-best logic of the argument. The first-best system would be one in which the judiciary is itself unbiased. In that case, the judiciary could simply weed out all welfare-reducing statutes while validating statutes that create public goods. Suppose, however, that the first best is unattainable; suppose, for example, that the appointments process produces a cadre of judges who show systematic overall bias in a given direction. Even in the presence of a biased judiciary of this sort, it does not follow that the lawmaking system will be biased overall; one must compare the direction of judicial and legislative biases. It is thus a fallacy of division to assume that the lawmaking system can be unbiased only if each of its components is unbiased in its own right.[155]

5. System Effects and the New Legal Realism. — The analytic consequence of all this is that the New Legal Realism is at best incomplete, because it fails to take account of system effects. Much of the New Legal Realism is devoted to assessing the voting behavior of individual judges, including how the behavior of individual judges is affected by the behavior of other judges through conformism and other "panel effects."[156] In light of the system effects discussed above, however, we can see that the overall *distribution* of individual votes mat-

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[155] *Cf. id.* at 880 ("If legislative bias yields inefficient and unfair statutes because the legislative process is insufficiently supermajoritarian, and if legislative bargaining costs are low, then review of statutes by biased judges may be socially desirable . . . .").

[156] *See, e.g.*, Miles & Sunstein, *supra* note 150, at 851–59; Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1719 (1997). For a recent overview of the literature on panel effects, see Pauline T. Kim, *Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects*, 157 U. PA. L. REV. 1319, 1320–27 (2009).

ters as much as their content. The New Legal Realism misses benign invisible-hand possibilities at two levels: at the level of multimember courts, which may behave in a legalist fashion even if most of their members vote in a highly partisan fashion most of the time, and at the level of the overall lawmaking system, which may succeed in promoting overall welfare even if no actors within the system are attempting to do so, and even if the judiciary displays systematic overall biases running in particular directions. Even if judges are political, that does not at all entail that *courts* are. Although courts might turn out to be political anyway, depending on how the votes of their members are distributed, analyzing the voting behavior of individual judges, even including panel effects, does not suffice to decide whether courts behave politically.

III. SYSTEM EFFECTS AND ADJUDICATION

I turn now from the analysis of constitutional structure to the analysis of adjudication, especially by Justices of the Supreme Court, although I will also consider other actors, such as the presidents and senators who together appoint judges. Section A examines problems of division, including the problems faced by Burkeans in a non-Burkean world, Thayerians in a non-Thayerian world, minimalists in a world of maximalists, and originalists in a nonoriginalist world. I suggest that on the premises of each approach, strategic legalism can be best for the judges concerned, under conditions I will try to state. Section B turns to problems of composition. Where methodological diversity is a desirable property for the judiciary as a whole, the systemically minded judge will become, under identifiable conditions, a legal chameleon who changes her approach as the composition of the judiciary changes around her. Even if no judges are capable of being legal chameleons, a diverse portfolio of judges with different principled commitments can be attained by wise appointments to the bench.

As the later discussion makes clear, I will assume that the "principled" judge is a consequentialist who chooses a theory of adjudication on the basis of its results. Not, however, on the basis of its policy results in particular cases, but either on the basis of its legal results in particular cases or on the basis of its long-run results for the legal system. The first is an act-consequentialist approach, the second a rule-consequentialist one. In either version, I do not believe the assumption is very restrictive; it subsumes even Ronald Dworkin, whose theory of adjudication — law as integrity, in which judges attempt to make law the best it can be along the dimensions of "fit" and "justification"[157] —

[157] *See generally* RONALD DWORKIN, LAW'S EMPIRE (1986).

is avowedly consequentialist.[158] And as we will see, even originalists have lately turned to arguments that justify originalist adjudication on essentially rule-consequentialist grounds.

Consequentialism does not entail welfarism, and this is another reason that the assumption is not very restrictive. It is perfectly possible for judges to adhere to a consequentialism of rights,[159] or more generally a consequentialism of legal entitlements, in which the judge attempts to ensure that legal entitlements (defined according to whatever independent theory the judge holds) are enforced to the maximum possible extent, regardless of the welfare effects of doing so. Conditional on consequentialism, the problems of system effects and the second best that I will discuss are entirely agnostic as among various first-order theories that define what counts as a correct legal outcome. Accordingly, I will consider arguments premised on a range of first-order theories, attempting to show that every such theory must confront systemic problems, and that such problems have a common structure. Although in any given context I will couch the discussion in terms of one or another first-order theory, that is merely for concreteness; the analysis goes through, *mutatis mutandis*, no matter how the first-order theory is specified.

A. Division and Strategic Legalism

1. Division. — Even if all judges should adopt a given theory, it does not follow that any one should, because others may not. Because the choices of other judges constrain the choices of any given judge, we are dealing with a strategic situation, the province of the theory of collective action and of game theory. From the standpoint of any given judge, the choices of other judges create constraints that implicate the logic of second-best adjudication: what it is best to do given the constraints arising from others' choices may well be very different than what it would be best to do if all[160] other judges adhered to the same theory.

In principle, this problem arises in two versions, one synchronic and one diachronic. The synchronic version involves interpretive theories that require some critical mass or threshold number of *current* judges to work as intended. The diachronic version involves interpretive theories that are sensitive to irreversible[161] action by *past* judges. In both versions, the disagreement of other present judges or the irre-

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158 *See* Ronald Dworkin, *In Praise of Theory*, 29 ARIZ. ST. L.J. 353, 364 (1997).

159 *See* Amartya Sen, *Rights and Agency*, 11 PHIL. & PUB. AFF. 3, 3 (1982).

160 "All" is not necessarily to be taken literally; I use it as shorthand for whatever critical mass of judges is necessary to produce the beneficial consequences promised by the relevant theory.

161 Diachronic system effects can obtain so long as it is costly to reverse the action of past judges. Here too, I use "irreversible" merely as a shorthand.

versible action of past judges function as constraints that trigger the logic of second-best adjudication for a current judge. The two problems often overlap or occur simultaneously, however, so I will illustrate both problems together in the setting of several examples.

2. *Examples.* — Of the five examples that follow, I have discussed the first two before, so I will give them brisk treatment and then move on to a more sustained analysis of the next three.

(a) Democracy-Forcing as a Step Good.[162] — Many interpretive approaches and tools are justified on the ground that they will elicit or force desirable responses from other institutions, particularly legislatures. Proponents of textualism as a general approach to statutory interpretation sometimes assert that it increases the quality of legislative drafting ex ante.[163] The canon of avoiding constitutional questions, clear statement rules, the nondelegation doctrine, and the rule of lenity have all been justified by reference to their dynamic effects;[164] by forcing legislators to speak clearly to override the relevant canons, the hope is to focus legislators' attention on the values the canons protect and to encourage democratic deliberation.

A problem arises when, and to the extent that, such interpretive approaches require collective action by some threshold number or critical mass of judges, at a given time or over time, in order to achieve their effects. Where such thresholds exist, then even if it would be desirable for a critical mass of judges to engage in democracy-forcing interpretation, it does not follow that it is desirable for an individual judge to do so; that inference is a fallacy of division. Whether it is desirable for an individual judge to do so depends upon what other judges do — upon whether the judicial system can coordinate on the collective action needed to produce the democracy-forcing effects that the canons aim to achieve.

When some critical mass is required for the canon to work, then democracy-forcing interpretation has the character of a *step good*: until the threshold needed for the efficacy of collective action is crossed, isolated judicial votes to engage in democracy-forcing interpretation

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[162] This section and the next are adapted, with heavy modifications, from Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549 (2005).

[163] *See, e.g.*, United States v. Taylor, 487 U.S. 326, 346 (1988) (Scalia, J., concurring in part) ("[W]e have an obligation to conduct our exegesis in a fashion which fosters th[e] democratic process [specified in the bicameralism and presentment requirements of Article I]."); Elizabeth Garrett, *Legal Scholarship in the Age of Legislation*, 34 TULSA L.J. 679, 685 (1999) ("[M]ethods like textualism and rules of clear statement are best understood as efforts to improve the quality of the decisionmaking in the politically accountable branches."); *cf.* W. David Slawson, *Legislative History and the Need To Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383, 407–10 (1992) (arguing that judicial recourse to legislative history results in irresponsible and incoherent congressional lawmaking).

[164] *See* Vermeule, *supra* note 162, at 564–65.

make no marginal contribution to the good's provision and produce no marginal benefits. The requisite critical mass need not, of course, be one hundred percent of the judges. On any given court, only a majority is required, although there must also be enough majorities on enough courts to achieve a critical mass at the level of the judicial system as a whole. The effect of the canon will be undercut if different majorities on different courts take different views, and if shifting majorities on the Supreme Court over time prove unable to coordinate the interpretive system.

Indeed, the marginal benefit of democracy-forcing judicial votes may well be *negative* until the threshold of collective action is reached; unilateral acts of democracy-forcing by judicial panels or individual judges might be affirmatively harmful to litigants or the overall system, and thus perverse. For a schematic example, suppose that (1) universal textualism by all judges is an equilibrium, in which legislative coalitions will place their instructions in the text; (2) universal intentionalism is also an equilibrium, in which legislators will place their instructions in the legislative history; (3) the net social benefits of the first equilibrium are greater than those of the second; and (4) the system is currently in the second equilibrium. An *isolated* textualist decision that eschews legislative history, on the theory that *universal* textualism would have beneficial democracy-forcing effects, would misread legislators' expectations in the case at hand, without producing any countervailing social benefit.

In some cases, the difference between step goods and public goods whose provision varies continuously with contributions can be finessed by seeing contributions to the step good as raising the ex ante probability that the good will be provided.[165] In the limit, the effect of judicial decisions might be perfectly divisible or marginal. For concreteness, consider the possible marginal democracy-forcing benefits of adding textualist judges to the judicial system. Increasing the number of textualist votes by one percent would then increase legislative incentives to draft responsibly by one percent.[166]

Yet this situation is only a theoretical possibility; it might or might not actually obtain, depending upon the distribution of the added votes, not just their number, and how the legislature responds to judicial decisions. As to the first point, adding textualist votes to the judicial system will have *no* effect, not even a marginal one, if those votes are distributed across cases in the wrong way. In the limiting case,

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[165] For discussion of this issue, see *id.* at 569–71; and EINER ELHAUGE, STATUTORY DEFAULT RULES 332–34 (2008).

[166] *See* ELHAUGE, *supra* note 165, at 333.

where textualist votes are only ever cast by dissenting judges, those votes are effectively wasted.

As to the second point, the legislative reaction to judicial decisions might well be lumpy, rather than perfectly divisible or marginal. This possibility can itself take two forms. In one version, the technology of drafting is inherently lumpy, so that legislators cannot make continuously variable marginal adjustments to every one percent increase in judicial textualism. It may be, for example, that the basic deal among the majority coalition can either be encoded in text or recorded in legislative history, but cannot be parceled out between text and legislative history with any arbitrarily desired degree of precision. In another version, the problem is not the technology of drafting but legislators' limited attention and cognitive capacities. Starting from a baseline case in which all judges are intentionalist, legislators might take no notice of textualism until the proportion of textualist judges or decisions reaches some critical mass.

Clearly, how legislatures respond to judicial decisions is an empirical question that cannot be decided in the abstract. Perhaps legislators accurately gauge and respond, at the margin, to a low probability that the judicial system will reach a textualist decision; perhaps they exaggerate and overreact to the low probability; perhaps they underestimate or ignore the low probability until enough textualists and textualist decisions are present to make the issue of judicial method salient and force it on the legislators' attention. In the last case, textualism justified on democracy-forcing grounds will be pointless, or even perversely harmful, unless and until some critical mass of other judges goes along.

(b) Burkeans in a Non-Burkean World. — What is the role of precedent in deciding constitutional cases? Here the division problem arises at two different levels. First, judges might not universally adhere to a theory of precedent that they universally share. Second, judges might have different theories of precedent altogether. At both levels, I will examine the dilemmas that arise for Burkean judges in a non-Burkean or partially Burkean world. Judges who think it desirable for the judiciary as a whole to attach a great deal of weight to precedent — what I will very loosely call Burkean judges[167] — might adopt a different approach to precedent if many other judges do not share their Burkean views, and they might be right in so doing.

As to the first level, suppose that judges experience a cost from voting in accordance with precedent whenever the precedent dictates a first-order result with which the individual judge disagrees, that all

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[167] *See* David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717, 1730–31 (2003).

judges share a particular theory of precedent, and that it would be socially beneficial for the judiciary as a whole to follow that theory. It does not follow that any individual judge should adhere to that theory, because of the logic of collective action. The judges are in a multiplayer game, which can be interpreted in several different ways.

In one interpretation, the game is a multiplayer Prisoners' Dilemma.[168] In any given case, considered as a one-time interaction, each judge's dominant strategy is to defect from following precedent no matter what other judges do. Because the game is repeated, however, things are not so bleak; cooperation among the judges can be an equilibrium, depending upon how much the judges discount the future, whether cooperation can be clearly identified, and whether various strategies of reciprocation and punishment (such as "tit-for-tat") are feasible in the given environment.[169] Here the threat of *retaliatory judicial activism* might sustain precedent-following as a cooperative equilibrium. Yet a breakdown of cooperation can also be an equilibrium, and if that occurs, it is not obvious why the Burkean judge should cooperate unilaterally. Doing so imposes individual costs for no social benefits.

In a different interpretation, the game of precedent-following is not a Prisoners' Dilemma but a game of coordination, such as an Assurance Game.[170] Each judge's first choice is to cooperate by sincerely following Burkean practices of respect for precedent, because universal cooperation will be best for all. However, no judge is assured of what the other judges will do, and no judge wants to be a chump who plays the cooperative move unilaterally while others defect. If coordination fails, the result may be a cadre of Burkean judges who, against their inclinations, show little regard for precedent. Suppose that Burkean judges, who afford great weight to precedent, respect the decisions of "activist" judges, here defined as judges who afford little weight to precedent; suppose also that activist judges do not respect the decisions of Burkean judges. Over time, legal change will systematically tend to come from activist rather than Burkean judges and will tend to occur in large leaps rather than in incremental, epistemically humble steps. Anticipating this, even the Burkean judges may afford little weight to precedent, and all judges will appear activist.

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168 *See* Erin O'Hara, *Social Constraint or Implicit Collusion?: Toward a Game Theoretic Analysis of Stare Decisis*, 24 SETON HALL L. REV. 736, 748–53 (1993).

169 *See* Posner, Spier & Vermeule, *supra* note 81, at 10–11.

170 This distinction is slightly inaccurate. Although a one-shot Prisoners' Dilemma has no coordination element — each player has a dominant strategy — a repeated version of the game makes coordination important. *See* O'Hara, *supra* note 168, at 751–53. The difference is that games such as Assurance have coordination built into their very structure. *See* Richard H. McAdams, *Beyond the Prisoners' Dilemma: Coordination, Game Theory, and Law*, 82 S. CAL. L. REV. 209, 220–22 (2009).

Let me now turn to the second level, at which judges disagree about the best theory of precedent itself. Some judges believe that precedents should never be overruled; some that precedents may be overruled if and only if there is clear error; and some that both clear error and a special justification, such as an intervening change in legal or factual circumstances, is required. The situation may be interpreted as a mixed game of coordination and distribution — a Battle of the Sexes — in which each judge would prefer that the whole court or judiciary coordinate on some theory of precedent or other, yet each also wants the judiciary to coordinate on her preferred theory.[171] In such cases, it is possible that the group will be unable, over time, to coordinate on any stable regime, because players hold out for the regime they favor.[172]

The following sequence illustrates this possible instability, over time, in the theory of precedent. In Period 1, a given theory of precedent prevails in the legal system — say, a theory requiring special justification to overturn precedent, so that mere error is not enough. Call this the Burkean theory of precedent. In Period 2, a sufficient majority of the judges uses a different, less demanding non-Burkean theory to overturn precedents decided during Period 1. We will stipulate that such precedents could not have been overturned according to the Period 1 Burkean theory. In Period 3, Burkean judges once again form a majority. According to their theory of precedent, may the Period 2 precedents be overruled? One answer is yes, because those precedents themselves rested on a mistaken theory of precedent. Another answer is no, because mere mistake is not a sufficient basis for overruling.

The Burkean judges face a dilemma: they must either apply their own theory of precedent retroactively, thereby increasing the instability of the legal system through overrulings of past nonconforming decisions, or else apply their own theory of precedent strictly prospectively, thereby confirming the validity of past decisions that support a different theory. Although the first best, for Burkeans, would have occurred if all judges had adopted the Burkean theory of precedent ab initio and consistently followed it over time, that possibility has been ruled out by the disagreements of other judges, and Burkeans are constrained to choose between two distinctly second-best options. The dilemma is exemplified by the position of judges who believe that the post-1937 Roosevelt Court cavalierly discarded settled constitutional rules, and who must in turn decide whether to discard the settled con-

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171 *See* McAdams, *supra* note 170, at 222–23; Strauss, *supra* note 167, at 1733–35. For hybrid games in which the Battle of the Sexes is embedded within an iterated Prisoners' Dilemma, see McAdams, *supra* note 170, at 226–30. Such refinements, while important, are not necessary for the points I attempt to make here.

172 *See* JAMES D. MORROW, GAME THEORY FOR POLITICAL SCIENTISTS 95 (1994).

stitutional rules generated by the Roosevelt Court. Another example is the position of judges who believe that the Warren Court cavalierly changed constitutional rules of criminal procedure and due process, and who must decide whether to discard those precedents in turn.

(c) Thayerians in a Non-Thayerian World. — A Thayerian judge, let us say, is a judge who upholds legislation against constitutional challenge whenever the legislation is premised on a reasonable understanding of the Constitution.[173] Consider the problems facing Thayerian judges in a largely non-Thayerian world.[174] In particular, imagine a constitutional order whose history is much like our own. In this constitutional order, most judges have not been Thayerian most of the time, at least not for many decades, and at least not globally. Locally, there are pockets of constitutional law in which the Court defers to any reasonable congressional enactment — the judges call this "social and economic legislation" — and there have been brief periods in which a majority of the Court was globally Thayerian. However, Thayerism has little or no purchase in the domain of "individual rights" and a distinctly mixed record in the domain of "structural" problems such as federalism and the separation of powers.

In this world, it is hardly obvious that the judge who would be Thayerian if other current judges were Thayerian, and if past judges had been Thayerian, would want to be Thayerian in the circumstances she actually faces. Two problems are especially serious: the irreversible effects of non-Thayerian action by judges in the past, and the distorting effects of partial or local Thayerism in the present.

(i) Irreversible Effects. — Thayerism is premised on a dynamic account of legislative capacities to interpret the Constitution in a responsible fashion. On this account, vigorous judicial review creates a "judicial overhang" or moral hazard effect: anticipating that the judges will catch their constitutional mistakes, legislators will make more mistakes.[175] Conversely, Thayerian judicial review will encourage legislators, who are aware that constitutional buck-passing is impossible, to be constitutionally responsible.

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[173] Within this broad rubric, there are different ways of specifying Thayerism. Some Thayerian judges may hold that a reasonable reading of constitutional text is required; some may hold that a reasonable account of original understandings, or of precedent, is required. Some especially capacious Thayerians may hold that the legislation should be upheld so long as it can reasonably be justified in terms of *any* of the standard sources of constitutional law. These distinctions, however, are not material to the second-best problems facing Thayerians, which are the same however the approach is specified.

[174] In previous work, I failed to take adequate account of this problem for Thayerians. See, for example, the brief and unsatisfactory remarks in VERMEULE, *supra* note 133, at 263–64. For suggestions that the Court should eliminate judicial review only prospectively and that unilateral disarmament is a bad idea, see TUSHNET, *supra* note 141, at 175.

[175] TUSHNET, *supra* note 141, at 57–65.

The problem is that if constitutional adjudication has been largely non-Thayerian for a long time, legislators may, according to the Thayerian theory itself, have been conditioned to constitutional irresponsibility. If so, a switch to Thayerism might produce the worst of all possible worlds: deferential judges upholding constitutionally irresponsible statutes. In the strongest form of this scenario, a constitutional culture and a set of legislative institutions have grown up that are systematically and permanently incapable of taking the Constitution seriously, and the courts lack the capacity to dispel that culture or reform those institutions. In a weaker form, a return to Thayerism would have beneficial dynamic effects in the long run, but the *interim* costs of legislatures' constitutional irresponsibility in the short run would be so great that they would dwarf the social gains from moving to Thayerism. Non-Thayerism might then amount to a sticky local maximum, analogous to the problem that arises when the transition costs of switching to an intrinsically superior technology are greater than the benefits of the switch.[176]

In either case, it may be true both that (1) Thayerism would have been best if followed consistently by all judges ab initio and also that (2) Thayerism would produce the worst possible state of affairs if introduced into a non-Thayerian world. From the standpoint of a Thayerian judge in such a non-Thayerian world, then, the second best might be non-Thayerism. In an environment in which past judges were Thayerian and other current judges are Thayerian, this judge would happily concur, but the judge will not advocate a switch to Thayerism in a second-best world.

(ii) Partial Thayerism. — There is a synchronic version of the same problem, involving the choice among (1) global Thayerism across all areas of constitutional adjudication, (2) partial or local Thayerism applying to only some areas of constitutional adjudication, and (3) global non-Thayerism. For the Thayerian judge, (1) is clearly the top-ranked choice. Suppose, however, that the choices of other past and current judges place (1) off-limits. Whatever the nature of constitutional adjudication, it will not be globally Thayerian. What is the best second-best choice for the Thayerian judge? On the logic of the second best, it is not necessarily the case that (2) is better than (3), even though (3) has no Thayerism in it at all. The Thayerian alert to systemic effects might well prefer (3) to (2), assuming (1) is unavailable.

Suppose, for example, that the Thayerian judge believes that global Thayerism is best because it produces a maximum of overall welfare, taking into account the costs and benefits of all possible global inter-

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[176] For more on the problem of local maxima, see generally ELSTER, *supra* note 41, at 111, 248–49.

pretive approaches. As compared to global originalism, global textualism, and other approaches, the Thayerian believes that Thayerism produces the best sum of decision costs, error costs, and costs of legal uncertainty. Now let us stipulate that in some domain — perhaps "individual rights" — other judges are resolutely non-Thayerian. Adhering to Thayerism only in domains other than individual rights will now produce additional systemic costs that can, in principle, tip the balance in favor of global non-Thayerism.

These systemic costs arise from the distortions created by differential standards of review in different areas of constitutional law. At the margin, legislatures that incur costs if their statutes are invalidated will have an incentive to pursue their policy goals by regulating "social and economic" matters, rather than through direct regulation of "individual rights," even if the latter course of action would be best overall. Moreover, there will be increased costs of litigation and legal uncertainty in cases where statutes can plausibly be described in either fashion. If these costs are sufficiently large, the Thayerian judge might think it better to give global heightened scrutiny to all statutes than to give deferential scrutiny only to some subset of statutes, even if universal deference would be best of all.

(d) Minimalists in a Maximalist World. — Similar problems face the minimalist judge, who thinks it best for the Court to issue narrow and shallow decisions — decisions that (1) do not decide a great deal and (2) rest on "incompletely theorized agreements"[177] among judges with different views. If other judges are not minimalist, then the minimalist judge may have to become a maximalist in self-defense. Even if the minimalist judge is motivated strictly by systemic considerations and cares only about contributing to a collective Court that produces the best results overall, the same result can follow.

The basic rationales for global minimalism are that it diminishes the risks and costs of making large, irreversible errors, because the minimalist Court takes only small and reversible steps in any given direction; that it leaves room for democratic or legislative responses to judicial decisions; and that it enables agreement on particulars among judges who disagree on fundamentals.[178] Suppose, however, that a majority of the Court will issue wide and deep decisions, not narrow and shallow ones, and the Court's minimalists are in the minority. In such a world, minimalism at the level of individual judges lacks the effects that are supposed to justify global minimalism by all judges. The Court as a whole will take sides on fundamentals and will take

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[177] Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).
[178] CASS R. SUNSTEIN, RADICALS IN ROBES 27–30 (2005).

large steps, creating risks of important and irreversible errors; the minimalist judge will not be able to stop it from doing so.

In such circumstances, the minimalist judge might do best to give up minimalism and instead attempt to ensure that the large steps the Court will take are, at least, steps in the right direction, whatever that is. The minimalist judge on a majority-maximalist Court, therefore, faces a standard dilemma for reformers, who must choose between protesting the system from the outside and working for improvements from within. In the case of the minimalist judge, the choice is between dissenting in the hopes of influencing future judges to become minimalists or else working to influence the direction in which the majority coalition goes, even if the steps the majority coalition takes and the rationales it advances are larger and more heavily theorized than the minimalist would prefer.

(e) Originalists in a Nonoriginalist World. — In recent years, several theorists have attempted to give originalist constitutional adjudication a new justification in terms of consequences.[179] In this burgeoning body of work, the argument is that originalist adjudication has beneficial effects for the legal system as a whole. Usually, this argument takes a rule-consequentialist form rather than an act-consequentialist one: "Given a sufficiently good constitutional text, originalists maintain that better results will be reached overall if government officials — including judges — must stick to the original meaning rather than empowering them to trump that meaning with one that they prefer."[180]

Why do rule-consequentialist originalists believe that originalism, as opposed to other modes of adjudication, produces the greatest net benefit overall? Several answers are possible. First, originalism might minimize judicial discretion, and this might in turn reduce legal uncertainty or produce other systemic benefits. This seems unlikely, however, compared to other approaches. Thayerism, or even deciding cases by a coin flip, would reduce judicial discretion more than would

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[179] The issue is slightly complicated by the distinction between interpretation and adjudication. Some originalists believe that this distinction is coherent and that originalism is the only valid form of interpretation, whereas originalism as a method of adjudication must be justified by reference to its consequences. *See, e.g.*, Gary Lawson, Response, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823, 1823–24 (1997). Other originalists do not seem to draw such a distinction, saying generally that originalism has pragmatic benefits. *See, e.g.*, John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 31 HARV. J.L. & PUB. POL'Y 917 (2008). I will confine my remarks to originalist adjudication and so will ignore the issue here.

[180] Posting of Randy Barnett to Legal Affairs Debate Club, http://legalaffairs.org/webexclusive/debateclub_cie0505.msp (May 3, 2005, 13:43), *quoted in* Cass R. Sunstein, *Of Snakes and Butterflies: A Reply*, 106 COLUM. L. REV. 2234, 2236 & n.8 (2006).

originalism, which requires the exercise of thick judgment about the import and weight of originalist sources.[181]

Second, originalism has been justified on the consequentialist ground that it promotes democracy, but again this seems suspect.[182] Originalism counsels that judges invalidate the current products of majoritarian lawmaking if the original understanding so requires, which in turn creates the notorious problem of the "dead hand." To be sure, democracy need not entail rule by contemporary majorities, but it requires theoretical epicycles to depict control of current majorities by long-dead generations as the summa of democracy.[183]

Given the infirmity of these answers, originalists have recently turned to a third argument: originalism produces good consequences because the original Constitution was a good one.[184] The original Constitution emerged from supermajoritarian procedures that tend, on average, to produce better constitutional law than do the majoritarian procedures used by current democratic legislatures. Following the original Constitution, where it conflicts with current democratic lawmaking, is thus beneficial on average.[185]

(i) Problems with Originalism. — I will suggest that this argument rests on a fallacy of division. Even if it would be best, in the rule-consequentialist sense, for all judges to be originalist, it is not best for only some judges to be originalist in a partially nonoriginalist world. The consequentialist argument for originalism fails because most judges most of the time have not been originalist, with episodic exceptions, a fact that originalists explicitly lament.[186] Whatever the consequentialist credentials of originalism ab initio, introducing originalism into a largely nonoriginalist system founders on problems of the second best.

Because most judges have not been originalist, the current originalist judge lives in a world of constitutional law shaped, in large part, by nonoriginalist judges. *Universal first-best originalism* is unattainable; there are at least some nonoriginalist decisions of the past that are too costly to undo. In this second-best world, past departures from the original understanding by nonoriginalist judges constrain what originalist judges can do today, and this means, according to the usual

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181 *See* Jonathan R. Macey, *Originalism as an "Ism,"* 19 HARV. J.L. & PUB. POL'Y 301, 303–04 (1996).

182 *See* John O. McGinnis & Michael B. Rappaport, *The Desirable Constitution and the Case for Originalism* 7–18 (Nw. Univ. Sch. of Law Pub. Law & Legal Theory Working Paper Series, Research Paper No. 08-05, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1109247.

183 *See generally* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).

184 McGinnis & Rappaport, *supra* note 179, at 924–28.

185 *Id.*

186 *See generally* ROBERT H. BORK, THE TEMPTING OF AMERICA (1990).

logic of the second best, that unless the originalist understanding of the Constitution is fulfilled in every case, the best consequences might well be obtained by departing from originalism on other margins as well. Given that a constitution is like the proverbial ship at sea that is constantly altered and rebuilt, implementing merely part of the original blueprint could have disastrous consequences in light of intervening alterations to other parts of the structure.[187]

To pursue an example mentioned above, a view with strong support from some originalists is that the Constitution of 1789 prohibited delegations (or "excessive" delegations) to the President and also prohibited the legislative veto. If originalism had been consistently followed ab initio, constitutional law would contain both prohibitions. Given that nonoriginalist judges have allowed massive delegations, however, invalidating the legislative veto on originalist grounds removes one of the few remaining shackles on the executive and thus produces the worst possible outcome. The second-best approach would be a form of nonoriginalist adjudication that permits a "translation" of original constitutional purposes,[188] or a compensating adjustment to the constitutional structure, by upholding the legislative veto.

(ii) Originalist Responses. — I will examine several lines of originalist response to this critique. In the most familiar response, stemming from Justice Scalia, originalists acknowledge that universal first-best originalism is unattainable, saying that they are "faint-hearted"[189] and will respect settled nonoriginalist precedents. The idea seems to be that precedent merely acts as a side-constraint on the outcomes that originalism would otherwise indicate, and leaves the originalist free to pursue those outcomes where precedent is not on point. This fallback view, however, is precisely what the general theory of second best makes problematic, at least if originalism is justified by reference to its consequences. The combination of the results that are untouchable with the originalist results that are still permissible may well have worse consequences than would a package containing *no* originalist results at all.[190]

Justice Scalia's view accepts that there are some nonoriginalist decisions that are too costly to undo, although it underestimates the severity of the problem. Alternatively, consequentialist originalists might deny that there are any nonoriginalist decisions that are too costly to

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187 Larry Kramer, *Two (More) Problems with Originalism*, 31 HARV. J.L. & PUB. POL'Y 907, 915 (2008); *see also* Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1182–88 (1993).

188 Lessig, *supra* note 187, at 1189–92.

189 Scalia, *supra* note 61, at 864.

190 This point is overlooked by John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803 (2009).

undo, in which case there would be no precedential constraints to trigger the general theory of second best. In one version of this view — which I am not sure anyone actually holds — originalist judges should simply reverse nonoriginalist precedents though the heavens fall. However, the resulting backlash would ensure that the only fall would be that of the judges who behaved so senselessly, and of the theory that drove them to do so. The final result would be, not universal first-best originalism, but a repudiation of originalism altogether — a consequence that originalists who justify originalism by reference to its consequences could hardly welcome.

In a more plausible version, originalism itself can build in scope for respecting precedents that (1) supply reasonable "liquidating" constructions of provisions whose original meanings are intrinsically general or ambiguous, (2) have generated reliance by identifiable individuals, or (3) provide epistemic aid in determining original meaning.[191] In this version, the reason that there are no nonoriginalist decisions that are too costly to undo is not that every decision can be undone, but that any decision that is too costly to undo can be squared with originalism by fitting it into one of the categories of permissible precedent.[192]

I believe that this version of consequentialist originalism fails, however. I am not sure whether all of these categories are consistent with the consequentialist theory that is supposed to underwrite adherence to originalism in the first place, but even if they are, the problem is that they threaten to encompass either too little or too much. They encompass too little if they do not square originalism with major examples of irreversible nonoriginalist precedent, such as the decisions creating the administrative state, and too much if they allow any nonoriginalist precedents to be squared with the theory and thus draw originalism's fangs altogether.

As the second risk is self-explanatory, let me illustrate the first. Let us suppose that an originalist decision like *Myers v. United States*[193] correctly identified the original meaning of the Article II Vesting Clause and of the Take Care Clause, and thus held correctly that it is unconstitutional to make executive officials partially independent of the President by making them removable only for cause.[194] Later decisions like *Humphrey's Executor v. United States*,[195] which uncere-

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191 *See* Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 263–69 (2005). I have compressed two of Barnett's categories — "construction" and "liquidation" — into one, because they largely overlap.

192 *See id.* at 269–70 (arguing that this version of originalism leaves much room for the doctrine of precedent).

193 272 U.S. 52 (1926).

194 *See id.* at 176.

195 295 U.S. 602 (1935).

moniously discarded *Myers*' elaborate analysis,[196] do not fall into the category of "liquidating" precedent, because they overruled the earlier originalist precedent that did the liquidating, and do not even purport to supply an epistemically useful originalist construction of the relevant provisions. Assuming that the independence of the independent agencies is a fixed feature of our institutional landscape, such cases cannot be squared with even a capacious version of originalism. They remain as irreversible nonoriginalist precedents that rule universal first-best originalism off the table, and thus trigger the problem of the second best.

3. Strategic Legalism. — I am now in a position to generalize these examples, to state the basic idea of strategic legalism, and to say something about the conditions under which strategic legalism makes sense. The idea of strategic legalism is neither descriptive — at the level of the Supreme Court, it turns out that the Justices frequently ignore strategic considerations[197] — nor unconditionally normative. Rather, it is conditional and prescriptive: even judges who decide strictly according to law must consider the possibility that the best attainable legal outcomes, by their own lights, will occur if they vote differently than they would if other judges agreed with their views.

(a) Types of Judges. — To define the issues more clearly, I will identify four ideal types of judges, who take different stances toward legal norms. The types are defined by their positions on two different axes: whether the judge is attitudinal or legalist, and whether the judge is strategic or nonstrategic.[198] Needless to say, real-world judges will not perfectly match any of the ideal types.

The first type of judge is *attitudinal but nonstrategic*.[199] This judge votes for her first-order policy preference in every case. If she is for gun control, then she votes to uphold gun control statutes, and vice

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[196] *Id.* at 626 (limiting *Myers* to very narrow factual circumstances despite the *Myers* Court's extensive historical and legislative analysis).

[197] According to a recent review of the evidence, "it is a mistake to characterize the [J]ustices on the Court as strategic actors, who take advantage of their strategic positions to achieve their legal or policy goals. Strategic behavior occurs on the Court, but it takes place much less often than the strategic scholars claim." SAUL BRENNER & JOSEPH M. WHITMEYER, STRATEGY ON THE UNITED STATES SUPREME COURT 165 (2009).

[198] For a clear recognition that these two axes are distinct, see LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES 6–8 (2006). "[I]n most strategic models that are applied to federal courts, judges act solely on the goal of achieving good policy," *id.* at 6, but as Baum points out, there is no logical connection between assuming that judges are strategic and assuming that they are attitudinal, in the sense of policy-oriented, rather than legalist, *see id.* at 7–8. Another standard formulation in the literature is that judges are "single-minded seekers of *legal policy*." Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323, 325 (1992) (emphasis added). However, this formulation is intrinsically ambiguous.

[199] *See generally* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 86–97 (2002).

versa if she opposes gun control. The attitudinal judge has no commitment to legalism at all, although for various reasons she may talk as though she does and may even believe that she does; it may be a case of self-deception or quasi-conscious bad faith rather than of deliberate deception of others.

The second type of judge is both *attitudinal and strategic*.[200] This type of judge votes so as to maximize the satisfaction of her first-order preferences in light of the anticipated reactions of colleagues and of other institutions. Such judges are alert to the threat of reversals, legislative overrides, and other instruments of backlash. The consequence is that the attitudinal and strategic judge will always vote so as to move final outcomes as close as possible to her ideal policy point, but will sometimes vote in a manner that departs from her ideal policy point in a given case.

The third type of judge is *legalist and nonstrategic*: she votes, in every case, in accordance with a legal theory about how constitutional or statutory provisions should be interpreted. The judge can be identified with an "ism"; she adheres to textualism, originalism, common law constitutionalism, or some other theory. Real judges are usually catholic about legal sources; most textualists will consider legislative history for some purposes or under some circumstances, and most originalists will give some weight to precedent. However, because different judges attach different weights to the different legal sources, judges can be described as more or less textualist if they weight text especially heavily, as originalist if they weight the original understanding especially heavily, and so forth.

The fourth type of judge is a *strategic legalist*.[201] Both halves of the description are important. The strategic legalist judge cares only about ensuring the right legal results, as dictated by whatever legal theory she happens to hold. In this sense, she is not at all like the strategic but attitudinal judge, who takes account of the anticipated reactions of colleagues and other institutions strictly in order to maximize the satisfaction of her first-order policy preferences. Yet in contrast to the legalist nonstrategic judge, the strategic legalist does not simply

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[200] *See generally* LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 9–18 (1998).

[201] There is only a small body of work that models judges as strategic maximizers of their legal views. *See, e.g.*, John A. Ferejohn & Barry R. Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT'L REV. L. & ECON. 263, 268 (1992) (using the phrase "politically sophisticated honest agent" to describe strategic legalism as one of three models of judicial interpretation). For a hybrid argument that strategic judges advance their views of both good law and good policy, see Pablo T. Spiller & Emerson H. Tiller, *Invitations to Override: Congressional Reversals of Supreme Court Decisions*, 16 INT'L REV. L. & ECON. 503, 504 (1996). Both articles, however, focus on the interaction between the Court and Congress, whereas I am focusing on the interactions among judges.

vote in every given case in the way that her legal theory would dictate. Rather, she votes so as to move the law as close as possible to the outcomes her legal theory would dictate, in light of what other judges and institutions will do.

As the examples given earlier are intended to illustrate, the logic of division implies that under second-best conditions, strategic behavior by the legalist judge can produce better results than nonstrategic behavior, according to the judge's own legalist premises. The legalist nonstrategic judge, who ignores the behavior of others, implicitly votes in the way that would be best, according to her theory, if all other judges and other constitutional actors agreed. In a nonideal world, however, the approach that would be best if all other judges follow suit will not necessarily or even usually be best if other judges behave differently. It may in fact turn out to be best, under special conditions I will discuss below, but it cannot simply be *assumed* to be so.

By "best," I mean best according to the legalist judge's own lights, whatever they are. Even the judge who is committed to an account of what would make law the best it can be does not necessarily do best, as judged by that very account, by voting in every case in the way that would make law best if other judges were to agree. Because other judges will often not agree, the legalist judge may do best, according to her own theory, by voting differently than she would if all other judges were certain to vote likewise. What the legalist nonstrategic judge sorely needs, and lacks, is a nonideal theory of legal interpretation — a second-best approach to constitutional and statutory cases.

(b) Evangelism, Judicial Capacities, and Second-Best Naïveté. — The second-best approach that makes strategic legalism a live possibility is, by its nature, incapable of showing that strategic legalism is always superior under nonideal conditions. All it can show is that voting as would be best if other judges voted likewise need not be best under nonideal conditions. Are there particular nonideal conditions under which it would in fact be best for an individual judge to vote as she would in an ideal world?

I will explore two such conditions, respectively involving *evangelism*[202] and *limited judicial capacities*. In the first, the individual judge hopes that by ignoring second-best considerations and resolutely behaving as though the ideal world is present or close at hand, she will set a shining example that will eventually persuade other judges to convert to her preferred first-best theory. As such, evangelism can be understood as a sophisticated form of strategic naïveté: the evangelist's very disregard for the consequences of her behavior in our fallen world so impresses the audience that it produces the very consequences for

[202] Thanks to Daryl Levinson for suggesting this term.

which the evangelist hopes. Justice Thomas's opinions, which resolutely reject constitutional precedent in favor of a return to the revealed (original) meaning of the Constitution, often have this flavor.[203]

Of the many paradoxes that afflict this approach, I will limit myself to one that is relevant to my theme: evangelists rarely take into account the systemic effects that can arise if *other* judges adopt the same strategy. A bench of evangelists offering different gospels, far from effecting a mass conversion to any single evangelist's creed, might simply further entrench each judge's beliefs, producing a vicious cycle of greater division and more intense evangelism. Moreover, in the eyes of the uncommitted audience, the very multiplicity of evangelists cancels out the force of each. Decades of judicial proselytizing, in favor of various approaches, have not produced a mass conversion to any one approach, perhaps because the proselytizers offset one another.

I now turn to the second condition. Here the basic idea is that because of limits on judicial capacities, including epistemic capacities, judges might commit more mistakes and more serious mistakes — as determined by their own lights — by attempting to behave strategically than by woodenly behaving as they would in an ideal world. On this rule-consequentialist approach, judges would deliberately behave as though they were oblivious to problems of second best, because the uncertainty of the strategic environment creates intolerable epistemic burdens. Among the sources of uncertainty is the intrinsic indeterminacy of strategic interaction with other judges, given the chronic possibility of multiple equilibria in games with a coordination component.[204] Calculating that they have only uncertain prospects of advancing their legalist positions through strategic behavior in this kind of inherently indeterminate environment, judges decide that the most straightforward path is to ignore the strategic nature of the environment altogether.[205] Here too, judges would display a kind of second-order strategic naïveté that mimics the theoretical unsophistication of the idealist judge, who simply assumes that all others will see the world as he does.

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[203] *See, e.g.*, Gonzales v. Raich, 545 U.S. 1, 58 (2005) (Thomas, J., dissenting) (rejecting the Court's understanding of the Commerce Clause in favor of an understanding based on the "text, structure, and history" of the clause); Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 487 (2001) (Thomas, J., concurring) (questioning the Court's reliance on the intelligible principle doctrine in delegation jurisprudence).

[204] *See* McAdams, *supra* note 170, at 212–13.

[205] Jon Elster quotes a dictum of Montaigne's: "In the state of indecision and perplexity brought upon us by our inability to see what is most advantageous and to choose it . . . , since we doubt which is the shorter road, we should keep going straight ahead." Jon Elster, *Mimicking Impartiality*, *in* JUSTICE AND DEMOCRACY 112, 113 (Keith Dowding, Robert E. Goodin & Carole Pateman eds., 2004) (quoting MICHEL DE MONTAIGNE, THE COMPLETE ESSAYS 144 (M.A. Screech trans., Penguin Books 1991) (1580)).

Let me illustrate strategic naïveté — and its problems — by discussing the possibility of *second-best originalism*.[206] As we have seen, consequentialist originalists cannot argue for the benefits of originalism by imagining a world in which originalism triumphs ab initio and prevails consistently over time, for that world is not our own. It remains theoretically possible, however, that even in an irreversibly second-best world (from the originalist standpoint), naïve originalism would produce greater net benefits than any interpretive approach that licensed judges to make or uphold compensating adjustments to the constitutional structure, such as the legislative veto. The argument would have to be that judges are ill-suited to identify valid compensating adjustments, so that the mistakes they make would have even more harmful consequences than would failure to adjust the constitutional rules to take account of systemic interaction between the originalist and nonoriginalist components of those rules.

To make the argument concrete, imagine two possible worlds. In one, a regime with neither delegations nor the legislative veto is first best, a regime with both delegations and legislative vetoes is second best, and a regime with delegations and no legislative vetoes is third best. In this world, given delegations, judges should allow legislative vetoes as a compensating adjustment. In a different possible world, the second-ranked and third-ranked regimes are reversed, so that a regime with delegations and no legislative vetoes produces greater net benefits than a regime with both delegations and legislative vetoes. Judges in this second world who erroneously believe they inhabit the first world will uphold the legislative veto, hoping to make a compensating adjustment that produces net benefits, but their action actually makes things worse. If this sort of mistake is sufficiently frequent and costly across the run of constitutional problems, then an interpretive approach that licenses judges to make compensating adjustments may actually be inferior overall to an approach that requires judges to behave *as though* they were naïve first-best originalists, oblivious to the second-best problems.[207] In general, this sort of rule-consequentialist argument illustrates a large question of institutional competence:

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[206] I mean this in a different sense than the form of second-best originalism attributed to Justice Scalia in section I.C.2, p. 22. Justice Scalia's view of originalism as "the librarian who talks too softly" works, if it works at all, only if followed by all judges ab initio, whereas the version of second-best originalism considered in the text attempts to address the problems created by nonoriginalist decisions in the past.

[207] For a somewhat similar argument that common law adjudication should ignore problems of the second best, see Ulen, *supra* note 39, at 217. However, because it is addressed to a different institutional setting, I believe that Ulen's argument is much stronger than the constitutional version of the argument I mention in the text.

which constitutional actors, if any, should be licensed to make compensating adjustments, in light of the general theory of second best?[208]

Whatever its ultimate merits, which I need not examine here, the rule-consequentialist argument for second-best originalism offers a very different type of justification than originalists have offered to date. The strategically naïve judge who decides to ignore second-best problems, on grounds of limited judicial competence and epistemic capacities, casts her vote on very different grounds than does the genuinely naïve judge who is simply oblivious to the second-best problems, even if the two judges' observed behavior is identical.

Finally, let us be clear that problems of division affect the strategically naïve judge no less than others. Even if, for example, it would be best for *all* judges to be rule-consequentialist originalists who are sufficiently sophisticated to mimic naïve first-best originalists, it need not be best for any *given* judge to act that way, if other judges disagree. Suppose that (1) some judges are genuinely naïve originalists; (2) other judges, although alert to the second-best problems with originalism, choose on rule-consequentialist grounds to behave as though they are naïve originalists; and (3) yet other judges attempt to practice enlightened second-best originalism or translation by making compensating adjustments to the constitutional structure. The overall result of the interaction between these three camps may be uncoordinated, incoherent, contested, or intermittent adjustments — plausibly the worst possible outcome for judges of all three types.

B. Composition and the Legal Chameleon

I now turn to adjudication and the fallacy of composition. As with division, the conceptual error that underlies the composition fallacy is a mistake about generalization. In the division case, the error is to infer that if some interpretive approach is desirable when adopted by the whole court or judiciary, it must also be desirable when adopted by an individual judge. In the composition case, the error is to infer that if some interpretive approach is desirable when adopted by an individual judge, it must also be desirable when adopted by the whole court or judiciary.

That inference fails if methodological diversity is a desirable property of courts or of the whole judiciary. In economic terms, individual judges adopt approaches at the margin, but not every judge can be at the margin. An interpretive approach might be best when adopted by the additional or marginal judge, but not best when adopted by all judges. Indeed, under conditions in which diversity of interpretive

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[208] For discussion of that question, and an earlier analysis of the issues in this paragraph, see Adrian Vermeule, *Hume's Second-Best Constitutionalism*, 70 U. CHI. L. REV. 421, 435–37 (2003).

method is a systemic good for the court or judiciary as a whole, the best judge might even be a kind of systemically minded legal chameleon, who would change her interpretive approach depending upon what mix of other judges is present on the court, until an equilibrium of optimal diversity is reached.

1. The Benefits and Costs of Methodological Diversity. — Although having a court composed of, for example, all textualists might be better or worse than having a court composed of all purposivists, it might be best of all to have a mixture of approaches.[209] Under what conditions might this be so? What exactly are the benefits, and costs, of methodological diversity in a judicial group?

(a) Epistemic Accuracy. — Let us begin with cases in which there is, by stipulation, a right answer to the legal question. (On some accounts, there is always a right answer, but I will remain agnostic about that claim.) As discussed in Parts I and II, cognitive diversity contributes to the epistemic accuracy of groups. It has been shown, remarkably, that adding group members of worse-than-random accuracy can actually improve group performance if the new members sufficiently reduce the correlation of errors across the group.[210] To the extent that diversity of interpretive method tracks or even produces cognitive diversity more generally, and thus reduces the correlation of errors across the group, then methodological diversity itself contributes to obtaining right answers.

But if there is disagreement about methods, what does it mean to say that the group is more likely to get the answers "correct"? By whose lights? Perhaps textualists believe the right answer just is the ordinary meaning of the text, while intentionalists believe the right answer just is the intention of the median legislator, and so forth. Then different judges will be asking different questions, in which case the logic of epistemic aggregation cannot apply.

Although doubtless true in some cases, this point overlooks a range of important cases in which methodological disagreement and first-order disagreement about right answers are fully compatible with meta-agreement on what would *count* as the right answer. In many cases, methodological disagreement really is about method — about what sources and tools judges should use to pursue their common goals. An important subspecies of textualist judge, for example, is the

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[209] I will confine the discussion to the benefits of methodological diversity within the highest court in a judicial hierarchy, such as the Supreme Court. It has been shown that in some circumstances ideological diversity at lower levels of the hierarchy can conserve on the costs of judicial administration, by allowing high-court judges to use the known ideology of lower-court judges as a screening device to reduce the number of decisions that must be reviewed on appeal. *See* Matt Spitzer & Eric Talley, *Judicial Auditing*, 29 J. LEGAL STUD. 649, 659–65 (2000).

[210] *See* Ladha, *supra* note 21, at 629. For an extensive treatment, see generally PAGE, *supra* note 21.

intentionalist who happens to think that the enacted text is the best or even exclusive evidence of intention. Here, both the intentionalist qua textualist and the all-out intentionalist are asking the same ultimate question — what are the legislators' intentions? — although they look to different sources to answer it.

(b) Preventing Polarization. — Like-minded judges share empirical assumptions and normative commitments that may be exaggerated by the presence of other like-minded judges.[211] As to issues that range along a single dimension (say, whether to give more or less weight to the rule of lenity), deliberating groups of like-minded judges may polarize in the direction of the predeliberation mean, and thus go to extremes.[212] Where the predeliberation mean is bimodal, so that opposing views are each well represented, this effect is suppressed.

Whether preventing polarization is a benefit depends upon whether going to extremes is generally bad, a point I will take up next. If it is bad, or in cases where it is bad, this point does useful work; it supplies psychological microfoundations for the idea that methodologically diverse groups will tend to avoid large mistakes in any direction.

(c) Moderation of Competing Approaches. — Diversity of interpretive approaches, methods, and perspectives will tend to moderate judicial approaches and outcomes. Suppose, for example, that interpretive formalism is not an on/off switch, but a continuum. We can well imagine that a group of textualist judges might always interpret statutes and constitutional provisions in a highly literalistic fashion; a group of purposivist judges might always interpret statutes and constitutional provisions in an extremely plastic, policy-sensitive fashion; and a group with diverse approaches might often follow the apparent meaning of legal texts but might occasionally tailor text to reasonable conceptions of original intentions or purposes.

Is this moderation good? Theorists strongly committed to one approach or the other might say that moderation is neither here nor there. If a moderate court gets the right outcome, as judged by the theorists' preferred approach, then moderation is good; otherwise it is not. Polarizing in the right direction is good; in the wrong direction, bad. But this point, unimpeachable from *within* the partisan perspective of any particular interpretive theory, is not helpful from the systemic standpoint. From that standpoint, the problem is how the overall court or judiciary should be arranged, given that many different camps of interpretive theorists each claims that *its* preferred approach is uniquely correct, and given that this disagreement over the correct

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[211] *See* CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 111–44 (2003). *See generally* CASS R. SUNSTEIN, GOING TO EXTREMES: HOW LIKE MINDS UNITE AND DIVIDE (2009).

[212] *See* SUNSTEIN, WHY SOCIETIES NEED DISSENT, *supra* note 211, at 112–14.

interpretive theory seems intractable, at least for the foreseeable future. Under these circumstances, moderation has much to recommend it. The systemically minded judge — or, as I shall add later, the systemically minded appointer of judges — who is uncertain which of the possible approaches is best might be wise to hedge the risks of wholesale adoption of one approach and wholesale rejection of its competitors. A methodologically diverse judiciary is, plausibly, the best way to minimize the risk that any particular approach will have bad consequences for the interpretive system.

In some cases, it is possible that moderation might actually increase the variance of outcomes. A bench composed solely of strict textualists, or of unsophisticated purposivists, might produce more predictable (even if more extreme) decisions than a bench featuring a mixture of interpretive approaches, just as a panel of extreme left-wing (or right-wing) judges might produce more predictable decisions than a mixed panel. Perhaps this is so, but perhaps it is not. For one thing, a bench of (say) all textualists might produce a set of decisions with equal variance, but now centered around a different, more extreme mean. Under genuine uncertainty about the direction and magnitude of effects of this sort, methodological diversity is the safest default position for the interpretive system.

(d) Legitimation for Multiple Audiences. — The audience for judicial decisions extends far beyond the litigants, or even other lawmaking institutions; it encompasses informed elites in the legal profession, the legal academy and universities generally, and the public. Different sectors of this audience have different convictions, often firmly held, about the proper approach to constitutional and statutory interpretation. The rulings of a methodologically diverse Court might appeal to a broader segment of this audience than the rulings of a methodologically homogenous one. An originalist Court might please originalists while dismaying nonoriginalists; a diverse Court might produce rulings that create a greater overall level of satisfaction, and enjoy wider acceptance.

2. Examples. — To make these suggestions more concrete, we may consider two perennial topics in American legal theory.

(a) Formalism and Functionalism in Separation of Powers Law. — The constitutional law bearing on separation of powers is famously riven by opposing methodological camps: so-called formalists and functionalists. Formalists argue for attention to text and original understanding, for rule-bound adjudication, and for clear lines of demarcation between the branches of the federal government,[213] except insofar as the branches have explicit constitutional authority to participate

[213] *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 697–734 (1988) (Scalia, J., dissenting).

in each other's activities; the President's veto power is an example. Functionalists argue for flexible adaptation of the separation of powers to the exigencies of modern government, for standard-based or balancing approaches to separation of powers adjudication, and for participation by each branch in the decisionmaking processes of other branches.[214] On this view, the separation of powers merely prohibits one branch from appropriating or intruding upon the "essential functions"[215] of other branches.

Plausibly, a Supreme Court composed of both separation of powers formalists and functionalists would do better than a bench composed solely of committed adherents of one or the other approach. That answer will seem incoherent to partisans of either view. After all, each side will say — agreeing on this although nothing else — whether the Court can be said to do well in any particular case depends on whether it has adopted the correct approach to separation of powers law.

From the systemic standpoint, however, diversity hedges the risks of large mistakes in either direction. A Court staffed solely by functionalists such as Justices Rehnquist and White would systematically undervalue the virtues of a rule-like approach to separation of powers adjudication: stability, predictability, and fidelity to text and original constitutional design. A bench of this sort might approve ill-considered improvisations, hasty institutional arrangements that tamper with the Constitution's deep structure. In hindsight *Morrison v. Olson*[216] looks like a case of just this sort; the independent counsel law was, on this view, a harmful solution to a nonexistent problem.

On the other hand, the extremes of formalism also look unattractive; a bench composed solely of separation of powers formalists might choke off valuable structural reform, producing excessive rigidity in the lawmaking system. Consider the line-item veto decision, *Clinton v. City of New York*,[217] which used strained formalist arguments to invalidate a bipartisan innovation that had been widely adopted in the states, and that was precious hard to distinguish from ordinary delegations of impoundment authority to the President.[218] Indeed *Clinton v. City of New York* was formalist in another, pejorative sense as well: the opinion concealed the majority's real concern, a nondelegation concern about transfers of excessively open-ended authority to the

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[214] *See, e.g.*, INS v. Chadha, 462 U.S. 919, 967–1003 (1983) (White, J., dissenting).
[215] United States v. Nixon, 418 U.S. 683, 707 (1974).
[216] 487 U.S. 654.
[217] 524 U.S. 417 (1998).
[218] *See id.* at 466–69 (Scalia, J., concurring in part and dissenting in part).

President, behind a dogmatic reading of the relevant constitutional texts.[219]

These examples suggest that a well-functioning approach to the separation of powers would minimize the sum of two types of errors: harmful decisions by political actors to tamper with constitutional structure for short-term advantage or poorly deliberated ends, on the one hand, and judicial rejection of valuable institutional innovations, on the other. Formalist judges are especially alert to the first type of mistake, functionalist judges to the second. A bench composed of both formalists and functionalists might detect enough of both errors to minimize their sum, relative to a uniform bench of either stripe.

Under imaginable assumptions, this possibility would not hold. If, for example, the Court is composed of five formalists and four functionalists, and the formalists always unite to invalidate constitutional innovations by a 5–4 vote, and if invalidation is an all-or-nothing proposition, then the collective outcome will be no different from that of a uniformly formalist court. However, the assumptions behind this story are shaky. First, "formalism" and "functionalism" lie on a continuum,[220] so the marginal formalist (or functionalist) will likely be a methodological moderate who will occasionally swing to the other camp. Second, invalidation is not all-or-nothing, but can be of greater or lesser scope; the possibility of partial invalidation allows for moderate outcomes. Finally, if at least one Justice is a legal chameleon and occupies a swing position on this dimension, then the chameleon can prevent either faction from dominating the decisionmaking, ensuring that outcomes at the aggregate level of the whole Court will reflect methodological diversity.

In general, the details might be specified in several different ways, and outcomes at the level of the Court will be sensitive to the precise specification. But it is quite possible to think that a bench composed of Justices with diverse views about separation of powers law would produce better structural constitutional law than a court with uniform views in either direction. This claim is, however, possible only from a systemic standpoint; from the standpoint of methodological partisans, it is incoherent.

(b) Interpreting Statutes To Avoid Absurd Results. — Consider also the question whether and when judges ought to interpret statutes to avoid absurd results. Intentionalists and purposivists are particularly alert to cases in which statutory text is overinclusive or (more rarely) underinclusive with respect to plausible conceptions of legisla-

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[219] *See id.* at 476 (Breyer, J., dissenting).

[220] *See* Thomas O. Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430, 486 (1987).

tors' intentions or purposes. These interpreters propose that courts should have wide discretion to mold a statute to fit its underlying objectives and to avoid the bizarre or unjust consequences of literalism. Formalists and textualists, on the other hand, are alert to detect cases in which the judicial interpretation to avoid absurd results creates rather than avoids mistakes.[221] Formalists stumble over examples such as the Arkansas statute that inadvertently repealed the state's entire code of laws;[222] functionalists stumble over examples like the *Holy Trinity* case,[223] in which the Supreme Court invoked the absurd-results canon to exempt an English minister from a statute that prohibited contracting with an alien to perform labor or service of any kind in the United States.[224] A bench composed of both formalists and functionalists might do the best job of detecting and preventing both sorts of mistakes, thus minimizing their sum; a bench staffed solely by one camp or the other might do worse overall.

In a first-best world, the examples would show not that courts should be composed of methodologically diverse judges, but just that courts should avoid mistakes at either extreme. A court composed of a single judge — the limiting case of nondiversity — might, on this view, get all the cases right if the judge is sufficiently skilled at avoiding the mistakes that arise from either erroneous formalism or erroneous functionalism. The problem is that no actual judges, in the nonideal world of the judicial system, are capable of infallibly striking the optimum. Methodological diversity across a number of judges harnesses the partial and fallible commitments, expertise, and prejudices of different types of judges, alert to different types of mistakes to which interpretation is prone, and enlists them to produce the best overall results for the system as a whole.

3. The Legal Chameleon and the Appointments Process. — What makes a good judge? How should the good judge interpret statutes and the Constitution? These are stock questions of legal theory, but as stated they are ill-defined; no answer can be given. What makes a good judge, and what the good judge would do, depends upon what

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[221] *See* Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. REV. 1109, 1127–29 (2008); Frederick Schauer, *The Practice and Problems of Plain Meaning: A Response to Aleinikoff and Shaw*, 45 VAND. L. REV. 715, 729 (1992).

[222] *See* Cernauskas v. Fletcher, 201 S.W.2d 999, 1000 (Ark. 1947).

[223] Church of the Holy Trinity v. United States, 143 U.S. 457 (1892).

[224] *Id.* at 458–62. For an argument that *Holy Trinity* got the legislative intentions and purposes wrong, thus creating rather than avoiding a mistake, see Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of* Holy Trinity Church, 50 STAN. L. REV. 1833 (1998). For a contrasting view, see Carol Chomsky, *Unlocking the Mysteries of* Holy Trinity*: Spirit, Letter, and History in Statutory Interpretation*, 100 COLUM. L. REV. 901 (2000).

other judges there are and what those other judges do.[225] The qualities that it is desirable for judges to have, and the actions it is desirable for them to take, depend on the judicial and institutional environment in which they find themselves.

(a) The Psychology of the Legal Chameleon. — In particular, under circumstances in which systemic diversity is desirable, the systemically minded judge will be a legal chameleon, who changes her colors as the environment changes. The legal chameleon acts so as to diversify the court on which she sits by adopting whatever interpretive method is underrepresented at the margin. Rather than copying her environment in order to camouflage herself, she will adjust so as to contradict the dominant tendency in her environment, reducing the risk of groupthink. The legal chameleon, then, might more accurately be called a counter-chameleon. She is a contrarian, but only insofar as contrarianism is beneficial for the group.

The legal chameleon has a measure of critical distance even from her own legal theory, whatever that is. She appreciates that the partisans of this or that interpretive theory may all do best if all are present within the Court or judiciary but none dominates. This perspective seems incomprehensible to the principled partisans, who see the chameleon as having only derivative and tactical commitments rather than unconditional ones, and who do not think they can possibly be made better off by the presence of judges who deviate from (what they take to be) the "true" approach to understanding the Constitution. From the chameleon's standpoint, however, awareness of the limits of one's own knowledge suggests that the group should hedge the risk that any particular theory is erroneous. The best way to do so is to have an overall group of judges with diverse approaches.

One might think that not all judges can be legal chameleons; perhaps the property cannot fully generalize. If the legal chameleon adjusts her behavior in light of what other judges do, how can it be pos-

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[225] There are thus two distinct objections to Ronald Dworkin's mythical judge, Hercules. *See generally* DWORKIN, *supra* note 157. The first is that Hercules has superhuman epistemic capacities, whereas real appellate judges have epistemic limits. The second is that Hercules sits alone, whereas real appellate judges sit collegially. The second objection implies that what it is best for the judge to do is not a question that can be answered in isolation. Even a superhuman Hercules must operate in an environment where the behavior of other judges, not to mention other institutions, may affect what would otherwise be his best course of action.

As I have tried to show, the multimember character of the appellate court may, under certain conditions, magnify the epistemic competence of its members, by virtue of the Jury Theorem. In that case, the second objection would itself provide a partial cure for the first. Furthermore, the judges may calculate that the cognitive costs of strategic legalism are too high, resulting in a sophisticated second-best naïveté that causes them to mimic the behavior of a judge, like Hercules, who ignores what other judges do. In that case, the first objection would itself provide a partial cure for the second. Needless to say, however, these possibilities require an entirely different type of analysis than Dworkin provides; his framework makes the questions themselves invisible.

sible for all judges to do so simultaneously? On closer inspection, however, the difficulty is illusory. In principle, a full bench of legal chameleons could engage in a process of mutual adjustment, coordinating on an equilibrium that optimizes the methodological diversity of the Court as a whole. The bench of chameleons would spread out across the methodological space, with some behaving as textualists, some as intentionalists or originalists, some as Burkeans, and so forth.

This scenario is patently fantastic, and it points to the real problem with the legal chameleon: it is too psychologically demanding to be so relentlessly flexible and systemically minded. Interpretive approaches are deeply held jurisprudential commitments, which cannot be taken off or put on like clothing. We ought not expect or demand, for example, that a judge whose prior beliefs or commitments are formalist or textualist should try to adopt a functionalist or intentionalist approach in order to diversify the court on which the judge sits. In reality, although some judges may be legal chameleons, most will not.

But because the benefits of methodological diversity are systemic rather than individualized, they can be promoted at the systemic level. To the extent that methodological diversity is desirable, presidents ought to appoint nominees who are true believers in whichever approach will diversify, at the margin, the courts to which they are appointed. And under the same conditions, senators have a systemic obligation to cast confirmation votes with the benefits of methodological diversity in mind, rather than simply attempting to stock courts with a uniform cast of like-minded interpreters. Where this occurs, a diverse portfolio of methodological partisans will mimic, in second-best fashion, the results that a full bench of legal chameleons would produce.

(b) Judicial Homogeneity as a Second Best. — A second-best approach to legal interpretation and adjudication cannot show that the legal chameleon's approach is always superior, just that its superiority is always possible. Above, I have tried to state conditions under which that possibility will materialize. Under what conditions might homogeneity of interpretive approaches among the judiciary nonetheless be best? In the spirit of the second-best model of judicial bias counteracting legislative bias, discussed in section II.E, another possibility is that methodological homogeneity among the judges might be an indispensable counterweight to homogeneity among the nonjudicial branches.

Suppose that presidents and (a critical mass of) senators coordinate on a particular approach to constitutional interpretation, which they fervently believe to be correct. Then methodological homogeneity among the judiciary might be necessary to create a diversity of interpretive approaches in the system overall, although that diversity would hold across institutions rather than within the judiciary itself. For concreteness, suppose that presidents and senators uniformly favor nonoriginalist approaches to constitutional interpretation. Then the benefits of methodological diversity can be attained at the level of the

overall lawmaking system only if the judiciary itself adopts a homogeneously originalist approach, one that is negatively correlated with the approach favored by nonjudicial officials. If the judges are not already originalists, then — in this scenario — a bloc of originalists should be appointed.

This suggestion, however, faces insurmountable conceptual and empirical problems. Were its diagnosis true — in which case nonjudicial officials are committed to some particular approach, rather than to systemic diversity — its prescription for diversifying appointments would be infeasible, precisely because of the truth of the diagnosis. By hypothesis, the nonjudicial officials who appoint the judges will be unlikely to favor diversification away from an approach they think best. If presidents and senators reject originalism, it is self-defeating to urge them to appoint a solid bloc of originalists in the name of systemic diversity.

But the diagnosis does not ring true in any event. Even nonjudicial officials who take constitutional questions seriously do not typically coordinate on a particular approach to constitutional interpretation, for the simple reason that their major commitments and agendas, however public-spirited they may or may not be, are selected on grounds that are largely random with respect to the technical modalities of constitutional interpretation. In a world of eclectic and diverse views and commitments among nonjudicial officials, it is best for the judiciary to be methodologically diverse as well.

CONCLUSION

There are tricky relationships between aggregates and their members, between systems and their components. When these relationships are misunderstood, fallacies of division and of composition are the result. Legal theory is not exempt from these problems, which are ubiquitous in constitutional theory and public law generally. I have tried to show that the concept of system effects is an indispensable analytic tool, especially in constitutional theory, because constitutionalism is a system of systems that involves the interaction of individuals within institutions and the interaction of institutions within an overall constitutional order. Although under some conditions actors within systems may do best to ignore system effects, under other conditions actors will do best by taking into account that what is best for all may not be best for each, and that what is best for each may not be best for all. Legal analysts, for their part, cannot make sense of constitutionalism without understanding it in systemic terms.