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SYSTEM EFFECTS AND THE CONSTITUTION

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Foreword: System Effects and the Constitution

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Abstract: A system effect arises when the properties of an aggregate differ from the properties of its members, taken one by one. 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 democratic, taken one by one; (2) the fallacious assumption that if judges are politically biased, courts will 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 implies that the choices of legal actors are strategically interdependent: the best course of action for any given 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 others 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 is a second-best approach to constitutionalism and legal interpretation.

The judge who takes system effects into account may 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 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. Indeed, the systemically-minded judge may even be a legal chameleon 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. Although such a course of action is psychologically demanding, 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.

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Foreword: System Effects and the Constitution

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A system effect arises when the properties of an aggregate differ from the properties of its members, taken one by one.[†] Familiar examples include Condorcet's paradox, in which the members of a collective-choice group each have transitive preferences, yet group preferences are intransitive; the "doctrinal paradox," in which logically consistent individual judgments aggregate in such a way that the group's judgments are logically inconsistent; 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 locally, in particular contexts, they have a common analytic structure and can profitably be analyzed in global terms.

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 democratic, taken one by one; (2) the fallacious assumption that if judges are politically biased, courts will 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 as possible of the conditions, taken one by one. Rather, multiple failures of the ideal can offset one other, producing a closer approximation to the ideal at the level of the overall system. Although the idea is abstract, we will see that the problem is 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 others do not

[†] This definition is adapted, with major modifications, from Robert Jervis, SYSTEM EFFECTS: COMPLEXITY IN POLITICAL AND SOCIAL LIFE 6 (1997).

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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 nonoriginalist in a world where many or most others are not originalist. Likewise, the Thayerian judge, who would favor a regime of universal deference to legislatures, might decide that Thayerism is counterproductive if his 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 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. Although such a course of action is psychologically demanding, 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

Part I.A. defines and illustrates system effects, and also introduces two critical tools, the fallacies of composition and division. I.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. I.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

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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.[‡] Where a group votes on a binary choice under majority rule, 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.[§] 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:

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.”^{**} As stated, the description is

[‡] For formal renditions of these fallacies, with social-science applications, see JON ELSTER, *LOGIC AND SOCIETY: CONTRADICTIONS AND POSSIBLE WORLDS* 97-106 (1978). Philosophers of logic have identified several subcases, in which the fallacies can rest on either semantic, conceptual, or causal mistakes. See, e.g., William L. Rowe, *The Fallacy of Composition*, 71 *MIND* 87, 89-91 (1962); Elster, *supra*, at 98-103. For the most part, my examples fall into the latter two categories; in any event, the philosophical refinements are not material for my purposes.

[§] Alternatively, although I will not pursue the issue, the primitives of the system might themselves be propositions of fact, morality or law. In such cases, 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 Bauman & Tsvi Kahana eds., 2006)

^{**} Paraphrasing Adam Ferguson. *AN ESSAY ON THE HISTORY OF CIVIL SOCIETY* 119 (Fania Oz-Salzberger ed., Cambridge Univ. Press 1996) (1767).

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extremely general. The outcomes generated by the invisible hand may 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,^{††} 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 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 that "[a]s every individual . . . by directing that industry in such a manner as its produce may be of greatest value, he intends only his own gain, he is in this, as in many other cases, led by an invisible hand to promote and end which was no part of his intention By pursuing his own interest he frequently promotes that of society more effectively than when he really intends to promote it."^{‡‡} As we will see, Madison attempted to transpose this major theme of the Scottish Enlightenment to the arena of constitutional design.

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.^{§§} 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 their individual share to the collective good.^{***}

The standpoints of the group and of the wider society may diverge, so that what is a malign system-level outcome from the standpoint of the group is 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 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 and may be bad, indifferent or even positively desirable from the standpoint of social welfare.

Aggregation of preferences. The free-rider problem arises when decisions about how much to contribute to the collective interest are themselves taken individually, and are thus decentralized. One standard means for coping with the problems of collective

^{††} BERNARD MANDEVILLE, *A Search into the Nature of Society* in *THE FABLE OF THE BEES AND OTHER WRITINGS* 130, 138-39 (E.J. Hundert ed., Hackett Publishing Co. 1997) (1723).

^{‡‡} ADAM SMITH, *THE WEALTH OF NATIONS: BOOKS IV-V* 32 (Penguin 1999) (1776).

^{§§} See generally Mancur Olson, *THE LOGIC OF COLLECTIVE ACTION* (1960).

^{***} Russell Hardin, *The Free Rider Problem*, *Stanford Encyclopedia of Philosophy* (2003), <http://plato.stanford.edu/entries/free-rider/>.

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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 $C > A > B$. 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 although 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.

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 should prefer a certain option if every member of the group does so.^{†††} 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.

Aggregation of beliefs and judgments. Condorcet's paradox arises among voters with different preferences. However, system effects 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."

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.^{§§§} 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 96% of the electorate are blind partisans who ignore the quality of the candidates. Of the 96%, half are blind A-partisans

^{†††} MARQUIS DE CONDORCET, *Essay on the Application of Mathematics to the Theory of Decision-Making* in CONDORCET: SELECTED WRITINGS 33, 52-54 (Keith Michael Baker ed., Bobbs-Merrill Co. 1976)

^{†††} Kenneth J. Arrow, SOCIAL CHOICE AND INDIVIDUAL VALUES 24-31, 51-59 (Yale Univ. Press 1963) (1951)

^{§§§} See Philip E. Converse, *Popular Representation and the Distribution of Information*, in INFORMATION AND DEMOCRATIC PROCESS 369, 381-82 (James Kuklinski and John Ferejohn eds., 1990).

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who will vote for A no matter what, and half are blind B-partisans who will vote for B no matter what. Fortunately, however, 4% 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 100% probability. Candidate A wins by a vote of 52-48. The electorate as a whole is certain to pick the better candidate even though 96% of voters are maximally biased, because the biases of the 96% offset one other.

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 will tend to converge. Suppose that the 96% 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, 48% to 48%. When the convergence is sufficiently close, exactly the same result holds as in the case of the biased voters, and the miracle goes through.

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 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 towards certainty. 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.^{††††}

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. In either case, it is fallacious to assume that smart (dumb) groups must have smart (dumb) members.

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.^{††††} So long as the biases of group members are uncorrelated or negatively correlated and thus point in different directions, they will tend to wash out in the aggregate. This is, of course, the miracle of aggregation; as we will see, this possibility

^{****} MARQUIS DE CONDORCET, *Essay on the Application of Mathematics to the Theory of Decision-Making* in CONDORCET: SELECTED WRITINGS, *supra* note , at 33, 48-49.

^{††††} In fact, so long as the distribution of competence is symmetric around the mean, the theorem can go through so long as the average chance of getting the right answer is greater than .471. See Bernard Grofman, Guillermo Owen & Scott L. Feld, *Thirteen Theorems in Search of the Truth*, 15 THEORY AND DECISION 261, 273-74 (1983).

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

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undermines the large recent literature on the political biases of judges on multimember courts.

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^{§§§§}

| | ‘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 groups’ 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”; (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 problems of judgment aggregation involve majority rule in courts, where the paradox was originally developed.^{*****} 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, parallel to Arrow’s Theorem, shows that no aggregation procedure can guarantee collective coherence while satisfying a list of attractively minimal criteria.^{††††} Moreover, even within courts, the logic of the problem can be generalized from judgments about outcomes in particular cases to judgments about

^{§§§§} Christian List, *Collective Wisdom: Lessons from the Theory of Judgment Aggregation* 6 (2008), <http://personal.lse.ac.uk/LIST/pdf-files/CollectiveWisdom19Oct.pdf>.

^{*****} See Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 *YALE L.J.* 82 (1986).

^{††††} Christian List & Phillip Pettit, *Aggregating Sets of Judgments: An Impossibility Result*, 18 *ECON. & PHIL.* 89, 96-100 (2002).

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the rules of law that should be used to generate those outcomes. This “generalized doctrinal paradox”^{****} 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, however, the interaction between and among institutions itself creates a system at the second level, one which 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.^{§§§§} Even if the cycle remained implicit and thus not actually observed, the need for an arbitrary stopping rule would make the course of decisions path-dependent, because highly sensitive to the order in which cases arose, and would thus give great power to whoever set the Court’s agenda.

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 control cut the link between 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.

In both cases, the arguments 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.^{*****}

^{****} Dimitri Landa and Jeffrey R. Lax, *Legal Doctrine on Collegial Courts*, J. POL. (forthcoming 2009) (manuscript at 21-24, on file with authors).

^{§§§§} See Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982).

^{*****} See DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 55 (1991).

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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.^{†††††} 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. 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 setter . . . will be at the mercy of the order of consideration in the other chamber."^{§§§§§}

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 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

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.^{*****} 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. 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.^{†††††} 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

^{†††††} MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING 54 (2000).

^{‡‡‡‡‡} Stearns, *supra* note at 53, explicitly identifies this fallacy of composition. Stearns' 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" – is nonstandard, and would be more apt as a definition of an increasing function. However, the substance of Stearns' point holds straightforwardly, given the definition used here.

^{§§§§§} Saul Levmore, *Bicameralism: When Are Two Decisions Better Than One?*, 12 Int'l Rev. L. & Econ. 145, 147 (1992).

^{*****} See R. G. Lipsey and Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11, 11 (1956-57).

^{†††††} *Id.*

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worse, inflicting harm that could exceed the increased consumer surplus from competition.††††††

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 of the relevant variables to take on their optimal values, considering the variables one by one.§§§§§§ The general theory of second best, however, exposes this 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.

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.*****

- 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.††††††††

- 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.***** A similar idea has been applied to many other systems: both the Russia of the tsars and the indigenous monarchies of India have been characterized as “despotism tempered by corruption.”§§§§§§§§

†††††† 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).

§§§§§§ The general theory of second best also shows that it is not necessarily best for the relevant variables to approach as closely as possible to their optimal values, assuming that at least one such variable does not reach the optimum. This mistake has been called the “approximation assumption.” Avishai Margalit, *Ideals and Second Bests* in PHILOSOPHY FOR EDUCATION 77, 77 (Seymour Fox, ed., 1983).

***** 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); Ulen, *supra* note at 208-19. For illuminating discussions of the second best in political theory, see JON ELSTER, EXPLAINING SOCIAL BEHAVIOR: MORE NUTS AND BOLTS FOR THE SOCIAL SCIENCES 439-442 (2007); Robert E. Goodin, *Political Ideals and Political Practice*, 25 BRIT. J. POL. SCI. 37, 52-55 (1995); Bruce Talbot Coram, *Second Best Theories and the Implications for Institutional Design*, in THE THEORY OF INSTITUTIONAL DESIGN 90, 90-102 (Robert E. Goodin, ed., 1996).

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

†††††††† JON ELSTER, EXPLAINING SOCIAL BEHAVIOR: MORE NUTS AND BOLTS FOR THE SOCIAL SCIENCES 440 (2007).

§§§§§§§§ 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

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- 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 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.***** I explain these divide-and-conquer tactics in more detail in II.B.

- Hume also argued that the first-best constitutional design would contain, inter alia, an executive who was (1) elected at (2) regular intervals. However, Hume continued, suppose that some political constraint mandated that the executive must serve for life. In the 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.”††††††††

- 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. The first-best regime would have laws that are both perfectly farsighted and also 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, capricious manner, the excessive severity of the old criminal law. . . .”§§§§§§§§

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

124-25, 137 (Harvard Univ. Press 1998) (1965); *see also* JON ELSTER, EXPLAINING SOCIAL BEHAVIOR: MORE NUTS AND BOLTS FOR THE SOCIAL SCIENCES 440 (2007).

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

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

***** “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.”

BERNARD MANDEVILLE, *The Grumbling Hive* in THE FABLE OF THE BEES AND OTHER WRITINGS, *supra* note , at 23, 28.

§§§§§§§§ 1 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND, 284, 293 (London, MacMillan 1883).

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any constitution are fixed at any given time, and even after revolutionary situations, constitutional designers face political and economic constraints which 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.”^{*****} Similar arguments have been made for other checks on delegated authority.^{†††††††††}

- 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 would want, and that such spending makes all concerned worse off. 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.^{*****}

- If the constitutional first-best is a parliamentary system with proportional representation, it does not follow that proportional 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.^{§§§§§§§§§} A first-past-the-post electoral system, whatever its intrinsic defects,^{*****} might be desirable for its tendency to produce two consolidated major parties, who 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 have proved inadequate. “[P]aradoxically enough, though [the creation of administrative power] may seem in theoretic violation of the

^{*****} 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)).

^{†††††††††} 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)

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

^{*****} See Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 656-57 (2000).

^{*****} This is Duverger’s Law. See MAURICE DUVERGER, *POLITICAL PARTIES: THEIR ORGANIZATION AND ACTIVITY IN THE MODERN STATE* 217 (Barbara North and Robert North, trans., Wiley 2d Eng. ed., rev., 1963).

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doctrine of separation of power, it may in matter of fact be the means for the preservation of the content of that doctrine.”††††††††††

- The converse of Landis’ argument is the claim that the Constitution should be read to establish a “unitary executive,” even though originally it did not. On this view, a departure from the original understanding is necessary because administrative business is more political and less technical than 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.*****

- 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 is essentially unchecked. In such 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” between officials and journalists that might produce a socially optimal level of disclosure overall.*****

- 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 best 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.††††††††††

- As I will discuss at length in Part III, second-best arguments can also apply to judicial interpretation of written constitutions. Justice Antonin Scalia initially argued for originalism on second-best rather than first-best grounds: although 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.

†††††††††† JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 46 (1938).

***** Lawrence Lessig and Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2-3 (1994).

§§§§§§§§§§ JON ELSTER, *EXPLAINING SOCIAL BEHAVIOR: MORE NUTS AND BOLTS FOR THE SOCIAL SCIENCES* 439 (2007).

***** This seems to be the implicit argument of ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 81-87 (1975). For an illuminating critique, see Note, *Media Incentives and National Security Secrets*, 122 Harv. L. Rev. 2228 (2009).

†††††††††† See JAMES F. STEPHEN, *A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND* 166 (London, MacMillan 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”).

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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.”*****

• 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.***** On this view, “to be faithful to the constitutional structure, the Court must be willing to be unfaithful to the constitutional text.”***** 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***** and that many standard problems must be analyzed in different terms once latent system effects are brought to the fore. 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 majorities, or instead some more complex conception of democracy, all of which are 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

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

***** Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1189-92 (1993).

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

***** 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* (unpublished). I will put aside the possibility of hopeless theorizing in what follows.

B. The Legislature and the Executive

In many cases, the interaction between the executive and legislature tends to produce problems of composition and division, because of the relatively 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.

Executive vote-buying and the divide-and-conquer strategy. ***** As indicated above, 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, exploiting collective action problems among the members. “[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.”***** 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,***** 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 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: “democratic legislators may refuse to sell a statute at all (a Nash equilibrium), or they may sell it cheap (another Nash equilibrium), but they will not sell it dear.”***** 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.*****

***** For an analysis of divide and conquer tactics, see Eric A. Posner, Kathryn Spier, and Adrian Vermeule, *Divide and Conquer*, <http://ssrn.com/abstract=1414319>. A version of the following discussion is included in that paper.

***** DAVID HUME, *Of the Independency of Parliament*, in *ESSAYS: MORAL, POLITICAL, AND LITERARY*, *supra* note , at 42, 45.

***** Applying J. Mark Ramseyer & Eric Rasmusen, *Cheap Bribes and the Corruption Ban: A Coordination Game Among Rational Legislators*, 78 *PUB. CHOICE* 305, 309-13 (1994).

***** *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); Yeon-Koo Che & Kathryn E. Spier, *Exploiting Plaintiffs Through Settlement: Divide and Conquer* (Harvard Law and Economics Discussion Paper No. 591, 2007), available at <http://ssrn.com.ezp-prod1.hul.harvard.edu/abstract=1009360>.

***** Thanks to Kathryn Spier for clarifying this point. 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.

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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.^{††††††††††††††††††††} 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.^{††††††††††††††††††††} 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 presidential selection means that would-be Presidents cater to a relatively narrow electoral base, plausibly narrower than that of the median member of Congress.^{§§§§§§§§§§§§§§§§§§§§}

This point considers only the first level of aggregation, from individual legislators to Congress on the one hand and 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 either of the institutions in the system would produce taken separately.

In one illuminating model, where 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.^{*****} 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 so as to be able to stay in office, with the prospect of obtaining more benefits in the future. A properly structured interaction between two imperfect representatives can do better, from the voters' standpoint, than either representative would do alone.

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 to two institutions labeled "President" and "Congress," but to the two houses of a bicameral legislature elected on the same basis, or to two committees in a unicameral legislature. In

^{††††††††††††††††††††} See, e.g., JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE 152 (1997).

^{††††††††††††††††††††} See Jide Nzelibe, *The Fable of the Nationalist President and Parochial Congress*, 53 UCLA L. REV. 1217, 1221, 1231-42 (2006).

^{§§§§§§§§§§§§§§§§§§§§} See *id.*

^{*****} Torsten Persson, Gérard Roland & Guido Tabellini, *Separation of Powers and Political Accountability*, 112 Q. J. ECON. 1163, 1179-83 (1997).

general, splitting up policymaking between two institutions with identical composition and structure can, somewhat counter-intuitively, 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.

A related point arises, however, 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, a bare quarter of the electorate can set policy for the whole. 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.

As the requisite majority grows towards 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. 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.

C. Emergent Democracy

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. More recently, interesting work has charged that our Constitution is undemocratic root and branch, and should be revised in a new constitutional convention.

In this 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; the Electoral College encourages presidential candidates to cater to small segments of the national electorate who live in battleground states; and the Supreme Court is somewhat disciplined by electoral

Levmore, supra note, at 147-48. JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY 211-12, 224 (Liberty Fund 2004) (1962). Cf. Loving v. United States, 517 U.S. 748, 757-58 (1996) (describing bicameralism as a feature of Congress that makes for "responsive" lawmaking). Parts of this section are adapted, with modifications, from Adrian Vermeule, Second-Best Democracy, 1 HARV. L. & POL'Y REV. (Online) (Dec.4, 2006), http://www.hlpronline.com/2006/06/vermeule_01.html. ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? (2002). SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2006).

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to jointly agree on national policy. 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. ++++++

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. ++++++ As to the second issue, delegation to the executive, the same democratic critics claim that delegation makes policymaking undemocratic. §§§§§§§§§§§§§§§§§§§§§§§§ The President, they suggest, is often elected by national minorities because of the structure of the Electoral College, and does not enjoy the democratic qualities of deliberation, multiple perspectives, and participation by all affected interests that Congress possesses – a view that flips around the presidentialist arguments given earlier.

Yet these two departures from the democratic benchmark – excessive supermajoritarianism in the lawmaking process, and excessive delegation to the executive -- are uncorrelated or even negatively correlated; their effects 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. 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 responsiveness to changing economic and policy conditions in the administrative state, and to increase its responsiveness to majoritarian sentiment.

The upshot is that large-scale delegation can itself be justified, in part, as a systemic adjustment whose intended effect was to unblock the vetogates of the national lawmaking process. The interaction of delegation and the quadricameral lawmaking system makes the package of both institutions more majoritarian than either standing alone. From the standpoint of majoritarian democrats who criticize the Constitution in a piecemeal fashion, the first-best would of course 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

+++++ Persson et al., *supra* note, at 1179-83

+++++ S Levinson, *supra* note, at 52.

§§§§§§§§§§§§§§§§§§§§§§§§ *Id.* at 109-16; *id.* at 167 (listing “excessive presidential power” as a “grievous defect[]” of the Constitution).

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results in noncompetitive electoral districts.***** 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 districts promote greater competition overall.†††††††††††††††††††† 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.††††††††††††††††††††

When aggregated at the level of the legislature, in other words, districts that are noncompetitive in different directions have the overall property of “second-order diversity.”§§§§§§§§§§§§§§§§§§§§

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.***** 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.”†††††††††††††††††††† If so, then simply urging as many piecemeal majoritarian changes as possible may produce far worse results, even on majoritarian grounds, than the constitutional status quo.

***** See, e.g., Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 617-30 (2002).
†††††††††††††††††††† See Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 668 (2002).
†††††††††††††††††††† *Id.*
§§§§§§§§§§§§§§§§§§§§ Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1117-18 (2005).
***** NANCY L. ROSENBLUM, ON THE SIDE OF THE ANGELS: AN APPRECIATION OF PARTIES AND PARTISANSHIP 456-57 (2008).
†††††††††††††††††††† 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: A THEORY OF SELF-SUSTAINABLE FEDERAL INSTITUTIONS* 300-01 (2004) (emphasizing that because institutions are interdependent, the constitutional designer cannot evaluate them piecemeal). Thanks to Mark Tushnet for these references.

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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 critics 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. ***** 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 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 democracy. The phrase itself originated with Alexander Bickel, ***** but it has a long history and periodically reappears, in changing and ever more sophisticated forms. *****

Rather than express views on the substance of this critical problem, ***** 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 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, ***** because an undemocratic Court contributes to a desirable overall package of supermajoritarianism, ***** or because the Court

***** See ADRIAN VERMEULE, *LAW AND THE LIMITS OF REASON* 170-71 (2009); Heather K. Gerken, *Hydraulics of Constitutional Reform: A Skeptical Response to Our Undemocratic Constitution*, 55 *DRAKE L. REV.* 925, 943 n.14 (2007).

***** THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (2d ed. 1986).

***** See JEREMY WALDRON, *LAW AND DISAGREEMENT* 211-312 (1999); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346, 1386-95 (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); Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 *HARV. L. REV.* 1693 (2008).

***** See ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 230-88 (2006); ADRIAN VERMEULE, *LAW AND THE LIMITS OF REASON* (2009).

***** DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 73-104 (1980).

***** See Cross, *supra* note, at 1550-76; Fallon, *supra* note, at 1718-28.

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“aggregate consequence[s]” 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*, ***** 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 multi-member judicial panels such as the Supreme Court, the court as a whole can constitute a system whose behavior differs from the behavior 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 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 the legislature, on the other, can offset each other and thereby ensure that the system as a whole maximizes welfare.

The Judicial Miracle of Aggregation. Suppose that many or most Justices are “biased” in the first-order political or partisan sense. ***** Their votes tend to track the party platforms or the policy preferences of appointing presidents. In cases of 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.” *****

But through a systemic lens, it is apparent that widespread judicial bias has unclear implications. First, widespread bias among the justices need not mean that the

***** Schauer limits his argument by saying that the Court should intervene primarily on “low-salience” questions. *See* Schauer, *supra* note, 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. ***** 128 S. Ct. 2229 (2008).

***** I will ignore “personal” bias, which arises when rulings are based on bribery or family connections.

***** Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831 (2008).

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 better legal answer with perfect accuracy. Suppose also that there is always a better legal answer, even in the hard cases that reach the Court. The eight partisans will vote randomly from the standpoint of identifying the best answer. Under majority rule, with a binary choice, the Court as a whole will vote for the best answer with an approximate probability of .56. ***** The same result obtains if the competence of the sole sincerely legalist justice is merely slightly better than random. If the legalist votes for the better answer with probability .51, then the Court's overall competence is .501; a majority vote on the Court is ever so slightly more likely than not to hit upon the correct legal answer.

This implies nothing at all about the desirability of vesting issues in the Court, or not. For one thing, the swing justice might vote sincerely but incompetently. If he votes worse than randomly, ***** then the Court as a whole will display a bias toward error. Moreover, we 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 towards legal accuracy at the level of the Court.

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 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. *****

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

***** $((8 * .5) + 1)/9 = .56$.

***** People are sometimes confused by the idea that someone can vote worse than randomly; doesn't that mean the swing justice could improve his 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 his competence below that of a coin flip.

***** This assumes that all 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.

in cases of political import, with Justice Kennedy as the swing voter. And Justice Kennedy has been shown to 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. Plausibly, Justice Kennedy votes sincerely, in the sense that he votes without political bias. By contrast, the votes of other justices are much more predictably partisan.

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.

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 60% of current federal appellate judges were appointed by Republican presidents.

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. Indeed, the lawmaking system will not necessarily behave in biased fashion even if both Congress and the judiciary are biased, so long as their biases run in offsetting directions. In the simplest version, 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 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.

Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 832-34 (2006).

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, 855-68 (2008); James R. Rogers & Georg Vanberg, *Resurrecting Lochner: A Defense of Unprincipled Judicial Activism*, 23 J.L. ECON. & ORG. 442 (2007).

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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.

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. In light of the system effects discussed above, however, we can see that the distribution of individual votes matters as much as their content. The new legal realism misses benign invisible-hand possibilities at two levels: the level of multimember courts, which may behave in legalist fashion even if most of their members vote in a highly partisan fashion most of the time, and 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. That “judges are political”^{*****} 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 individual judicial votes 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, mimimalists in a world of maximalists, and originalists in a non-originalist 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

***** CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006).

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diversity is a desirable property for the judiciary as a whole, the systematically 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” – is avowedly consequentialist. ***** And as we will see, even originalists have lately turned to arguments that justify originalist adjudication on essentially rule-consequentialist grounds. One of my aims is to engage those arguments.

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,”+++++ 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

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 other judges adhered to the same theory. +++++

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

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

+++++ “All” is not 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.

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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 action by past judges. In these cases, the disagreement of other present judges or the irreversible action of past judges, or both, 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.

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

Democracy-Forcing as a Step Good. Many interpretive approaches and tools are justified on the ground that they will elicit or force desirable responses from other institutions, particularly legislatures. Textualism as a general approach to statutory interpretation has been justified on the ground that it increases the quality of legislative drafting ex ante. 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; 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.

The problem arises when, and to the extent that, such 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 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.

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

This subsection 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).

See, e.g., *United States v. Taylor*, 487 U.S. 326, 346 (1988) (Scalia, J., concurring) (“[W]e have an obligation to conduct our exegesis in a fashion which fosters th[e] democratic process [specified in Article I’s bicameralism and presentment requirements]”); 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.”); 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).

See Vermeule, *The Judiciary is a They, Not an It: Interpretive Theory and the Fallacy of Division*, *supra* note , at 564-65.

textualism. It may be, for example, that the basic deal among the majority coalition can 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, this 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.

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 – 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 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 do so, because of the logic of collective action. The judges are in a multi-player game, which can be interpreted in several different ways.

In one interpretation, the game is a multi-player Prisoners' Dilemma.[†] 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. 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.

[†] 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).

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In a different interpretation, the game of precedent-following is not a Prisoners' Dilemma but a game of coordination, such as an Assurance Game.[‡] 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 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.

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.[§] 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.^{**}

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 use 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

[‡] This distinction is slightly inaccurate. Although a one-shot Prisoner's Dilemma has no coordination element – each player has a dominant strategy – a repeated version of the game makes coordination important. 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).

[§] Cf. David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle* 112 YALE L.J. 1717, 1733-34 (2003). For hybrid games in which the Battle of the Sexes is embedded within an iterated Prisoners' Dilemma, see McAdams, *supra* note, at 226-30. Such refinements, while important, are not necessary for the points I attempt to make here.

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

overrulings of past nonconforming decisions, or apply their own theory of precedent prospectively, thereby confirming the validity of past decisions that support a different theory. Although the first-best, for Burkeans, would occur if all judges had adopted the Burkean theory of precedent *ab initio* and consistently followed it over time, that possibility is 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 constitutional 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.

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.^{‡‡} Consider the problems facing Thayerian judges in a largely non-Thayerian world. In particular, imagine a constitutional order whose history is much like our own. In this constitutional order, most judges most of the time have not been Thayerian, at least 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.

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. Conversely, Thayerian judicial review will encourage legislators, who

^{††} In previous work, I failed to take adequate account of this problem for Thayerians. See, e.g., the brief and unsatisfactory remarks in ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 263-64 (2006). For suggestions that the Court should eliminate judicial review only prospectively, and that unilateral disarmament is a bad idea, see Tushnet, *supra* note, at 175.

^{‡‡} 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.

^{§§} Tushnet, *supra* note, at 57-65.

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are aware that constitutional buck-passing is impossible, to be constitutionally responsible.

The problem is that if constitutional adjudication has been largely non-Thayerian for a long time, legislators will, 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 in the long run have beneficial dynamic effects, but the *interim* costs of legislatures' constitutional irresponsibility in the short run would be so great as to 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.***

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 best 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.

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 interpretive 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 the costs of legal uncertainty. Now let us stipulate that in some domain – perhaps “individual rights” – other judges are resolutely non-Thayerian. Thayerism only for domains other than individual rights will now produce additional systemic costs that can, in principle, tip the balance in favor of global non-Thayerism.

*** For the problem of local maxima, see Elster, *supra* note, at 111, 248-49.

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These systemic costs arise from the distortions created by differential standards of review in different areas of constitutional law. At the margin, legislatures who 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 characterized 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.

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”^{†††} among judges with different views. If other judges are not minimalist, then the minimalist judges 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 minimizes 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 response to judicial decisions; and that it enables agreement on particulars among judges who disagree on fundamentals. 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 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, that is, 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 minimalist, on the one hand, and 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.

Originalists in a Non-Originalist World. In recent years, several theorists have attempted to give originalist constitutional adjudication a new justification in terms of consequences.^{‡‡‡} In this burgeoning body of work, the argument is that originalist

^{†††} Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).

^{‡‡‡} 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

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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.”^{§§§}

Why do rule-consequentialist originalists believe that originalism, as opposed to other modes of adjudication, produces the greatest net benefit overall? Several possible answers might be given. 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 both reduce judicial discretion more than would originalism, which requires the exercise of thick judgment about the import and weight of originalist sources.

Second, originalism has been justified on the consequentialist ground that it promotes democracy, but again this seems suspect. 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.^{****}

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.^{†††} 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.

I will suggest that the 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.^{††††} Whatever the consequentialist credentials of originalism ab initio,

interpretation, whereas originalism as a method of adjudication must be justified by reference to its consequences. See, e.g., Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823, 1823-24 (1996). Other originalists do not seem to draw such a distinction, saying generally that “originalism” has pragmatic benefits. See, e.g., John O. McGinnis and 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.

^{§§§} Cass Sunstein & Randy Barnett, Legal Affairs Debate Club, Constitution in Exile?, March 2, 2005, http://legalaffairs.org/webexclusive/debateclub_cie0505.msp, quoted in Cass R. Sunstein, *Of Snakes and Butterflies: A Reply*, 106 COLUM. L. REV. 2234, 2236 n.8 (2006).

^{****} See, e.g., BRUCE A. ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991).

^{††††} McGinnis and Rappaport, *supra* note, at 924-28.

^{††††} See generally ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990).

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, departures from the original understanding by nonoriginalist judges constrain what originalist judges can do today, and this means, according to the usual 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 can have disastrous consequences, in light of intervening alterations to other parts of the structure.^{§§§§}

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 features. 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 best second-best would be a form of nonoriginalist adjudication that permits a “translation” of original constitutional purposes,^{*****} or a compensating adjustment to the constitutional structure, by upholding the legislative veto.

Originalist responses. I will examine several lines of originalist response to this critique. In the most familiar response, stemming from Justice Antonin Scalia, originalists acknowledge that universal first-best originalism is unattainable, saying that they are “faint-hearted”^{†††††} 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 rules out, at least if originalism is justified by reference to its consequences. The consequentialist-originalist cannot coherently say “well, too bad some of the first-best results indicated by my theory are off limits, but I’ll take as many of the rest as I can.” 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.^{†††††}

This 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

§§§§ 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).

***** Lessig, *Fidelity in Translation*, supra note, at 1189-92.

††††† Scalia, supra note, at 864.

††††† This point is overlooked by John McGinnis and Michael Rappaport, *Reconciling Originalism and Precedent*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1399504#.

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are too costly to undo, in which case there are 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. The problem is that 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 it. 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 supply reasonable “liquidating” constructions of provisions whose original meaning is intrinsically general or ambiguous, that have generated reliance by identifiable individuals, or that provide epistemic aid in determining original meaning.^{§§§§§} In this version, the reason that there are no nonoriginalist decisions that are too costly to undo is not that any decisions 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.

I believe that this idea 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 either to encompass too little or too much – too little if they do not square originalism with major examples of irreversible nonoriginalist precedent, such as the decisions creating the administrative state, 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*^{*****} 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. Later decisions like *Humphrey’s Executor*,^{†††††} which unceremoniously discarded *Myers*’ elaborate analysis, do not fall into the category of a “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 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.

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 it 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

^{§§§§§} 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.

^{*****} 272 U.S. 52 (1926).

^{†††††} 295 U.S. 602 (1935).

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considerations⁺⁺⁺⁺⁺ – 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.

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 position on two different axes: whether the judge is attitudinal or legalist, and whether the judge is strategic or nonstrategic.^{§§§§§} Needless to say, real-world judges will not perfectly match any of the ideal types.

The first type of judge is attitudinal but nonstrategic.^{*****} This judge votes her first-order policy preference in every case. If she is for gun control, then she votes to uphold gun control statutes, and vice-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.⁺⁺⁺⁺⁺ 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 is a textualist, an originalist, a common-law constitutionalist, or adheres to some other theory. Real judges are usually catholic about legal sources; most textualists will consider legislative history for some purposes or under some circumstances, while most originalists will give some weight to precedent. However, because different judges attach different weights to the different

⁺⁺⁺⁺⁺ According to a recent review of the evidence, “it is a mistake to characterize the justices 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).

^{§§§§§} For a clear recognition that these two axes are distinct, see LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* 6 (2006). “[I]n most strategic models that are applied to federal courts, judges act solely on the goal of achieving good policy,” *id.*, 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. 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.

^{*****} See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 86-97 (2002).

⁺⁺⁺⁺⁺ See generally LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998).

legal sources, they can be roughly be described as more-or-less textualist if they weight text especially heavily, and so forth.

The fourth type of judge is a strategic legalist.^{*****} 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 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 "superior," I mean superior 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 in a way different 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.

Evangelism, Judicial Capacities, and Second-Best Naiveté. 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?

^{*****} 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. LA W & ECON. 263, 267-70 (1992). For a hybrid assumption 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. LA W & ECON. 503, 504-05 (1996). In both cases, however, the focus is on the interaction between the Court and Congress, whereas I will focus on the interactions among judges.

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I will explore two such conditions, respectively involving evangelism^{§§§§§§} 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 naiveté: 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 which the evangelist hopes. Justice Thomas' opinions, which resolutely reject constitutional precedent in favor of a return to the revealed (original) meaning of the Constitution, often have this flavor.

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 other'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, has 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 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 are 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. 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.^{*****} Here too, judges would display a kind of second-order strategic naiveté that mimics the theoretical unsophistication of the idealist judge, who simply assumes that all others will see the world as he does.

Let me illustrate strategic naiveté – and its problems -- by discussing the possibility of second-best originalism.^{††††††††} As we have seen, consequentialist originalists cannot argue for the benefits of originalism by imagining a world in which

^{§§§§§§} Thanks to Daryl Levinson for suggesting this term.

^{*****} 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." *Mimicking Impartiality*, in JUSTICE & DEMOCRACY 112, 113 (Keith Dowding, Robert E. Goodin & Carole Pateman eds., 2004).

^{††††††††} I mean this in a different sense than the form of second-best originalism attributed to Justice Scalia in I.C. Scalia's view of originalism as "the librarian who speaks 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. *Supra* note, at 864.

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. However, 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.***** In general, this sort of rule-consequentialist argument illustrates a large question of institutional design: which constitutional actors, if any, should be licensed to make compensating adjustments, in light of the general theory of second-best?*****

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. In general, 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,

***** For a somewhat similar argument that common-law adjudication should ignore problems of the second best, see Ulen, *supra* note, at 217-19. 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 text.

***** 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).

although alert to the second-best problems with originalism, choose on rule-consequentialist grounds to behave as though they are naïve originalists; (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 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 are present on the court, until an equilibrium of optimal diversity is reached.

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.***** Under what conditions might this be so? What exactly are the benefits, and costs, of methodological diversity in a judicial group?

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.†††††††† To the extent that diversity of interpretive method tracks or even produces

***** I will confine the discussion to the benefits of methodological diversity within the highest court in the judicial hierarchy, such as the Supreme Court. It has been shown that 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, 651 (2000).

†††††††† Ladha, *supra* note , at 629; for an extensive treatment, see generally Page, *supra* note .

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 that 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 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.

*Preventing polarization.****** Likeminded judges share empirical assumptions and normative commitments that may be exaggerated by the presence of other likeminded judges. 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 likeminded judges may polarize in the direction of the predeliberation mean, and thus go to extremes. 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.

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 might 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 would 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;

***** See generally Cass R. Sunstein, GOING TO EXTREMES: HOW LIKE MINDS UNITE AND DIVIDE (2009); Cass R. Sunstein, WHY SOCIETIES NEED DISSSENT (2003).

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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 interpretive theory seems intractable, at least for the foreseeable future. Under these circumstances, moderation has much to recommend it. The systemically-minded judge – or, 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.

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.

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

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,^{§§§§§§§§} except insofar as the branches have explicit authority to participate 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 decision-

^{§§§§§§§§} See, e.g., *Morrison v. Olson*, 487 U.S. 654, 697-734 (1988) (Scalia, J., dissenting).

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making processes of other branches.***** On this view, the separation of powers merely prohibits one branch from appropriating or intruding upon the "essential functions"†††††††††† of other branches.

Plausibly, a Supreme Court composed of both of 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 Justice 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****** looks just like a case of 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. New York*,§§§§§§§§§§ which uses strained formalist arguments to invalidate a bipartisan innovation that has been widely adopted in the states, and that is precious hard to distinguish from ordinary delegations of impoundment authority to the President. Indeed *Clinton v. New York* is formalist in another, pejorative sense as well: the opinion conceals the majority's real concern, a nondelegation concern about transfers of excessively open-ended authority to the President, behind a dogmatic reading of the relevant constitutional texts.

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. Plausibly, 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 extreme -- another version of the nightmare of aggregation discussed in Part II. However, the assumptions

***** See, e.g., *INS v. Chadha*, 462 U.S. 919, 967-1002 (1983) (White, J., dissenting).

†††††††††† *United States v. Nixon*, 418 U.S. 683, 707 (1974).

***** *INS v. Chadha*, 462 U.S. 654 (1988).

§§§§§§§§§§ *Clinton v. New York*, 524 U.S. 417 (1998).

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behind this story are shaky. First, “formalism” and “functionalism” lie on a continuum, 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 also provides scope 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 counterbalance whichever faction temporarily has the upper hand, 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, only possible from a systemic standpoint; from the standpoint of methodological partisans, it is incoherent.

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 legislators’ intentions or purposes. These interpreters propose that courts should have wide discretion to mold statutes to fit their underlying objectives and to avoid the bizarre or unjust consequences of literalism. Formalists or textualists, on the other hand, are alert to detect cases in which the judicial interpretation to avoid absurd results creates rather than avoids mistakes.***** Formalists stumble over examples such as the Arkansas statute that inadvertently repealed the State’s entire code of laws;†††††††††† functionalists stumble over examples like the *Holy Trinity* case,†††††††††† 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. 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 non-ideal 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.

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

†††††††††† Cernauskas v. Fletcher, 201 S.W.2d 999, 1000 (1947).

†††††††††† Church of the Holy Trinity v. United States, 143 U.S. 457, 458-61 (1892).

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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 other judges there are and what those other judges do.^{§§§§§§§§§§} 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.

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 under-represented 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 dominate. This 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 others judges do, how can it be possible 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

^{§§§§§§§§§§} There are thus two distinct objections to Ronald Dworkin’s mythical judge, Hercules. *See* RONALD DWORKIN, *LAW’S EMPIRE* (1986). 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 naiveté 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.

behaving as textualists, some as intentionalists or originalists, some as Burkeans, and so forth.

This 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 likeminded 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.

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 Part II, 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 only be attained at the level of the overall lawmaking system 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

***** Here again, I will bracket the contestable distinction between interpretation and construction upon which some originalists insist. *See supra* note.

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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 system effects are 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.