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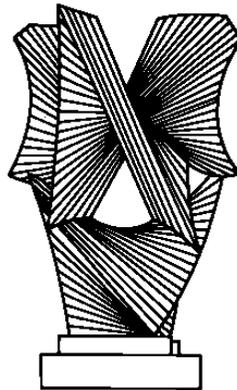
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INSIDE OR OUTSIDE THE SYSTEM?

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Inside or Outside the System?

Eric A. Posner* & Adrian Vermeule**

March 11, 2013

Abstract. In a typical pattern in the literature on public law, the diagnostic sections of a paper draw upon political science, economics or other disciplines to offer deeply pessimistic accounts of the motivations of relevant actors in the legal system. The prescriptive sections of the paper, however, then issue an optimistic proposal that the same actors should supply public-spirited solutions. Where the analyst makes inconsistent assumptions about the motivations of actors within the legal system, equivocating between external and internal perspectives, an inside/outside fallacy arises. We identify the fallacy, connect it to an economics literature on the “determinacy paradox,” and elicit its implications for the theory of public law.

Imagine a paper about constitutional theory that offers the following argument: “All officials are ambitious, and thus prone to maximize their power. To solve the problem, judges should adopt the following rules of constitutional doctrine....”¹ The natural reaction would be to ask whether the diagnosis in the first sentence covers the judges as well; if it does, the prescription in the second goes wrong by assuming public-spirited motivations on the part of the judges who are asked to supply socially beneficial rules. Parallel questions arise, mutatis mutandis, if the diagnosis is not that officials are ambitious, but that they are self-interested in some other way, or are partisan, or ideological.

There are two ways of understanding what has gone wrong in this sort of argument. One might say that the problem is one of incentive-compatibility: the diagnosis rests on an account of the officials’ motivations that is inconsistent, at least prima facie, with the motivations that must be present if the theorist’s solution is to be supplied by those very officials. At a deeper level, however, the problem is that the theorist is skipping back and forth between two different perspectives: an external perspective that attempts to explain the behavior of actors within the constitutional order as an endogenous product of self-interested aims, and an internal perspective that assumes the standpoint of the judge and asks how the judge ought to behave so as to promote the well-being of the constitutional system and the nation. In cases of this sort, the analyst is not doing ideal theory, which asks simply what well-motivated officials should do.

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¹ Cf. Julian David Mortenson, *Executive Power and the Discipline of History*, 78 U. CHI. L. REV. 377, 385 n.27 (2011) (claiming that the Madisonian theory of separation of powers rests on “the recognition of human ambition” as opposed to “selfless patriotism,” yet also assuming that judges will use judicial review to promote the common good, *see id.* at 425). These two views can be reconciled only by the further assumption that judges are not human.

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Rather the analyst is combining ideal with nonideal theory in an incoherent way, positing nonideal motivations for purposes of diagnosis and then positing idealized motivations for purposes of prescription.

The hypothetical example is crude in the extreme, but we believe that legal theory is rife with examples that have essentially the same structure, and are only somewhat more subtle and difficult to identify. We will thus attempt to identify and illustrate a problem or class of problems -- the inside/outside fallacy -- that appears with some frequency in the theory of public law. The inside/outside fallacy occurs when the theorist equivocates between the external standpoint of an analyst of the constitutional order, such as a political scientist, and the internal standpoint of an actor within the system, such as a judge² -- although there is nothing unique about judges in this regard, and we will see examples in which the internal standpoint is that of some other type of official. This equivocation yields a kind of methodological schizizophrenia. In a typical pattern, the diagnostic sections of a paper draw upon the political science literature to offer deeply pessimistic accounts of the ambitious, partisan or self-interested motives of relevant actors in the legal system, while the prescriptive sections of the paper then turn around and issue an optimistic proposal for public-spirited solutions.

Our point is not substantive or empirical. It is not to argue for, or against, any particular assumptions about the behavior of judges, other officials, or other legal or political actors. Rather it is strictly a point about consistency -- the consistency of assumptions and perspectives. The increasing cross-fertilization of legal theory with economics and political science, while highly beneficial for all these fields, creates a methodological risk. The risk is that the analyst will implicitly make one set of assumptions in one part of an argument, taking an external perspective, while implicitly making different and inconsistent assumptions in another part, taking an internal perspective. Our aim is to clarify the nature of this risk, to explain why it tends to arise, and to show how it may be prevented.

The inside/outside problem is not unique to legal theory.³ It is just that other disciplines understand the problem and make best efforts to avoid it. There is an instructive parallel in the

² On the difference between internal and external perspectives, see, for example, H.L.A. HART, *THE CONCEPT OF LAW* (1961); Richard H. Fallon, Jr., *Constitutional Constraints*, 97 CAL. L. REV. 975 (2009); John Ferejohn, *Positive Theory and the Internal Point of View of Law*, 10 U. PA. J. CONST. L. 280 (2008). Law professors may of course play either the role of the analyst, as when they attempt to explain judicial behavior, or the role of an actor within the system, as when they argue cases or write briefs as *amici curiae*. The latter activities may blur the difference between roles as a practical matter (and in some cases that blurring is precisely the point). Yet as a conceptual matter, the distinction never blurs. Law professors may switch hats very rapidly, or try to wear two hats at once, but that behavior is irrelevant to the conceptual distinction we draw.

³ Similar problems arise in Marxist theory. There is a standard tension between the external perspective of “scientific socialism” -- according to which revolution becomes inevitable in the presence of certain economic and social conditions -- and the internal perspective of political activists, who are committed to bringing about revolution for normative reasons and through intentional action. “The horns of the dilemma are well known. Either the laws of history operate with such iron necessity that political action is superfluous -- communism will somehow come about ‘by itself’ without propaganda, leadership or mass action -- or, if this view is discarded, as it must be, political action must be guided by values.” JON ELSTER, *AN INTRODUCTION TO KARL MARX* 189 (1986). The standard response to this tension is that the role of the revolutionary activist is to “shorten and lessen the birth pangs” of the inevitable future. KARL MARX, *Preface* to *CAPITAL: VOLUME ONE* (First German ed. 1867), available at <http://www.marxists.org/archive/marx/works/1867-c1/p1.htm>. That formulation in turn creates further problems; for discussion, see ELSTER, *supra*, at 189–190. For an alternative attempt to resolve the tension, see G.A. COHEN,

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history and theory of welfare economics; here is a stylized version. At Time 1, welfare economists assume a benevolent government that attempts to maximize some social welfare function. These economists offer public-regarding advice to government officials based on the assumption that those officials will implement the advice, if they find it persuasive about where the public interest lies -- based, in other words, on the internal standpoint of a government assumed to be well-motivated.

At Time 2, however, a new breed of public choice economist expands the scope of economic theorizing to include the government officials themselves. These public choice economists endogenously derive the behavior of officials from standard economic postulates, usually by assuming that officials are both rational and self-interested. It then becomes painfully apparent that the social welfare harms arising from self-interested official behavior cannot be remedied by offering public-regarding advice to those same officials, as in the old welfare economics. If the diagnosis offered by public choice economics is correct, the officials will not be listening to public-regarding counsel as such. The only sort of advice to which the officials might listen, even in principle, is a suggestion that the officials have mistaken where their own self-regarding interest lies. The analyst must account not only for the demand side of the problem (what solution a benevolent social planner would desire to institute) but also for the supply side of the problem (who will have the incentives to supply that solution, given the analyst's diagnosis of the problem).

In the literature on welfare economics this insight goes by the name of the “determinacy paradox.”⁴ If the analyst endogenously derives the behavior of actors within the system for purposes of diagnosis, the analyst must also endogenize those actors' response to any advice the analyst might give. If the analyst stands outside the system for purpose of diagnosis, it is inconsistent to assume an internal standpoint for purpose of prescription, with the narrow exception of strictly instrumental advice about how rationally self-interested actors may best promote their interests. Our principal claim is that legal theory needs to absorb the insights of the determinacy paradox.⁵

Section I illustrates the inside/outside fallacy in three different settings: Madisonian arguments that assume power-maximizing behavior by officials or institutions in the lawmaking system (I.A); partisanship arguments that assume partisan behavior on the part of officials (I.B); and process theory arguments that assume prejudiced behavior by majorities, self-entrenching

HISTORY, LABOUR AND FREEDOM: THEMES FROM MARX, ch. 4 (1988). Thanks to Jon Elster and Mark Tushnet for guidance on these issues.

⁴ The original source is Jagdish Bhagwati et al., *DUP Activities and Economic Theory*, in *NEOCCLASSICAL POLITICAL ECONOMY* (David Colander ed., 1984). For extensive consideration, see the articles in a symposium in 9 *ECON. & POL.* 205 (1997).

⁵ For an earlier effort along these lines, see Adrian Vermeule, *Self-Defeating Proposals: Ackerman on Emergency Powers*, 45 *FORDHAM L. REV.* 631 (2006). For legal scholarship that is sensitive to the relevant problems, see, e.g., Scott Baker & Anup Malani, *The Problem of Rational Courts* (arguing that if courts are as rational as the actors they regulate, certain legal rules turn out to be inefficient) (draft on file with authors); James E. Fleming, *Toward a More Democratic Congress?* 89 *B.U. L. REV.* 629, 640 (2009) (critiquing proposals to improve Congress by means that require congressional approval); Mark Tushnet, *Some Skepticism about Normative Constitutional Advice*, 49 *WM. & MARY L. REV.* 1473 (2008) (arguing that outside advisers on constitutional design will be ignored if their counsel does not align with the incentives of local actors); Mark Tushnet, *Self-Historicism*, 38 *TULSA L. REV.* 771 (2003) (critiquing historicist analysis of constitutional law when used to support normative recommendations to judges).

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behavior by incumbent officials, or rent-seeking behavior by organized groups (I.C). Across these settings, we will see legal theorists drawing on the external standpoint of political science literature with devastating effect, then abandoning that standpoint to offer public-spirited advice to officials -- especially judges -- whose motivations that same literature brings into serious question.

Section II turns to debates surrounding presidential power and prerogative. We detect versions of the inside/outside fallacy in several common ideas in the relevant literatures. One is the trope that, where emergencies require presidential action inconsistent with law, presidents should violate the law, openly declare the violation to the public, and seek some sort of ex post ratification -- a regime we call “responsible illegality.” Another is the idea, exemplified by Justice Robert Jackson’s opinion in Korematsu v. United States,⁶ that judges should decline to interfere with military action in wartime, but should also refuse to make a decision that upholds the military action, for fear of creating a bad precedent. Both of these arguments commit the same mistake, which is to imagine that presidents or judges can take actions that somehow stand outside the constitutional system and will thus have no precedential effect inside that system. On the contrary, whatever presidents and judges do creates a precedent to which the future may point; there is no escaping the system from within. Although it is not initially obvious, this turns out to embody the same sort of mistake highlighted by the determinacy paradox, or so we will suggest.

Section III turns to the legal literature on interpretation and adjudication, while Section IV discusses the literature on international law. In both settings, we identify examples of the inside/outside fallacy that arise because of inconsistency between the empirical premises that analysts or actors propound about (other) actors within the system, on the one hand, and the normative proposals that analysts or actors offer on the other. In cases such as Bush v. Gore,⁷ for example, initial decisionmakers attempt to make one-off decisions with no precedential value, but the attempt fails. The initial decisionmakers try to make a non-precedential decision because they fear that downstream decisionmakers will use the precedent for ends the initial decisionmakers do not want, but they overlook that the same motivations will cause the downstream decisionmakers to ignore the instruction that the initial decision should be treated as non-precedential.

In Section V, we distill the themes of our critique and indicate its limits. Diagnosis of the inside/outside fallacy requires logical consistency between the behavioral assumptions underlying the analyst’s diagnosis and prescription. In itself a requirement of consistency has few substantive implications, in the sense that there is usually some logically consistent combination of assumptions to justify almost any argument about constitutional design and interpretation. Yet some such combinations will simply be implausible, and will thus be ruled out by evidence if not by logic. And in any event the very exercise of making the assumptions consistent has a disciplining effect. It should no longer be possible to combine pessimism about diagnoses with unexplained optimism about solutions, as so much legal theory does. In a brief conclusion, we suggest that awareness of the fallacies we discuss underscores the difficulty of combining external political science with internal legal scholarship in a coherent way.

⁶ 323 U.S. 214 (1944).

⁷ 531 U.S. 98 (2000).

I. Madisonianism and its Competitors: Ambition, Partisanship, and Process Failures

Constitutional theory endlessly rings the changes on themes of ambition, partisanship, and political process failures. Analyses that invoke these concepts are a fertile environment in which the inside/outside fallacy may breed, because the temptation is to diagnose problems by impeaching the motivations of officials or other political actors, then to propose solutions that rest on high-minded premises about the motivations of whoever the analyst is asking to supply the solutions. In this Section we offer examples of this fallacious two-step procedure.

It is not as though ambition, partisanship, and process failures are three different topics. The connections are numerous and complex: ambitious people may promote their ends through partisan or interest-group activity; parties are ambitious both as institutional actors and as vehicles for the individual ambitions of their members; parties are to some extent merely coalitions of interest groups; and so on. Nonetheless, we separate out the three concepts in order to track different bodies of literature that have distinct, albeit overlapping, emphases. Ambition, both individual and institutional, is the focus of a literature adumbrating and critiquing Madison's famous argument in Federalist 51 that a properly designed system of checks and balances will make "ambition counteract ambition." Partisanship is the focus of an enormous literature in American political science, with particular emphasis on legislative-executive relations during periods of divided or unified party government; legal scholars have usefully arbitrated this literature to critique the Madisonian view.⁸ Finally, exploitation of minorities by majorities, self-entrenchment by incumbent officials, and rent-seeking by interest groups are the focus of literatures in political economy and public choice theory. We will take up these three strands of public law theory in turn, identifying the inside/outside fallacy in its native habitat.

A. Madison and "Madisonian" Judging

A number of recent contributions have clarified the Madisonian account of checks and balances.⁹ Heavily influenced by the Scottish Enlightenment ideas of Adam Ferguson and Adam Smith,¹⁰ Madison's Federalist 51 sketches an invisible-hand theory of the relationship among lawmaking institutions under the proposed federal Constitution. What makes Madison's theory an invisible-hand theory is that he does not suppose that officials in the new lawmaking institutions will be motivated to pursue the public interest, however defined. Rather they will be acting to promote their individual ambitions; those ambitions will be tied to the long-run interests of the institutions they staff ("the interests of the man will be connected to the rights of the place"); and the result will be a system of institutions competing with each other to promote their interests. The point of such a system is to prevent tyranny, defined as the accumulation in a

⁸ See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312 (2005).

⁹ See, e.g., Nick Barber, *Institutional Self-Defence* (Oxford Legal Stud. Research Paper No. 61/2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2162129; Eric A. Posner, *Balance-of-Power Arguments and the Structural Constitution* (U. Chi. Inst. L. & Econ. Olin Research Paper No. 622, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2178725; ADRIAN VERMEULE, *THE SYSTEM OF THE CONSTITUTION* (2011).

¹⁰ See ADAM FERGUSON, *AN ESSAY ON THE HISTORY OF CIVIL SOCIETY* (1767); ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (1776).

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single institution of all legislative, executive and judicial powers. The invisible-hand system of institutional competition, in other words, produces liberty as a byproduct of individually and institutionally self-interested behavior -- just as actors in competitive markets, like Adam Smith's butcher, indirectly produce social goods as a byproduct of self-interested motives.

Legal theorists have criticized this account on many fronts. For one thing the baseline from which balance of powers is to be measured is conceptually ambiguous and empirically unclear.¹¹ For another the connection between officials' individual interests and institutional interests is weak, especially in Congress; the dominant motivation for legislators is partisanship, not institutional ambition, so that Madisonian competition among institutions is replaced by partisan competition. (We examine this view in I.B., and will also examine a variant view, asymmetric Madisonianism, which posits that the presidential bureaucracy does systematically protect and promote the long-run interests of the Presidency as an institution, while on the legislative side there is much weaker incentive to defend congressional prerogatives). Furthermore, Madison's account is an ersatz invisible-hand system, which lacks the key causal mechanism that might in principle (if not in practice) make Smithian market competition socially beneficial. By contrast with competition in ideal markets, Madisonian competition lacks a price mechanism that aligns the outcomes of the invisible-hand system with social welfare.¹²

For now, we set aside these critiques to focus on the way in which legal scholars have attempted to carry forward the Madisonian vision. The main argument of interest here is an argument for what we will call "Madisonian" judging, in which judges act as impartial regulators or referees of the competitive system, attempting to promote an ongoing system of checks and balances over time. The quotation marks indicate that, in our view, the argument is fallacious, a kind of category mistake. Judging of that sort may or may not be defensible on other grounds, but cannot be justified on the basis of Madison's invisible-hand theory of checks and balances. Any attempt to do so will end up committing the inside/outside fallacy.

"Madisonian" judging supposes that the proper role of courts, in controversies involving the separation of powers and the structure of government, is to prevent "encroachment" or "aggrandizement" in which one branch absorbs all or part of the power of another.¹³ (In Madison's original and narrow formulation, tyranny would arise only when one branch absorbed the whole power of another, but the post-Madisonian theory usually ignores this restriction and treats partial encroachment identically to wholesale conquest; we will follow suit). In this vision, relentless competition between the "political branches" -- an odd locution that legal theorists use to denote the non-judicial branches -- needs an impartial referee, one who occupies the same position in relation to the lawmaking system as an impartial antitrust regulator occupies in relation to the system of market competition. The judicial branch is that referee.

¹¹ See M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PENN. L. REV. 603 (2001); Posner, *supra* note 9.

¹² VERMEULE, *supra* note 9, at 42.

¹³ For discussions of aggrandizement in constitutional doctrine and theory, see, for example, *Bowsher v. Synar*, 478 U.S. 714, 727 (1986); *INS v. Chadha*, 462 U.S. 919, 951 (1983); *Buckley v. Valeo*, 424 U.S. 1, 122-23 (1976); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123 (1994); A. Michael Fromkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346 (1994); Daryl Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 916 (2005); Thomas P. Crocker, *Presidential Power and Constitutional Responsibility*, 52 B.C. L. REV. 1551 (2011).

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Whatever may or may not be said on behalf of such a vision, it is emphatically not derivable from Madison's invisible-hand argument. Nothing in that argument posits the existence of a branch of government that functions as an external regulator of the competitive system. On the contrary, the frame of Madison's argument supposes that "exterior provisions"¹⁴ for protecting liberty amount to little more than "parchment barriers,"¹⁵ compliance with which will fail the test of incentive-compatibility; no institution will have both the capacity and incentive to enforce such a set of arrangements. The challenge for the constitutional designer is precisely to set up naturally self-regulating institutional mechanisms, resting on the powerful motives of ambition and self-interest rather than the feeble motive of promoting the common good. The point of the very title of *Federalist 51* -- "The Structure of the Government must Furnish the Proper Checks and Balances Between the Different Departments" -- is that checks and balances must arise endogenously from structural competition, rather than from the exogenous commands of the antitrust regulator.

Put differently, arguments for "Madisonian" judging go wrong by assuming that judges stand outside the Madisonian system. That amounts to a confusion of perspectives. Madison writes as a constitutional designer trying to persuade constitutional ratifiers. Both Madison and his audience stood outside the system of institutional competition that would, upon ratification, be established by the new Constitution. But there is not a word in *Federalist 51* suggesting that the judicial branch, an institution within the new constitutional order, will somehow stand outside the system of mutual checking through institutional ambition. Indeed, throughout *The Federalist* Madison lists the "judiciary department" as on the same footing as the legislative and executive departments; each must be given the capacity and incentive for self-defense, and the motive power of institutional self-defense must be supplied by tying individual to institutional ambition. Madison does think that the greatest risk of aggrandizement comes from the "legislative vortex"¹⁶ but this does not imply that judges are outside the competitive system he would erect; it merely implies that both the executive and the judges must be given especially powerful means of self-defense. Madison says exactly that as to the executive, and the logic extends to the judicial branch as well. The framers, socialized in the traditions of English law in which all judges were at least in theory the Crown's judges, had only a hazy conception of the distinction between executive and judicial power; there is no reason to think that Publius expected the judiciary branch to behave differently, from the standpoint of institutional self-defense, than the executive branch.

The true Madisonian perspective, then, is the external standpoint of a designer of the constitutional system, who must also perforce be an analyst of politics. From that standpoint, the judiciary is just another of the branches struggling to encroach upon the others or to aggrandize itself at the expense of the others; judges are just part of the invisible-hand system, not some sort of external regulator of the system. Indeed, the paradoxical logic of the true Madisonian perspective is that the invisible-hand system may work well only if judges, presidents or legislators do not consider the overall welfare of the system, but instead attempt to aggrandize the power of their respective branches. Imagine, for example, that public-spirited officials in the

¹⁴ The *Federalist* No. 51 (James Madison).

¹⁵ The *Federalist* No. 48 (James Madison).

¹⁶ *Id.*

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legislative and judicial branches incorporate the legitimate institutional interests of the executive into their own decisions, while the executive single-mindedly aggrandizes its own power, heedless of the legitimate institutional interests of the other branches.¹⁷ The asymmetric distribution of public-spirited motivations across branches might lead to a kind of double-counting of executive interests, creating a long-run tendency to remorseless expansion of executive power. That expansion might or might not be a good thing, all things considered, but from a Madisonian perspective it represents a destabilizing force within the system of checks and balances, which if taken to an extreme would defeat the original aim of preventing aggrandizement. The best chance to prevent aggrandizement might be for the judges and legislators to ignore even the legitimate interests of the executive, robustly contesting assertions of executive power.

More abstractly, if universal cooperation to promote overall welfare is unattainable, a competitive system might function best overall if none of the actors attempts to consider the overall well-being of the system, and instead all concerned pursue their private interests. This is a problem of partial compliance or second-best, one that arises in many domains. Analogously, economists and political theorists have argued that even if an economy in which all agents are fully altruistic would be best of all, an economy in which all agents are entirely self-interested might do better for all than an economy in which agents are somewhat altruistic (or only some agents are altruistic).¹⁸ Likewise, in an adversarial system of litigation, judges might obtain the most useful information from litigants if each party advocates relentlessly for its own interests, rather than attempting to consider the other party's interests from an impartial perspective.¹⁹ These are just possibilities, as is our parallel point about a Madisonian system. But it is a serious complication for "Madisonian" judging that judicial attempts to stand outside the system, as an impartial referee or antitrust regulator, might make things worse, not better, from the very standpoint of preventing aggrandizement.

¹⁷ See VERMEULE, *supra* note 9, at 39–40.

¹⁸ Serge-Christophe Kolm, *Introduction to the Economics of Altruism, Giving, and Reciprocity*, in 1 HANDBOOK ON THE ECONOMICS OF GIVING, RECIPROCITY AND ALTRUISM 1 (Serge-Christophe Kolm & Jean Mercier Ythier eds., 2006) (hereinafter HANDBOOK); Jon Elster, *Altruistic Behavior and Altruistic Motivations*, in HANDBOOK, *supra*, at 183.

¹⁹ VERMEULE, *supra* note 9, at 91–93.

B. Partisan Competition

An alternative to the Madisonian system of institutional competition is a system of partisan competition. In the political economy literature that models interactions -- checks and balances -- among institutions in a system of separated powers, a common modeling constraint is some rule that prevents Coasean bargains among actors to carve up or reallocate powers on mutually beneficial lines.²⁰ Such a constraint is a necessary prerequisite to a functioning system of mutual checks among separated institutions; if actors may costlessly bargain to reallocate powers among themselves, then the Constitution's specification of powers and functions will be circumvented. Low transaction costs defeat the separation of powers across institutions.²¹

Political parties illustrate the Coasean vulnerability of the Madisonian system. Parties, on this perspective, are coalitions of actors who implicitly bargain to reallocate powers among themselves, regardless of the long-run power or interest of the institutions they happen to temporarily control. If, for example, Congress and the Presidency are both controlled by the same party, there is no reason to expect vigorous institutional competition between the branches. The individual interests of legislators will be tied to the interests of their partisan coalition, not to those of Congress as an institution; the "interests of the man" will come untethered from "the rights of the place." There is no reason to think that partisan interests will or will not systematically or routinely correlate with long-run institutional interests, although they may do so fortuitously and in the short run.

In the legal literature, Daryl Levinson and Rick Pildes have offered an important and clarifying argument that the U.S. system is one of "separation of parties, not powers."²² To be sure, our system displays both separation of parties and separation of powers.²³ In the configuration of divided government, in which Congress and the Presidency are controlled by different parties, partisan interests happen to align with institutional divergence, producing institutional conflict and competition that may if anything be all too vigorous. But even then the institutional competition is in part a byproduct of partisan competition, so Levinson and Pildes are surely correct that the Madisonian vision of institutional competition is a distinctly poor guide to observed political behavior, in large part because parties reallocate powers along lines that are orthogonal to institutions. Accordingly, Levinson and Pildes worry most about periods of unified government; their concern is that parties will transform the Madisonian system into a system of excessively concentrated powers, through delegation and other mechanisms.

This diagnosis rests on an external account of the system of partisan competition, one that draws upon political science and economics to explain the motivations of actors in the constitutional order. When the discussion turns to prescriptions, however, things change. Levinson and Pildes offer a number of proposals for ameliorating the harms of unified government. Among these are prescriptions offered to (1) the judiciary, (2) "democratic

²⁰ GEOFFREY BRENNAN & ALAN HAMLIN, *DEMOCRATIC DEVICES AND DESIRES* (2001); TORSTEN PERSSON & GUIDO TABELLINI, *THE ECONOMIC EFFECTS OF CONSTITUTIONS* (2005).

²¹ Donald Wittman, *The Constitution as an Optimal Social Contract*, in *THE FEDERALIST PAPERS AND THE NEW INSTITUTIONALISM* 73–84 (Bernard Grofman & Donald Wittman eds., 1989).

²² Levinson & Pildes, *supra* note 8.

²³ Richard Epstein, *Why Parties and Powers Both Matter*, 119 *HARV. L. REV. F.* 210 (2006) (responding to Levinson & Pildes, *supra* note 8).

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institutional designers” and (3) the political parties themselves.²⁴ All three sets of prescriptions assume the internal perspective of their respective addressees, and all three suffer from versions of the determinacy paradox. If the diagnosis of partisan competition is correct, there may be no institution with both the capacity and incentive to supply solutions. Levinson and Pildes, that is, offer supply-side prescriptions that may fail the test of incentive-compatibility, given their own account of political motivations. This is not to say that their prescriptions necessary fail incentive-compatibility. Perhaps some further conditions might be specified that would make the supply side of the story hang together with the demand side. But the prescriptions cannot simply be assumed or stipulated to succeed, based on a theory of motivations inconsistent with the theory that underpins the diagnosis.

The prescriptions offered to the judiciary include, *inter alia*, suggestions for ways in which judges might massage the constitutional law of separation of powers, and the closely related interpretive default rules concerning statutory authorization of presidential action, in order to ameliorate or check the potential harms arising from unified partisan government. But this amounts to a sudden switch to an internal perspective that assumes public-spirited judging; it implicitly treats the judiciary as outside the partisan system that the diagnosis describes as ubiquitous. Why should the judges be any different? Unified government, at least if protracted for a sufficient period, would mean that judges associated with one party control the judiciary, and in effect reallocate powers to a branch controlled by the same party, through their constitutional rulings.

It is no answer to observe that Article III judges enjoy life tenure and are thus putatively insulated from politics. That insulation liberates the judges to indulge their preferences, subject to the constraints of the reactions of other institutions. But the preferences that are indulged may themselves be partisan ones. Because parties control the selection mechanism, judges will be selected on a more or less partisan basis, subject to the constraints of what the other party will agree to. Even the latter constraint will give way in periods of unified government, when both President and Senate are dominated by the same party. The literature in political science on the determinants of judicial voting finds a strong partisan influence. Although law also matters, and although partisanship matters most in certain classes of cases and at the Supreme Court, still and all, the single best predictor of judicial votes in cases where there is disagreement is generally the political party of the appointing president.²⁵ Moreover, studies that have attempted to determine the causal mechanisms that bring judicial rulings into alignment with majoritarian preferences have found that the main channel is selection -- selection of judges with the right ideological proclivities.²⁶ Those judges need not, of course, subjectively experience themselves as casting votes along partisan lines; the mechanism operates behind the judges’ backs, through bias rather than ill intentions.

Judges are inside the political system, not outside it. If the system is structured and pervaded by partisan competition, as Levinson and Pildes argue, then one cannot turn around and

²⁴ Levinson & Pildes, *supra* note 8, at 2368–84.

²⁵ CASS SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006).

²⁶ See, e.g., Michael Heise & Gregory C. Sisk, *Judges and Ideology: Public and Academic Debates about Statistical Measures*, 99 NW. U. L. REV. 745 (2005); Frank B. Cross & Emerson F. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155 (1998).

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assume that the judges will be immune. If and to the extent that judges are partisan, so that judicial votes are determined by partisan advantage (whatever the subjective experience of judging), then it is pointless to give the judges public-spirited advice. Unless that advice happens fortuitously to coincide with partisan interests, it will fall on deaf ears. Levinson and Pildes clearly identify the anomaly, observing that “the judicial branch itself is hardly quarantined, at least in the long run, from the effects of party politics. The hope that courts will use constitutional rules to check unified party government must be tempered by the recognition that the same unified government will be appointing judges and exercising some measure of ongoing political control over the courts.”²⁷

Similar points hold for Levinson and Pildes’ other supply-side prescriptions, addressed to “democratic institutional designers” and to the parties themselves. As to the former, Levinson and Pildes are vague about who these designers are supposed to be; most frequently, they use the passive voice and other constructs that leave it unclear which actor is meant to supply the institutional prescriptions they recommend. The reason for doing so is clear. Most of the institutional prescriptions that Levinson and Pildes offer are sub-constitutional -- involving legislative rules to protect legislative minorities and administrative structures to insulate agencies from partisan oversight. But this runs squarely into the determinacy paradox. Such rules will have to be supplied by Congress, but according to the terms of Levinson and Pildes’ diagnosis legislators act principally on partisan motivations, and it is unclear why they will have any incentive to supply institutions intended to ameliorate partisanship or the effect of unified government.²⁸ To enact the relevant rules and institutions would require, in many cases, the approval of both houses of Congress plus the President; they are thus most easily enacted during periods of unified government, precisely the periods in which the dominant party will have the least interest in enacting them.

A fortiori, the same holds for prescriptions addressed directly to the parties. When Levinson and Pildes say things like “we might use legal rules and institutions to prevent strong parties from unifying government so thoroughly as to threaten Madisonian values,”²⁹ one wants to ask who this “we” is supposed to be. We act principally through parties, or so Levinson and Pildes have argued, and the question is why parties would have any incentive to listen to such advice or to adopt it. The point is not that such arrangements could never come about. In certain

²⁷ Levinson & Pildes, *supra* note 8, at 2355.

²⁸ For another, and quite typical, example of this problem, see Gregory Dolin, *Speaking of Science: Introducing Notice-and-Comment into the Legislative Process* (papers.ssrn.com/sol3/papers.cfm?abstract_id=2211769). The diagnosis is that Congress bungles science-related issues, in large part due to the “lack of an independent, non-partisan forum for discussing and evaluating proposals” (*id.* at 26). Committee hearings end up being partisan charades rather than occasions for genuine deliberation. See *id.* at 6-15. The cure is supposed to be a “nonpartisan body of experts,” akin to the Congressional Budget Office (CBO), that would “score” proposals for scientific validity. See *id.* Given the diagnosis of hopeless partisanship, the argument needs an account of the supply side – of why exactly partisan members of Congress would bring such a nonpartisan scientific body into existence and then respect its neutrality over time. The only account offered here – offered as an explanation for the creation of a nonpartisan CBO, but presumably intended to apply by analogy -- is the idea that “Congress is by its very nature bipartisan (even when a single party has a majority in both chambers) and therefore each party has to try to accommodate the other to a certain extent,” *id.* at 41. This is in obvious tension with the diagnosis; if that’s so, then why doesn’t the ordinary committee process provide a sufficiently bipartisan forum, making a special body unnecessary?

²⁹ *Id.* at 2379.

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political configurations, certain mechanisms might explain why parties cede rights to legislative minorities, create agencies insulated from their own control, or otherwise act against their seeming short-run interests. Work in political science explores such mechanisms.³⁰ But as is common in the legal literature, Levinson and Pildes do not discuss such supply-side mechanisms in any detail, and their existence cannot by any means simply be assumed.

We have lingered on Levinson and Pildes because of the importance of their work on partisan competition and the constitutional order, but similar inside/outside problems crop up elsewhere. Another example is a recent and important paper by Curt Bradley and Trevor Morrison on acquiescence and historical gloss in separation of powers law.³¹ The traditional notion, captured by Justice Frankfurter's concurrence in Youngstown Sheet & Tube Co. v. Sawyer,³² is that a long-continued pattern of executive behavior known to and acquiesced in by Congress can create a "gloss" on presidential power that becomes part of the operating constitution.

Bradley and Morrison draw upon the political science literature and related legal work to launch a devastating critique of that idea. Congress faces severe problems of collective action; even if all legislators would benefit from defending the long-run interests and prerogatives of Congress as an institution, individual legislators' incentives are political and partisan, above all to seek re-election. Given the public-good character of legislative self-defense, that good will be undersupplied and Congress as an institution will often fail to protect itself from presidential aggrandizement. The institutional Presidency, by contrast, suffers fewer problems of collective action because it has a relatively unified and hierarchical structure, and because there is a standing executive bureaucracy, in the White House Counsel's Office and elsewhere, devoted to protecting presidential prerogatives. Although Bradley and Morrison do not use the term, their picture is in effect one of asymmetric Madisonianism, in which the Presidency as an institution does a much better job of protecting its interest than does Congress. It follows from this analysis that the acquiescence doctrine is suspect, because Congress will sometimes or often fail to take action to protect itself even when it should (from a Madisonian point of view). Congressional silence is a poor proxy for substantive agreement or a tacit interbranch bargain; rather it may indicate only inertia and failures of collective action among legislators.

So far the analysis is highly persuasive. But when Bradley and Morrison turn to the prescriptive questions, they never ask whether the system of asymmetric Madisonianism that they discuss at the stage of diagnosis might affect the behavior of judges as well; rather the judges are assumed to be outside the system. In their words,

[T]he same shortcomings with the Madisonian model that undercut claims of congressional acquiescence in general also carry specific implications for the role of the courts in this area....The implication here is that courts should be more

³⁰ See, e.g., DAVID E. LEWIS, *PRESIDENTS AND THE POLITICS OF AGENCY DESIGN* (2003); Arjen Boin, Sanneke Kuipers & Marco Stenbergen, *The Life and Death of Public Organizations: A Question of Institutional Design?*, 23 *GOVERNANCE* 385 (2010).

³¹ Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 136 *HARV. L. REV.* 412 (2012).

³² 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring).

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circumspect about invoking congressional acquiescence as a basis for deferring to executive practice. By itself, this point does not defeat all arguments for judicial deference in matters relating to executive power. But it does suggest that such arguments should be closely scrutinized, to ensure that they are not based on the kinds of Madisonian assumptions about congressional capacity and motivation that we have shown to be problematic here.³³

But the judges to whom the prescription is addressed may have no incentive to heed it, for the very reasons given in the diagnosis. The core issue Bradley and Morrison identify is that Presidents do a better job of attending to the long-run institutional interests of the Presidency than partisan legislators do of attending to the long-run institutional interests of the Congress. Which motivation -- institutional aggrandizement or partisan advantage -- dominates judicial behavior? Either answer would compromise Bradley and Morrison's prescriptions. If judges are good Madisonian actors who attempt to aggrandize the judiciary -- if the "interests of the [judge]" are tied to the "rights of the [institutional judiciary]", to adapt Madison's phrase -- then judges will follow Bradley and Morrison's suggestions only insofar as doing so promotes the judiciary's interests.³⁴ Those interests, however, run orthogonally to the beneficial functioning of the Madisonian system, viewed from the external standpoint of the system designer or theoretical analyst.

Conversely, suppose that the judiciary is not a good Madisonian actor. Suppose, given that there are hundreds of Article III judges arranged in a somewhat loosely centralized hierarchy, that the judiciary suffers from problems of collective action similar to those that afflict Congress. Judges' individual incentives need not align, and may or may not systematically align, with the aim of Bradley and Morrison's advice, which are to promote the healthy overall functioning of the Madisonian system. Here too it is critical that the judges who are supposed to supply remedies are themselves selected by the very actors whose pathologies (from the Madisonian standpoint) are at issue. One of the main channels of long-run presidential influence is the selection of judges. If Congress -- particularly the Senate -- is unable to organize consistently to defend congressional prerogatives during the process of appointment and confirmation, the consequence may be a systematic tendency, over time, for the judiciary to be composed of judges who happen to believe, quite sincerely, that the Constitution correctly read imposes substantial constraints on Congress, favors expansive executive power, or both. Such judges will, for the very reasons identified in Bradley and Morrison's diagnosis, be resistant to their prescriptions.

³³ Bradley & Morrison, *supra* note 31, at 452.

³⁴ As Alison Lacroix points out:

[T]he Madisonian model haunts Bradley and Morrison's account. Much of their argument presumes an adversarial relationship between the political branches and largely overlooks the role of judiciary. Their Article for the most part treats the judiciary, especially the Supreme Court, as an arbiter of separation of powers disputes rather than as an active branch of the federal government. But, as the examples of judicial review and the political question doctrine demonstrate, the Court's decisions on issues of justiciability are assertions of ultimate interpretive authority, however deferential and self-restraining their immediate impact.

Alison L. LaCroix, *Historical Gloss: A Primer*, 126 HARV. L. REV. F. 75, 83 (2012).

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This is just one empirical possibility among many. It is also logically possible that in any given case, judges' incentives or biases will happen to align with the goals of a well-motivated designer of a sustainable system of Madisonian competition. But any such alignment may be fortuitous and temporary. Nor is the possibility limited to judges; the President's self-regarding incentives might, in particular circumstances, lead him to protect congressional prerogatives, say from judicial attack. The contingencies are unlimited and complex, and it is possible to specify just the right combination of assumptions to get almost any story off the ground, at least for a short flight. But there is no general and systematic reason to think either that there will be, or will not be, judicial demand for the sort of counsel that Bradley and Morrison offer. Substantively, the issues are empirical and contingent, and we are (for present purposes) entirely agnostic about the merits. Methodologically, however, the crucial issue we mean to raise is one of consistency: Judges too are inside the system, and advice from the external standpoint will have to be refracted through the motivations of actors within the system. The analyst's first duty is to ensure that the combination of assumptions she adopts is consistent, across both prescription and diagnosis.

C. Process Theory: Majority Prejudice, Official Self-Dealing, Interest Groups

We have focused on Madisonianism and its variants, but structurally similar points apply to other theoretical frameworks in public law; we will treat these more briefly. Our catch-all label is "process theory," stemming from sources such as John Hart Ely's theory of judicial review and literatures in public choice and political economy.³⁵ Process theories comes in many shadings, but we will mention three main concerns: (1) majority prejudice that prevents the impartial representation of minorities; (2) self-dealing by incumbent officials who choke off "the channels of political change," through institutional arrangements that in effect gerrymander the political system to perpetuate themselves; and (3) vote-buying and campaign financing by interest groups who cause legislators to act in ways that benefit the groups but reduce overall welfare.

In all three contexts, theorists have proposed judicial review as a potential corrective. Ely justified a great deal of the Warren Court's work as an effort to promote representation of the interests of minorities in a pervasively prejudiced system of politics, or alternatively to prevent incumbent officials from insulating themselves against political challenge.³⁶ A generation after Ely, public choice theorists argued that the role of interest groups in politics implied a need for expansive judicial review; facing no need for re-election, life-tenured federal judges would be less beholden to such groups and could deploy constitutional protections to block inefficient ("rent-seeking") legislation.³⁷

Here too, however, the theorists tended to offer skeptical accounts of the motivations and behavior of political actors at the stage of diagnosis, while quietly dropping those accounts at the

³⁵ See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

³⁶ *Id.* at 74–75.

³⁷ See, e.g., Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627 (1994); Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471 (1988).

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stage of prescription. The same motivations that cause legislators, interest groups and others to behave in self-interested or prejudiced ways will cause those actors to constrain or negate judicial efforts to correct process deficiencies. The theorists overlooked, in other words, that judges do not stand outside the system; judicial behavior is an endogenous product of the system.

As to interest-group theory, for example, Einer Elhauge in effect identified the determinacy paradox problem -- although not in those terms -- when he argued that

[t]hose advocating more intrusive judicial review rarely address this comparative question. Instead the tendency is to emphasize the flaws of the political process and then assume without analysis that the litigation process will operate better. The litigation process plays the role of a *deus ex machina* that can correct the flaws that grip the other lawmaking branches but is apparently without flaw itself. But the litigation process cannot be treated as exogenous to interest group theory: it too is susceptible to interest group influences.³⁸

If particular groups remain latent -- i.e. unorganized -- because they face severe problems of collective action, then they will be unorganized for purposes of litigation just as much as for purposes of electioneering, campaign finance and lobbying. Thus organized groups will have systematic advantages in setting judicial agendas through case selection, in the quality of advocacy they offer, and so forth. The simple accounts of collective action that underpin most interest-group theory are insufficiently fine-grained to discriminate between action in legislative and judicial arenas.

This is not to say that more fine-grained theories cannot be offered. Tom Merrill, for example, replies that interest group theory rightly understood does justify more intrusive judicial review, because (1) fewer resources are needed to enter the litigation arena than the legislative arena; and (2) once litigation has begun, the marginal effect of further expenditures falls more quickly towards zero in litigation than in lobbying.³⁹ If Merrill is correct, then Elhauge overstates things when he makes the substantive claim that “the same interest groups that have an organizational advantage in collecting resources to influence legislators and agencies generally also have an organizational advantage in collecting resources to influence the courts.”⁴⁰ But whichever view is correct on the merits, Elhauge’s crucial methodological point remains unimpeached: judicial behavior cannot be treated as exogenous or a *deus ex machina* -- a miraculous intervention from outside the system. The analyst must follow through to determine whether the same theories of motivation, cognition and behavior offered to diagnose a problem also vitiate the remedy, including the preferred remedy of so many constitutional theorists, expanded judicial power.

³⁸ Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 34 (1991).

³⁹ Thomas W. Merrill, *Does Public Choice Theory Justify Judicial Activism After All?*, 21 HARV. J.L. & PUB. POL’Y 219 (1997).

⁴⁰ Elhauge, *supra* note 38, at 67–68; *see also* Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

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The same holds with appropriate modifications for Ely's theory of judicial review. Suppose that a large, stable and prejudiced majority controls both the executive and legislative branches by virtue of its domination over elections. Because the executive and legislative jointly control the process of judicial appointments, that same majority may, either with invidious intent or in a heedless way, filter out judges who would challenge majority prejudices and filter in judges who share them. Or it may not do so, under certain conditions; the possibilities are legion and the questions are ultimately empirical. But as a matter of methodological consistency, it is incumbent on the Elyian theorist to explain why such a result will not hold, given the theorist's assumptions about other actors.⁴¹

Likewise, if incumbents are choking off the channels of political change, one of their principal concerns might well be to choke off the litigation channel that might be used to challenge their entrenched power. Through appointment of members of the entrenched coalition to the bench, implicit threats of retaliation, or simple refusal to enforce judicial decisions against themselves, the incumbents would attempt to structure judicial behavior so as to perpetuate their own power. They may or may not succeed in doing so, but the analyst must confront the issue and attempt to identify the conditions under which the attempt will or will not occur and will or will not prevail. As a matter of consistency, judicial behavior cannot be assumed to float outside the political system, and the theories deployed to identify problems cannot be quietly discarded when the time comes to propose solutions.

A final example, closely related to process theory and problems of majority prejudice, involves a reaction to Derrick Bell's "interest-convergence thesis," which holds (roughly) that "blacks receive favorable judicial decisions to the extent that their interests coincide with the interests of whites."⁴² On this view, an overwhelmingly white judiciary maximizes the promotion of "white interests."⁴³ If so, then it follows that normative advice to judges must take this constraint into account or else prove irrelevant; arguments for favorable judicial decisions for blacks must be cast in terms of the interests of whites.

The interest-convergence thesis has been criticized for denying the moral agency of white judges who attempted to undermine segregation out of moral conviction, rather than racially-defined group interest; this denial is said to encourage fatalism and passivity about racial progress through constitutional law.⁴⁴ But the criticism fails if, in fact, the interest-convergence thesis is true; then the relevant complaint would be not that the white judges lack agency, but that they exercise their agency in morally objectionable ways. A valid criticism would arise only if some analyst both subscribed to the interest-convergence thesis and also offered the white judiciary normative advice to the effect that the judges should protect the constitutional rights of blacks regardless of white interests. Bell himself, however, appears to have been consistent on this score.⁴⁵

⁴¹ For an example in this spirit, see Cass R. Sunstein, *If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155 (2007).

⁴² See Bell, *supra* note 40; Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 NW. U. L. REV. 149, 151 (2011).

⁴³ *Id.* at 188.

⁴⁴ *Id.* at 160.

⁴⁵ Bell, *supra* note 40, at 523.

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II. Presidential Power and Emergencies

Inside/outside fallacies are frequently on display in debates over presidential power and emergency powers. These debates are related to the broader debates over separation of powers and checks and balances, and thus partake of the problems discussed in Section I, but there are additional reasons why the inside/outside problem becomes especially acute in this domain. Presidential power and emergency powers pose acute dilemmas for analysts and actors who want government to have power to respond vigorously to emergencies, but who also fear that an imperial Presidency will ride roughshod over legality and liberal rights. A common reaction is to attempt to escape the dilemma by licensing presidential action that -- the hope runs -- will somehow remain outside the system, setting no precedent for the future and maintaining the purity of the law and legal rights. We will trace that idea through three different arguments, and show that it rests on a conceptual confusion. Presidential action is always and necessarily action within the system; there is no way to prevent such action from setting precedents. So too with judicial responses to presidential action; whatever judges do will create a precedent, either de jure or de facto, within the system.

A. Responsible Illegality

We will begin with a view of emergency powers that is widespread among liberal commentators (liberal in the political theory sense). This view comes in a number of shadings and variants, but the common theme is an attempt to wall off emergency action from the ordinary legal system and constitutional order. The fear is that the need to allow government to act vigorously in emergencies will cause judges or other actors to distort the normal rules in ways that will license ongoing abuses when the emergency has passed.

Thus the commentators want government actors, especially the executive, to adopt a posture of responsible illegality. The President, for example, if faced with the need to take decisive action in emergencies that violates ordinary liberal rights, should do what needs doing, candidly admit the illegality, and throw himself on the judgment of the public. The public in turn may ratify his actions through legislation, retroactively immunize him from liability, pardon his excesses, or otherwise excuse him from the ordinary legal consequences of wrongdoing. Although this sort of regime has been justified in part on grounds of accountability, the main impetus is to immunize ordinary law from the distorting effects of emergencies. Above all, liberal commentators want to prevent the creation of a new equilibrium in which extraordinary powers wielded in one emergency have become routinized in the legal system.⁴⁶

The mistake is to think that presidential emergency action can be somehow placed outside the ordinary system -- outside the constitutional order of which it is a part. On the contrary, even if judges or legislators refuse to give presidential action de jure recognition under the Constitution, the cycle of illegality-and-ratification may itself become routinized as a part of the constitutional order, resulting in the same substantive expansion of executive power in a small-c constitutional sense. In Albert Venn Dicey's account of martial law and emergency

⁴⁶ See, e.g., Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?*, 112 YALE L.J. 1011, 1023 (2003) (arguing for an "Extra-Legal Measures model" of emergency powers in which public officials may "act extralegally," subject to ex post review); GIORGIO AGAMBEN, *STATE OF EXCEPTION* (2008).

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powers, *ex post* ratification or indemnification by Parliament of necessary but illegal ministerial action is seen as a convention -- an unwritten political norm that, although not enforceable in the courts of law, is nonetheless obligatory on the relevant actors.⁴⁷ So too in the American case. The liberal commentators forget that the constitutional order comprises not only laws, but also conventions that determine which laws must be respected and which may be broken, with what consequences. Such conventions result, in part, from precedent-setting behavior by political actors; an episode of illegality-plus-ratification will itself set a precedent. The overlay of illegality-licensing conventions is just as much part of the system as the first-order laws themselves. The liberal hope to set up a wall of separation between emergencies and the constitutional system is thus doomed to fail.

Although the connection is not immediately obvious, the inside/outside fallacy lurking within the argument for responsible illegality is another example of the determinacy paradox, just as in the cases discussed in Section I. The diagnosis that underpins the argument from responsible illegality is that presidents, legislators, judges and other actors have a set of motivations and beliefs that threaten to produce a cycle of ever-expanding executive power -- a one-way ratchet. Although proponents of the theory do not usually offer clear and precise mechanisms to explain this cycle, the implicit picture is a reprise of asymmetric Madisonianism, powered by emergencies: presidents seek to maximize their power and that of their office, while legislators and judges are myopic, granting presidents expansive emergency powers today without sufficiently taking into account the future consequences of the precedent that they set. But the prescription, the regime of responsible illegality, does nothing to remove these underlying motivations and cognitive shortcomings. If presidents are power-maximizers, then will not admit that they acted illegally and ask the public for forgiveness; and if they are public spirited, then there is no reason to constrain them with the law.⁴⁸

B. Robert Jackson on Emergencies and Precedent

The fantasy that emergency action can be quarantined through a principle of responsible illegality bewitches external analysts of presidential and emergency powers, but a similar mistake afflicts actors within the system as well. A classic example is Justice Robert Jackson's opinion in Korematsu v. United States,⁴⁹ the notorious decision that licensed internment of Japanese aliens and Japanese-American citizens in a military zone along the west coast during World War II. Jackson's opinion attempts to square the circle of emergency powers by stepping outside the system from within the system -- a conceptual impossibility.

In Jackson's view, the judges were helpless to resist the military's internment order, nor should they wish to resist it. As to the feasibility of resistance, the nature of military problems

⁴⁷ ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION, 280, 407 (1915).

⁴⁸ The paradox can be seen more easily once one realizes that scholars who advocate responsible illegality are essentially arguing that the President should engage in civil disobedience and the legal system should forgive him when it is justified. From a post-realist perspective, where the law is interpreted as whatever happens in the legal system, the President who is forgiven never acted illegally in the first place. It's as if Congress passed a law that provided that anyone who engages in civil disobedience may not be convicted of the crime they are trying to commit. People then who tried to engage in civil disobedience would not be able to do so; the underlying substantive law that they object to would simply cease to exist.

⁴⁹ 323 U.S. 214 (1944).

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entails that “courts can never have any real alternative to accepting the mere declaration of the authority that issued the order that it was reasonably necessary from a military viewpoint.”⁵⁰ As to the desirability of resistance, “[w]hen an area is so beset that it must be put under military control at all, the paramount consideration is that its measures be successful, rather than legal. The armed services must protect a society, not merely its Constitution.”⁵¹ But it does not follow, for Jackson, that the courts should themselves review and uphold the military order. To do so would create a damaging precedent, one that “lies around like a loaded weapon.”⁵² Jackson’s thought is that extra-legal military action creates a precedent if, but only if, it receives a judicial imprimatur: “A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution.”⁵³

Accordingly, Jackson adopted a seemingly paradoxical stance. He voted to discharge the detainee, on the ground that the courts should not themselves enforce unconstitutional military orders,⁵⁴ but he also indicated that the courts should not have attempted to interfere with the Army in carrying out its tasks.⁵⁵ The only way to reconcile these two ideas is that, on Jackson’s view, the courts should simply refuse to exercise jurisdiction if a detainee sues for review of the military’s extra-legal behavior; Jackson’s hope is that the military will do what it needs to do, entirely outside the legal order, while courts refuse to intervene.

Jackson’s opinion is beloved by lawyers, who hope to preserve law’s purity by extruding military action into some realm outside the legal system. The hope is doomed to fail, however, because there is a small-c constitution that surrounds and subsumes the Constitution. The constitution is determined and structured, in part, by historical episodes that help to create practices, norms and obligatory conventions. One of those practices or norms may itself be that courts should step out of the way when military action is imperative; putative non-decisions of the sort Jackson suggested in Korematsu would themselves amount to decisions to create a behavioral, practice-based precedent of that sort, one that future judges or other actors could cite on appropriate occasions. Judges may refuse to create a legal precedent in the narrow sense of decisions in the judicial reports, but they cannot avoid creating an unwritten precedent through their behavior. There is no way for judges to extrude military action and their refusal to review it from the total system of constitutionalism (as opposed to Constitutional Law). Any judicial move is a move within the system; there is no escaping the system from within.

In a non-obvious way, Jackson’s opinion falls into a version of the determinacy paradox. The fear of creating a precedent is the fear that future actors will take a precedent that defers to the military and use it in ways Jackson thinks harmful (the “loaded gun”). That amounts to a diagnosis of the motivations of future actors; Jackson’s prescription is for the Court to decide nothing. Yet the future actors, given the very motivations posited by the diagnosis, may also claim that the decision to issue no decision is itself a precedent, one that requires inaction by

⁵⁰ *Id.* at 245.

⁵¹ *Id.* at 244.

⁵² *Id.* at 246.

⁵³ *Id.*

⁵⁴ *Id.* at 247.

⁵⁵ *Id.* at 248.

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subsequent courts when asked to overturn military action. Jackson's view turns out to be pragmatically self-defeating because of an inconsistency between diagnosis and prescription -- the hallmark of the determinacy paradox.

At bottom, Jackson's Korematsu opinion is Delphic and his assumptions unclear. There might well be ways of understanding or specifying those assumptions to make his argument cohere; here are some possibilities. Jackson might be making one of two assumptions about the motivations of future judges. First, he might assume that judges on future courts, like his own, will be motivated to avoid confrontation with the military. But if that is so, the prescription -- avoid setting a judicial precedent -- will have no effect on them whatsoever. Second, he might assume that judges on future courts blindly follow judicial precedents, and if that is so, failing to set a judicial precedent may encourage them to rule against the military in appropriating circumstances. But if that is Jackson's reasoning, he needs to explain why future judges will act differently from his own court. There is a third possibility, and that is that Jackson hopes that the failure of his court (and possibly future courts) to endorse a military action will at least force the military to justify its actions to the public, so that a heightened level of public attention will substitute for judicial review. Only this last possibility escapes the inside/outside problem. So we do not mean to deny that Jackson's opinion might be reconstructed in a coherent fashion, only that there is a prima facie inconsistency in his view, and that attention to the inside/outside problem is a necessary precondition for clarifying his argument.

C. Emergencies and the "Noble Lie": the Beneficial Illusion of Youngstown

One of Jackson's major contributions to legal theory was his concurrence in Youngstown,⁵⁶ with its famous three-category classification of presidential action: category one, in which the action is clearly authorized by statute, so that the president wields the full combined power of the legislative and executive branches; category two, in which statutes are silent or ambiguous, so that presidential action occurs in a "zone of twilight"; and category three, in which the action is clearly prohibited by statute, so that the president can rely only on his own constitutional powers, and even then only to the extent that they are exclusive and paramount, so that they trump the statutory prohibition.⁵⁷

Legal theorists, such as Sam Issacharoff and Rick Pildes, have elaborated Jackson's framework into a theory of presidential power during emergencies.⁵⁸ On this theory, courts engage in constitutional review in ordinary times, but in perceived emergencies they ask whether the president is acting with congressional authorization, validating the president's action if but only if that is true. Although judicially-developed constitutional rights may have to bend and give way during emergencies, courts can at least ensure that presidential action is legitimated and checked by democratic oversight, through a requirement of legislative approval.

⁵⁶ Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

⁵⁷ *Id.* at 634–55 (Jackson, J., concurring).

⁵⁸ See, e.g., Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQ. L. 1 (2004).

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Legal-realist critics,⁵⁹ however, drawing on work by political scientists,⁶⁰ have questioned whether this theory identifies a cause of judicial behavior or instead merely rationalizes judicial behavior. The federal statutory landscape is so full of statutes, and those statutes are so frequently vague or ambiguous -- especially with respect to the unanticipated issues that arise in emergencies -- that it is usually possible for judges to argue, with a straight face, that presidential action in emergencies is authorized by some statute or other. Exhibit A is Dames & Moore v. Regan,⁶¹ which drew upon a hodgepodge of inapposite statutes to find implied authorization for presidential suspension of legal claims arising from the Iranian hostage crisis and pending in United States courts. The overall point is that a judicial determination of statutory authority is often epiphenomenal, following from rather than determining the judges' decision.

As against this, Issacharoff and Pildes reply that even though, or even if, the authorization framework is partly illusory, it is a beneficial illusion, one that underscores values of democracy, checks and balances, and constitutionalism generally.⁶² The response is theoretically interesting because it is not one that can be offered from within the system. It would be pragmatically incoherent, even self-defeating, for judges to adopt the Issacharoff and Pildes approach to presidential emergency powers and to publicly justify it by saying that the approach, although a rationalization of decisions produced on other grounds, produces beneficial illusions. The very act of justifying the illusion in this way would dispel it, so long as those supposed to be subject to the illusion -- the audience for judicial decisions, including informed citizens -- are told that an illusion is what the justification really is. The upshot is that the beneficial-illusion argument must necessarily remain esoteric; it represents the sort of "noble lie" argument that surfaces occasionally in constitutional theory. The noble lie requires that the true justification for a practice remain concealed from the population subject to a beneficial illusion, which means that judges cannot publicly offer that justification within the system. Analysts of the system of emergency powers may propound it to one another, and judges may secretly harbor the notion within their hearts, but the beneficial illusion cannot become the stated justification of the governing legal regime within the legal regime. The determinacy paradox can be avoided here, but only through subterfuge.⁶³

D. The Supermajoritarian Escalator

Finally, we may mention a concrete proposal that illustrates how the determinacy paradox afflicts proposals for institutional reform of emergency decisionmaking. (Our treatment

⁵⁹ See, e.g., ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* (2007).

⁶⁰ See, e.g., Terry Moe & William Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132 (1999).

⁶¹ 453 U.S. 654 (1981).

⁶² Issacharoff & Pildes, *supra* note 58, at 36–37.

⁶³ There is a similar paradoxical flavor to Dan Kahan and Donald Braman's argument that because people evaluate evidence through "cognitive filters" derived from their cultural commitments, it is futile for advocates to try to change their minds about gun control by supplying them with facts and figures. Instead, advocates should construct "a pertinent yet respectful expressive idiom" that will persuade (delude?) people into taking the advocates' position. See Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1291, 1323 (2003). In the spirit of the noble lie, the advocate may need to conceal his motivation for constructing the idiom in order to make it succeed; it is not clear whether Kahan and Braman contemplate that.

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will be brief because we have already made the point elsewhere.⁶⁴) The proposal is Bruce Ackerman's idea of a "supermajoritarian escalator" -- a framework statute that aims to limit presidential emergency powers through a procedural device. The statute would give presidents unilateral power to declare an emergency (producing expanded executive powers), but would also require legislative authorization after a short period. The threshold for authorization is initially a simple majority, but rises in successive periods until it tops out at a stringent 4/5ths supermajority rule.

The thought behind the proposal is that the framework statute will constrain presidents from opportunistically seizing upon emergencies to expand their powers, and will prevent panicky legislators from voting blank-check delegations of massive new powers to presidents in emergencies. Yet Ackerman fails to follow through on that logic, which applies as much to the prescribed framework statute as to actions that presidents and legislators would otherwise take absent the statute. If legislators are panicky in the wake of an emergency, they may just as easily abrogate the framework statute -- by a simple majority -- as they would otherwise delegate powers to the president, absent the statute. And presidents, who by Ackerman's hypothesis are opportunistic power-maximizers, will have every incentive to portray the framework statute as a dangerous legalism that hamstring the executive and disables it from taking necessary action. Ackerman's framework statute is an attempt at legislative self-binding that fails, because the same motivations and beliefs that make the self-binding desirable (in Ackerman's view) also make it incentive-incompatible.

The self-defeating supermajoritarian escalator illustrates our broader claim, that the topic of emergency powers is fertile ground for inside/outside fallacies and the determinacy paradox. There are two generic reasons why this appears to be so. One is that legal academics typically combine distrustful pessimism about the motivations and cognition behind governmental assertions of emergency powers with optimism about the ability of legal rules and institutional structures to channel and constrain those powers. But this combination constantly threatens to become self-defeating, because the legal rules and institutions at issue must themselves ultimately be supplied by governmental officials, who are subject to the same motivational and cognitive pathologies. The determinacy paradox arises when the assumptions about motivations, beliefs and constraints that underlie the diagnosis are inconsistent with those necessary for the prescription to succeed, yet this is the chronic state of legal theorizing about emergency powers.

The second generic reason is that legal theorists hope to keep the law pure and urge judges and legislators to act accordingly. They hope, in other words, to reconcile *raison d'état* with legalism by identifying ways in which judges may act to create separate spheres, so that the legal system remains uncontaminated by governmental action that does what needs to be done in emergencies; such action, if extruded from the system, will create no precedents for the future. The hope is conceptually self-defeating, however, because the very attempt to wall off emergency action itself creates a precedent for the future -- namely a precedent that the President may do what needs doing, that legislators will ratify the action *ex post*, and that the judges will not interfere. That norm is itself part of the legal system in a larger sense that includes unwritten constitutionalism, historical episodes and surrounding practices and conventions, even if the norm is never written down formally in the pages of the reported judicial decisions. Emergency

⁶⁴ See Vermeule, *supra* note 5; POSNER & VERMEULE, *supra* note 59.

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powers become part of the legal system writ large in spite of, indeed because of, the measures that theorists urge to wall them off from the system.

III. Interpretation and Adjudication

We turn now from separation of powers and presidential power to more general themes, including theories of constitutional interpretation, economic theories of litigation, and the role of precedent in constitutional adjudication. The same paradoxes arise in these settings, albeit in different form.

A. Originalism and Textualism

Justice Scalia is well-known for his support for originalism and textualism. Originalism is the doctrine that courts should enforce the Constitution as it was understood at the founding, rather than as it has developed over time. Textualism is the doctrine that courts should interpret statutes as written, and not on the basis of legislative history. (We will bracket the apparent tension between these two positions, which others have analyzed).

Justice Scalia argues that one advantage of these doctrines is that they limit the ability of judges to decide cases in a way that advances their ideological or partisan preferences. For example, textualism

will narrow the range of acceptable judicial decision-making and acceptable argumentation. It will curb -- even reverse -- the tendency of judges to imbue authoritative texts with their own policy preferences. ... Textualism will not relieve judges of all doubts and misgivings about their interpretations. ... But textualism will provide greater certainty in the law, and hence greater predictability and greater respect for the rule of law.⁶⁵

He makes a similar argument about originalism,⁶⁶ and also more generally about the virtues of rules compared to standards.⁶⁷

The premise of these arguments is that judges will be inclined to implement their political or policy preferences; if that were not the case, then the self-constraining advantage of originalism, textualism, and rule-following would be unnecessary. And because the Supreme

⁶⁵ ANTONIN SCALIA & BRIAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* xxviii–xxix (2012).

⁶⁶ “But originalism does not invite [a judge] to make the law what he thinks it should be, nor does it permit him to distort history with impunity. All of this cannot be said of constitutional consequentialists. If ideological judging is the malady, the avowed application of such personal preferences will surely hasten the patient’s demise, and the use of history is far closer to being the cure than being the disease.” Antonin Scalia, Lecture Sponsored by the Thomas Center for the Protection of Freedom of Expression (April 20, 2010) (excerpts *available at* https://www.law.virginia.edu/html/news/2010_spr/scalia.htm).

⁶⁷ “For when, in writing for the majority of the Court, I adopt a general rule, and say, ‘This is the basis of our decision,’ I not only constrain lower courts, I constrain myself as well. If the next case should have such different facts that my political or policy preferences regarding the outcome are quite the opposite, I will be unable to indulge those preferences; I have committed myself to the governing principle.” Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179–1180 (1989).

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Court supervises and controls the lower courts, it is straightforward that the Court can demand that the lower courts adopt methodologies that suppress their political or policy preferences. What is puzzling, and possibly paradoxical, is that Justice Scalia's argument is reflexive. He argues that his commitments to originalism, textualism, and rule-following also prevent him from implementing his policy preferences. He urges other judges to adopt these methodologies voluntarily so as to curb their own instinct to implement their ideological preferences.

The paradox can be seen from two directions. First, one can ask why a justice who seeks to implement his policy preferences would adopt a method that prevents him from doing so. If the account of motivation is correct, he would have no reason to adopt such a method. Second, one can ask why a justice who is public-spirited enough to adopt a method to prevent himself from implementing his policy preferences would not be public-spirited enough to decide cases neutrally, case by case. Justice Scalia risks committing the inside/outside fallacy, as he asserts, from an external perspective, a theory of judicial motivation that is inconsistent with the premise of his normative proposals.

There may be a way out of the paradox. Suppose that judges care about two things: (1) advancing their ideological preferences; and (2) maintaining their individual reputation for impartiality. It is possible that if judges too obviously implement their preferences, they will harm their reputations so greatly that the reputational costs to the judge will exceed the ideological benefits. Thus, when judges decide cases, they will want to avoid implementing their preferences when doing so is too obvious, and in these cases decide in a neutral or nonideological fashion.

But then why would they not just do so? The argument depends on an empirical premise as well, namely, that judges suffer from weakness of will and so, when confronted with an ideologically charged case that has a clear answer contrary to a judge's preference, will implement their immediate ideological preference despite the (possibly only long-term) damage to the judges' reputation. Like a smoker or failed dieter, the judge cannot forbear from immediate ideological consumption, despite knowing the long-term harms.⁶⁸ Justice Scalia's implicit theory seems to be that judges can lash themselves to the mast by adopting methodologies like originalism and textualism, which function as self-binding devices. Perhaps it is easier to stick with a methodology than to a more general commitment to decide cases in a neutral way. If all these assumptions are true, then the determinacy paradox is evaded. Judges act in their enlightened self-interest -- advancing their ideological preferences to some degree while also maintaining their stature in the long term -- by being originalists and textualists. On this interpretation, Justice Scalia's argument is internally consistent: he is merely giving advice to judges as to how to advance their own long-run interests.

We provide this argument only for purposes of illustration. Needless to say, that is not the usual basis on which originalism and textualism are justified. Moreover, the theory does not seem plausible to us. But the main point is that whether or not originalism and textualism can ultimately be justified, any successful justification will have to offer empirical premises that are

⁶⁸ For a related but somewhat different version of these ideas, in which the judge suffers not from weakness of the will but from a belief that self-binding through rules is irrational, see Mark Tushnet, *Self-Formalism, Precedent, and the Rule of Law*, 72 NOTRE DAME L. REV. 1583 (1997).

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consistent with the normative recommendations of the theory. Here too, our concern is not with the substantive merits of views, but with consistency between premises and conclusions.

B. Judges and Efficiency

Formalists like Justice Scalia are not the only people who commit the inside/outside fallacy. It is easy to find examples among jurists and commentators who believe that judges should act to advance policy goals. Consider the standard pair of ideas in the law and economics literature that government officials act in their self-interest and that judges should maximize efficiency or welfare. Judges are government officials, of course, and so then the question arises why judges acting in their self-interest would ever accept the advice to maximize efficiency or welfare.

The puzzle has produced a large but inconclusive literature.⁶⁹ One approach is simply to assert that judges somehow lie outside the rules that apply to everyone else.⁷⁰ Perhaps lifetime tenure enables judges to act in a less self-interested way. But most common law judges in the United States are subject to election, and in any event a standard feature of principal-agent models in economics is that the agent who is not constrained by a principal will act in her own interest, not in the interest of the principal or of the public more generally.

The opposite approach is that judge's personal preferences do not matter because of structural features of litigation. If judges choose efficient legal rules, parties will settle; only inefficient rules will be subject to the pressures of the litigation process; and rules will eventually become efficient.⁷¹ These theories have been shown to rest on highly fragile assumptions,⁷² but even if these assumptions were robust, the theories would not avoid the inside/outside fallacy. If the evolutionary pressures of litigation ensure that the law will be efficient, then the advisor might as well keep silent. Efficiency arises in these models through an invisible-hand mechanism, not because judges intentionally seek to promote the public interest. The judges in the model either behave randomly or have no interest in public-spirited advice.

Models of more recent vintage assume more complex motivations for judges. Judges might care about various policy outcomes; minimizing the risk of being overturned; avoiding too much work; or getting reelected.⁷³ One can avoid the inside-outside fallacy and still make normative recommendations by assuming that judges at least partly care about advancing the public interest. The current challenge is to do so in an empirically reasonable way. Here again,

⁶⁹ See, e.g., Robert D. Cooter, *The Objectives of Private and Public Judges*, 41 PUB. CHOICE 107 (1983); Richard A. Posner, *Judicial Behavior and Performance: An Economic Approach*, 32 FLA. ST. U. L. REV. 1259 (2005); ANDREI SHLEIFER, *THE FAILURE OF JUDGES AND THE RISE OF REGULATORS* (2012); LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES* (2013).

⁷⁰ See, e.g., RICHARD A. POSNER, *HOW JUDGES THINK* (2008).

⁷¹ See George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977); Paul H. Rubin, *Why is the Common Law Efficient?*, 6 J. LEGAL STUD. 51 (1977).

⁷² See, e.g., Robert Cooter & Lewis Kornhauser, *Can Litigation Improve the Law Without the Help of Judges?*, 9 J. LEGAL STUD. 139, 156 (1980).

⁷³ See, e.g., EPSTEIN, LANDES & POSNER, *supra* note 69; Kirk A. Randazzo, *Strategic Anticipation and the Hierarchy of Justice in the U.S. District Courts*, 36 AM. POL. RES. 669 (2008); Max M. Schanzenbach & Emerson H. Tiller, *Strategic Judging under the U.S. Sentencing Guidelines: Positive Political Theory and Evidence*, 23 J. L. ECON. & ORG. 24 (2007).

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the inside/outside fallacy can be sidestepped, but there is a further question whether the assumptions needed to sidestep it are plausible. Whether or not they are plausible, identifying the fallacy clarifies the issues by eliminating inconsistent assumptions that posit one type of behavior for purposes of diagnosis, and a different type of behavior for purposes of prescription.

C. Bush v. Gore and the Non-precedent Precedent

Bush v. Gore arose out of the disputed presidential election in 2000. Bush had received more votes than Gore after the initial count of ballots, but the difference was small. Gore claimed that the vote count was inaccurate and, after litigation in the lower courts, persuaded the Florida Supreme Court to order a recount. Bush petitioned the U.S. Supreme Court for what was effectively a writ of certiorari. The Court held by a 7 to 2 vote that the Florida Supreme Court's ruling violated the Equal Protection Clause. A 5 to 4 majority ordered a halt to the recount, which gave Bush his victory.

The seven-justice majority focused on the procedures -- or, really, lack of procedures -- that the Florida Supreme Court directed state officials to use in the recount of the ballots. As David Strauss has noted, the Court's holding can be interpreted as establishing a principle "that, at least where the right to vote is concerned, the states may not use discretionary standards if it is practicable to formulate rules that will limit discretion."⁷⁴ However, this principle would have been greatly at variance with the judicial philosophies of the five conservative justices, who had generally deferred to the states on matters of voting.⁷⁵ Possibly for this reason, the opinion includes this famous sentence: "Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."⁷⁶ While one could interpret this statement as merely cautioning courts in future cases that the Supreme Court did not have adequate time to think through the implications of its holding, most commentators have argued that the Court meant to deny Bush v. Gore precedential value,⁷⁷ and we will assume that this latter interpretation is correct.

The conservative justices faced the same problem that Jackson did in the Korematsu case, discussed earlier. They wanted the case to come out in a certain way but did not want the outcome to serve as a precedent for future rulings. For Jackson, the problem was how to avoid defying the military in the particular case, which may have led to a politically damaging showdown, without establishing a precedent that the president can intern American citizens whenever he believes that they pose a threat to security. For the five-justice majority in Bush v. Gore, the problem was how to ensure that Bush would prevail⁷⁸ without establishing a precedent

⁷⁴ David A. Strauss, *Bush v. Gore: What Were They Thinking?*, 68 U. CHI. L. REV. 737, 750 (2001).

⁷⁵ See *Bush v. Gore*, 531 U.S. 98, 139–41 (2000) (Ginsburg, J., dissenting).

⁷⁶ *Id.* at 109 (majority opinion).

⁷⁷ See, e.g., Guido Calabresi, *In Partial (but Not Partisan) Praise of Principle*, in *BUSH V. GORE: THE QUESTION OF LEGITIMACY* 67, 80 (Bruce Ackerman ed., 2002) (hereinafter *LEGITIMACY*) (deeming the opinion "designed to self-destruct"); Samuel Issacharoff, *Political Judgments*, 68 U. CHI. L. REV. 637, 650 (2001) (describing the opinion as "the classic 'good for this train, and this train only' offer").

⁷⁸ Many scholars believe that the majority had a nakedly political goal. See, e.g. Jack M. Balkin, *Bush v. Gore and the Boundary between Law and Politics*, 110 YALE L.J. 1407 (2001); Margaret Jane Radin, *Can the Rule of Law Survive Bush v. Gore?*, in *LEGITIMACY*, *supra* note 77. Others believe that they were justified in taking extra-constitutional steps to end a disputed election. See, e.g., RICHARD A. POSNER, *BREAKING THE DEADLOCK* (2001);

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that any voting regime that relies on discretionary standards is constitutionally suspect -- a precedent that might, in their view, have been unwise as a purely jurisprudential matter, or merely unpredictable, or possibly harmful for Republicans.

We argued before that Jackson's approach was doomed to fail because, even under his approach, a judicial refusal to interfere with military decisionmaking in Korematsu would have established a small-c precedent. However, we could not provide any direct evidence, because of the counterfactual quality of the issue. Jackson's opinion was not the majority opinion, so it could not establish even a small-c precedent. The majority opinion in Korematsu is now generally regarded as bad law; courts are reluctant to cite it; the case has, in effect, been overturned.

Bush v. Gore provides a better test case because the precedent-limiting language appears in the majority opinion. A number of scholars initially predicted that despite the limiting language, the equal protection rule would have precedential value.⁷⁹ Others disputed this prediction.⁸⁰ In fact, the evidence has borne out the prediction.⁸¹ A number of lower courts have cited Bush v. Gore in the course of striking down election statutes. Although some of the initial rulings were overturned on appeal or reversed by en banc panels,⁸² in recent years Bush v. Gore has provided the basis for a number of final judgments.⁸³ For example, a federal court struck down an Ohio law that restricted early voting for everyone except military voters, reasoning that the distinction between the two types of voters could not be justified under the principle of Bush v. Gore.⁸⁴ The same court, also citing Bush v. Gore, held that "Ohio's disenfranchisement of voters for voting in the wrong polling location because of poll worker error violated the equal protection clause."⁸⁵ Thus, the limiting language failed to have its intended effect.

The reason is that the Court acted within a system in which any statement or judgment by the Court has precedential value. Lower courts try to predict how the Supreme Court will react to their decisions; its past behavior is the best clue. And where there is a conflict within a single

John C. Yoo, *In Defense of the Court's Legitimacy*, 68 U. CHI. L. REV. 775 (2001). A middle position is that the majority believed that the Florida Supreme Court sought to throw the election for the Democrats, and saw no other way to stop them. See Strauss, *supra* note 74, at 751–55, who addresses but rejects this argument.

⁷⁹ See Charles Fried, *An Unreasonable Reaction to a Reasonable Decision*, in LEGITIMACY, *supra* note 77, at 3, 15 (describing the Court's "caveat" as simply "boilerplate"); Owen Fiss, *The Fallibility of Reason*, in LEGITIMACY, *supra* note 77, at 84, 88 (deeming the disclaimer "commonplace").

⁸⁰ See *supra* note 77 and accompanying text.

⁸¹ Compare Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 STAN. L. REV. 1 (2007) [hereinafter Hasen, *The Untimely Death*], with Richard L. Hasen, *The 2012 Voting Wars, Judicial Backstops, and the Resurrection of Bush v. Gore* (U.C. Irvine Sch. L. Research Paper No. 2012-75), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2182857. The latter paper shows that lower courts have begun to use Bush v. Gore as a precedent in important cases, and the Supreme Court has been unwilling or unable to stop them.

⁸² *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 882 (9th Cir. 2003), *vacated en banc*, 344 F.3d 914 (9th Cir. 2003); *Stewart v. Blackwell*, 444 F.3d 843 (6th Cir. 2006), *superseded en banc* by 473 F.3d 692 (6th Cir. 2007). These "punch card" cases are discussed in greater depth in Hasen, *The Untimely Death*, *supra* note 81, at 9–15.

⁸³ *Obama for America v. Husted*, 2012 WL 3765060 (S.D. Oh. 2012), *aff'd*, 697 F.3d 423 (6th Cir. 2012); *NEOCH v. Husted*, 2012 WL 4829033 (6th Cir. 2012).

⁸⁴ *Obama for America*, 2012 WL 3765060.

⁸⁵ *NEOCH*, 2012 WL 4829033.

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opinion -- here, between the judgment and the limiting language -- the judgment provides the better guide for the future because it reflects an outcome rather than mere talk. It is reasonable for lower courts to assume that cases with facts legally indistinguishable from those of Bush v. Gore will be decided in the same way -- unless, to be sure, the Supreme Court's decision was partisan, but lower courts could not ignore a precedent on those grounds, even implicitly. The Court could not suspend the rules of precedent for one case because the rules of precedent are rules of the system in which the Court acts. Similar issues arise with respect to "unpublished" opinions, which are sometimes cited by later litigants or courts, contrary to the intentions of the issuing court.⁸⁶

As in Jackson's Korematsu opinion, the Court's mistake here rests on a non-obvious version of the determinacy paradox. Fearing that downstream courts would use a precedent in ways the majority would not approve, the majority in effect commanded those courts to ignore the decision. But the majority's positive theory of the motivations of downstream courts and the majority's command or prescription were pragmatically inconsistent. Given the posited motivation on the part of downstream courts, those courts will also have every reason to ignore the command, and to take the original decision into account the way they take other decisions into account. The attempt by the Bush v. Gore majority to deny precedential effect to its own decision thus rested on a self-refuting theory of the motivations of the actors it attempted to bind.

IV. International Law

Inside/outside fallacies also appear in debates about international law. International law bears more than a passing resemblance to constitutional law because, like constitutional law, it establishes the norms that govern the behavior of institutions while depending on those institutions to enforce those norms.⁸⁷ It is this double nature that provides fertile soil for inside/outside fallacies. We will focus on the example of humanitarian intervention, and then more briefly show how this problem appears in other areas of international law.

A. Humanitarian Intervention

The UN Charter forbids states to use military force except in self-defense or with the authorization of the Security Council.⁸⁸ It contains no exception for so-called humanitarian intervention, where a state uses military force to protect a foreign population from abuses by its own government. In theory, the Security Council may authorize a humanitarian intervention -- it did so to prevent Qaddafi from massacring Libyan rebels and civilians in 2011.⁸⁹ But the Security Council is usually reluctant to authorize warfare.

⁸⁶ See, e.g., Patrick J. Schiltz, *The Citation of Unpublished Opinions in the Federal Courts of Appeals*, 74 *FORDHAM L. REV.* 23, 43–47 (2005) (arguing that judges and lawyers rely on unpublished opinions as sources of precedent, whether or not courts permit those opinions to be cited). As of 2006, federal courts of appeals are required to permit parties to cite unpublished opinions. See Fed. R. App. P. 32.1.

⁸⁷ See Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 *HARV. L. REV.* 1792 (2009).

⁸⁸ U.N. Charter art. 2, para. 4 ("All members shall refrain ... from threat or use of force."); art. 39 (U.N. authorization); art. 51 (self-defense exception).

⁸⁹ S.C. Res. 1973, S/RES/1973 (Mar. 17, 2011).

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In the years leading up to the 1999 military intervention in Serbia, ethnic Albanians in the Serbian province of Kosovo had launched an insurgency, with the goal of obtaining autonomy from the Serbian government. The Serbian government responded with harsh military reprisals, and by 1999 a campaign to drive ethnic Albanian Kosovars out of the country, a form of ethnic cleansing or possibly even genocide. Efforts were made to obtain Security Council authorization for an international military intervention to protect the Kosovars and expel Serbian military forces from the province, but they ran into resistance from Russia, a traditional ally of Serbia and the possessor of a veto on the Security Council. Nonetheless, the United States led other NATO countries in an air attack on Serbian troops and installations, which ultimately defeated Serbia.

The military intervention clearly violated international law. The Security Council had failed to authorize it, and the self-defense exception did not apply because Kosovo was not an independent country that had been invaded. A commission was established to evaluate the war and, in the end, came to the conclusion that the war was “illegal but legitimate.”⁹⁰ This formulation meant that the law violation was morally justified. It seemed to satisfy commentators who opposed legalizing humanitarian intervention because of the fear that such an exception to the UN regime would enable states to rationalize predatory wars by pointing to human rights violations in the target state, yet who also believed that the 1999 intervention was in fact justified.⁹¹ By maintaining the posture of illegality, this stance deters countries from engaging in war except when the humanitarian purpose is genuine.

But the argument is questionable. If the Kosovo intervention was legitimate, then any humanitarian intervention under similar conditions is legitimate. In future cases, states that launch invasions will be able to point to Kosovo as a moral if not legal precedent, and be able to argue that since the Kosovo intervention was permitted, their interventions should be as well. If the reason to avoid a legal precedent is that states can rationalize predatory interventions by pointing out similarities to past humanitarian interventions despite their different motivations, the same problem will apply to a moral precedent as well. So while the legal system remains “pure,” the practical effect of its purity is nil. The rules of “legitimacy” or morality supersede the legal rules, reproducing the problem of ambiguity at a higher plane, and so one does not really escape the system; one just redefines it using different words.

The inside/outside fallacy is only implicit, as in the case of presidential emergency power, but just as real. The behavioral premise from an external perspective is that states seek to maximize power; that is why they need to be constrained by a legal system that does not create a loophole for military attacks that can be rationalized as humanitarian interventions. Yet within the internal perspective states are urged to launch humanitarian interventions for moral reasons that are inconsistent with the behavioral premises. The effort to escape the dilemma by positing a plane of morality or legitimacy that supersedes the plane of legality entangles the analyst in the fallacy.

⁹⁰ INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED (2000).

⁹¹ See Antonio Cassese, *Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?* 10 EUR. J. INT’L L. 23 (1999); Nico Krisch, *International Law Legality, Morality and the Dilemma of Humanitarian Intervention after Kosovo*, 13 EUR. J. INT’L L. 323 (2002); Anne Orford, *Muscular Humanitarianism: Reading the Narrative of the New Interventionism*, 10 EUR. J. INT’L L. 679 (1999).

B. The Problem of International Legal Change

International law lacks an institution like a legislature through which the law can be revised and changed. When states seek to change international law, the most reliable method is to call a convention, to which all states send delegates. The convention may produce a draft treaty, and then the treaty becomes law if and when states ratify it. As a result of this cumbersome process, international law can easily become out of date and hence is fragile, as states may find themselves bound to rules that no longer serve their interests.

However, there is another mechanism for legal change --unilateral action on the part of one state followed by general acquiescence by the others. The classic example is President Truman's continental shelf announcement. In 1945, President Truman announced that henceforth the United States would regard the continental shelf abutting U.S. territory as under its exclusive jurisdiction.⁹² This announcement was a violation of international law, or at least portended violation, as international law at the time regarded the continental shelf beyond the territorial sea as under the jurisdiction of no country.

However, rather than object to the Truman announcement, other countries made similar claims about their own continental shelves, and over time a consensus emerged that states had exclusive jurisdiction over their continental shelves. Under general principles of international law, norms qualify as international law when states regard them as legal norms and act consistently with them. This test was satisfied, and so U.S. policy was no longer in violation of the law. Many decades later, states ratified the Law of the Sea Treaty, which confirmed the legality of the new norm.⁹³

Most commentators regard the Truman announcement as illegal, like the Kosovo intervention.⁹⁴ The problem with this view is that illegality provides a presumption against action: if states are told that some action violates international law, that means they should not engage in it. Yet why would one tell Truman not to engage in an action that would end up benefiting the world? One should instead say that the legality of Truman's action depended on the future reactions of other states. It would turn out to be legal if other states approved of it; otherwise, it would turn out to be illegal. There is an analogy in common law development. An act that might seem obviously illegal under common law precedents may be deemed legal by a court that for policy reasons decides to overrule or distinguish those precedents. A lawyer advising a client who was thinking about embarking on this act would need to predict the court's ruling in order to advise the client, taking into account the policy considerations that might influence the court in a future case. But international lawyers have resisted this understanding of change in customary international law, no doubt because they fear that this understanding would make it too easy for states to violate customary international law on the basis of pretextual

⁹² Proclamation No. 2667, 10 Fed. Reg. 12,305 (Sept. 28, 1945).

⁹³ See United Nations Convention on the Law of the Sea, art. 77, opened for signature Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994).

⁹⁴ See, e.g., Eric A. Posner & Alan O. Sykes, *Efficient Breach of International Law: Optimal Remedies*, "Legalized Noncompliance," and *Related Issues*, 110 MICH. L. REV. 243, 287 (2011); Jonathan I. Charney, *The Power of the Executive Branch of the United States Government to Violate Customary International Law*, 80 AM. J. INT'L L. 913, 915 & n.8 (1986).

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justifications. But then we are back to the fallacy, where one simultaneously insists on absolute compliance with the law based on the premise that states act in a self-interested way, while encouraging states to deviate from bad law for public-spirited reasons.

V. Themes and Solutions

Across these examples, the common setting involves a system, that is, a group of agents who interact with each other according to a set of rules and produce some outcome.⁹⁵ Someone standing outside the system (for example, an academic) proposes a theory as to why the agents interact as they do, observes that the outcome is socially undesirable or suboptimal in some way, and then makes a normative proposal as to how the agents should change their behavior so as to improve the outcome. The classic example is Madisonian judging. The analyst first argues that branches of government or the officials within those branches seek to maximize their power (the behavioral premise) and then argues that judges should maintain a balance of power between the executive and the legislative branches (the normative proposal). The contradiction is that if judges too maximize their power, then they will have no reason to produce a socially desirable outcome except in the event that the socially optimal outcome results from their power-maximization -- in which case there is no reason to make a normative argument (except insofar as the analyst can give the actors advice or information about how best to pursue their own interests, an exception to be discussed below).

A variation arises when an agent within the system makes the proposal. As we have seen, judges make the same Madisonian argument, first citing Madison for the proposition that branches or officials are power-maximizers and then arguing that they should balance the power of all branches rather than maximize the power of their own. The contradiction here is more acute than in the case of the analyst. For here, by accepting Madisonian premises, the judges are saying in effect that they are maximizing their power, even while they claim that they are acting in the public interest. External analysts might be making inconsistent assumptions but they are at least not refuting their own claim to sincerity.

Another set of examples involves agents who seek to cabin the effect of their actions, in violation of the underlying rules of the system. If people act on the basis of predictions as to how judges will make decisions, then judges cannot simultaneously make a decision and claim that it will not be repeated in the future. Here, judges implicitly admit that people will be influenced by their decisions, while attempting to assert that they should not be influenced by their decisions. Similarly, when constitutional and international law change, agents are simultaneously arguing that everyone should follow the law and that a particular form of law-breaking is justified because of its socially beneficial effects. From an external perspective, people follow the law; from an internal perspective, people should disregard the law when an emerging new law would be superior.

As we have seen, the literature on the determinacy paradox in welfare economics makes the same point, although in other settings. We understand the determinacy paradox to be analytically coterminous with the inside/outside fallacy; these are different ways to describe the

⁹⁵ This definition encompasses the case of two-level systems, in which interactions between individuals create institutions that then interact with one another. See VERMEULE, *supra* note 9, at 27.

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same problem. We prefer the latter description because it underscores that, in such cases, the analyst confuses internal and external perspectives -- traditionally a central issue for legal theory.⁹⁶ From the external perspective, the analyst seeks to explain the behavior of agents inside the system. From the internal perspective, the analyst takes the viewpoint of the agents and asks how the agent should behave so as to improve outcomes. If the external perspective is correct, then it is hard to see how agents will act any differently from the way they do, in which case they will not heed advice as to how they should change their behavior -- except insofar as the analyst can offer instrumental information or tactical advice about how actors should best pursue their interests. The analyst should propose that the rules of the system be changed, not that agents within the system change their behavior; and the analyst must then confront the further question whether any relevant actors have both the capacity and motivation to change the rules of the system. If the internal perspective is correct, however, then the behavioral premises of the external perspective must seem wrong or at least questionable.

It is not possible to avoid the methodological problems by characterizing arguments of this sort as "ideal theory." In these arguments, the very problem is that the analyst combines ideal with nonideal theory in an inconsistent fashion. The analyst attributes nonideal motivations to the agents or actors within the system for purposes of diagnosis, and then attributes idealized motivations to those same agents or actors for purposes of advice-giving and prescription. Either an ideal or a nonideal approach would be coherent taken by itself, and applied consistently to both diagnosis and prescription, but the combination falls between two stools.

Are there ways out of this methodological dilemma? We can think of four.

Aligning the perspectives. One solution is to stipulate that people in the system have the same public-regarding preferences as the outside analyst. Consider a theory of judging, according to which judges are assumed to have public-regarding preferences, and the outside analyst appeals to those preferences in the course of urging judges to improve the law, constrain the executive, or take any similar action. Judges would no longer be able to cite Madison. Instead, they would simply assert that they can maintain the balance of power between the executive and the legislature because they, unlike the political branches, have the proper incentives.

A more modest and plausible version of this argument is that even if judges do not have perfectly public-regarding preferences, the norms of judicial practice are different from those that govern legislative and executive behavior. Perhaps judges internalize the principle of judicial neutrality or fear reputational sanctions from the legal community, or from the public. Even though officials who appoint judges (or the voters that elect them) may have partisan motives for choosing particular judges, everyone may expect that, once in office, judges will respect norms of neutrality, at least to a greater degree than other political agents would. Thus, judges are receptive to public-regarding arguments made by outside analysts, at least some of the time.

Both of these arguments avoid the inside/outside argument, but that does not mean they are correct. The first argument ignores the massive literature on judicial behavior, which

⁹⁶ See HART, *supra* note 2; Fallon, *supra* note 2.

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provides empirical evidence of ideological or strategic judging at least on the margin. The second argument incorporates that literature but in an ad hoc way. Indeed, the literature suggests that judges are most likely to be ideological in high-stakes cases,⁹⁷ and among the high-stakes cases are those in which judges are called on to arbitrate disputes between the executive and legislative branches. Our point, however, is not that it is empirically impossible for judges to act neutrally; it is, rather, that scholars typically fail to make well-thought-out empirical assumptions. They instead proceed with unconscious assumptions about judges standing outside the system, assumptions that are inconsistent, or at best not obviously consistent, with other assumptions those very scholars make about the incentives of other officials.

Or consider yet another approach, according to which people are “normally” self-regarding or power-maximizing but on occasion can be roused to take public-spirited action. Suppose, for example, that people act in a self-regarding way 95 percent of the time, and in a public-spirited way 5 percent of the time. One might then argue that the analyst who assumes that people are self-regarding but makes public-spirited proposals is on firm ground, as even if the recipients of the argument ignore them 95 percent of the time, at least 5 percent of the time they will advance the public good.

The problem with this argument stems from the theory of the second-best, which we mentioned earlier. Consider the Madisonian theory, where it was regarded as urgent for judges to maximize power so as to oppose self-aggrandizement by the executive and legislative branches. If the Madisonian theory is correct, then judges should power-maximize even in the periods in which they are public-regarding—that is, public-spirited motives should cause them to act *as if* they were power-maximizing. In other contexts, there are other problems. Under the Pildes/Levinson theory, for example, we would need to address all kinds of empirical complexities—whether, for example, legislative and executive officials sometimes act in a public-spirited way, and how that should affect the actions of judges. We would need to explain why the balance of selfish and other-regarding behavior exhibited by public officials favors the Pildes/Levinson prescription (strict review by occasionally public-regarding judges of normally self-interested legislation when government is unified) rather than the opposite (deferential review by occasionally self-interested judges of occasionally public-regarding legislation when government is unified). As before, we do not deny that *some* theory, some just-right stipulation of premises, could revitalize these arguments; our point is that the authors do not supply such a theory.

Agents can temporarily exit the system. Another escape from the dilemma is to assume that people can temporarily exit the system for the purpose of evaluating and revising it. International law demands compliance from states, but from time to time states can disregard this demand so long as they take the proper attitude toward it, for example, one of disinterested criticism in the spirit of international cooperation. The analyst cannot influence judges within the system but can advocate a change in the rules of the system. A flavor of this idea can be found in Bruce Ackerman’s theory of constitutional moments, according to which constitutional change can take place outside the formal channels of amendment when the public is aroused by events

⁹⁷ See Issac Unah & Ange-Marie Hancock, *U.S. Supreme Court Decision Making, Case Salience, and the Attitudinal Model*, 28 L. & POL. 295 (2006); Paul M. Collins, *The Consistency of Judicial Choice*, 70 J. POL. 861 (2008).

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and attentive to constitutional issues.⁹⁸ Law-breaking during extraordinary “moments” does not degrade the law during normal times. Within-system behavior occurs during normal times, when agents are assumed to act in their self-interest; outside-system behavior occurs during emergencies or other special periods, when agents are willing to act in a more public-spirited fashion.⁹⁹

This approach avoids the inside/outside fallacy but at the price of invoking a deus ex machina. How exactly are people able to extract themselves from the system? A more satisfying account is one that explains how people are capable of acting both normally and extraordinarily. One might argue, for example, that the small-c constitution (or body of international law) accepts law-breaking that is subsequently validated by popular (or sovereign) consensus. But this is just an awkward way of saying that such law-breaking behavior is not law-breaking at all, or is so only contingent on subsequent events turning out in a certain way. This approach forces one to confront clearly the risk that the inside/outside evasion was meant to avoid in the first place: that once people accept that law-breaking may be normatively justified for consequential reasons, the law loses its authority, and people break the law more often for bad reasons than for good reasons.

One can, as noted, also argue that any agent can advocate a change in the system itself. A judge might argue that current incentives for judges are bad, and therefore the constitution should be changed. Many judges and other commentators make just this argument about, for example, judicial elections or lifetime tenure.¹⁰⁰ But while this approach is superficially attractive, it does not really overcome the underlying difficulty. If, for example, tenure enables judges to indulge their ideological preferences, then why should we expect them to do anything different if they participate as citizens in the process of constitutional reform? Won't they pursue constitutional rules that benefit them even more? Again, one must assume that during temporary periods agents can somehow overcome the incentives that animate them during “normal times.” Perhaps that is true, but the assumptions underlying the claim must be carefully spelled out to avoid the dilemmas we have mentioned.

The ad hoc stipulation. In Justice Jackson's opinion in Korematsu, and the per curiam opinion in Bush v. Gore, the ad hoc stipulation is used by an agent inside the system to attempt to cabin the precedential effect of its behavior when it purports to act outside the system. Justice Jackson purported to act outside the system by claiming that a decision favoring the military should be rendered so as to avoid establishing a precedent. The per curiam opinion in Bush v.

⁹⁸ BRUCE ACKERMAN, *I WE THE PEOPLE: FOUNDATIONS* (1993).

⁹⁹ Interestingly, Ackerman abandons this view for security emergencies, urging Congress to adopt a framework statute to constrain a possibly ill-motivated executive. See BRUCE ACKERMAN, *BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM* 4–5 (2006). As Elster has pointed out, it is typical of constitutional moments that they take place during emergencies; only then are people aroused enough to debate fundamental law. See Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 *DUKE L.J.* 364, 370–71, 394–95 (1995).

¹⁰⁰ See, e.g., Sandra Day O'Connor, *Forward to JAMES SAMPLE ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS, 2000–2009* (2010); Jamal Green, *Term Limits for Federal Judges*, *N.Y. TIMES*, July 8, 2012, <http://www.nytimes.com/roomfordebate/2012/07/08/another-stab-at-the-us-constitution/revisiting-the-constitution-we-need-term-limits-for-federal-judges>.

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Gore purported to act outside the system by asserting that a decision that would normally have precedential effect would have no such effect.

Consider the theory that the Bush v. Gore decision was a kind of judicial coup d'état. The court stepped outside its normal role as constitutional adjudicator in order to hand the election to Bush, or at least ensure that he would not lose on a recount. Taking the most sympathetic view to the majority, we might suppose that the court acted properly either to avoid a constitutional crisis or to prevent the Florida Supreme Court from throwing the election to Gore.¹⁰¹ We might read the majority as stipulating that it will act again only in a crisis—that is why it would be improper to read the equal protection holding as precedent for future “normal” cases. But it could not say so explicitly without risking its own credibility—perhaps, people would accept the Court’s resolution of the crisis only if they believed the equal protection rationale.

If all this is true, one might interpret the inside/outside fallacy not so much as a logical conundrum as an illustration of the constraints of public reason. It may be that public officials can leave the system; the problem is that they cannot say they are doing so without subverting their goals. The two international law examples also illustrate this idea: states publicly declare their allegiance to international law and then argue that law violations represent extreme and unrepresentative deviations that are confined to their facts, as lawyers would say, and do not undermine the system of international law itself. The “noble lie,” which we discussed in the context of Issacharoff and Pildes’ defense of authorizing statutes, is a version of this problem. It seems to us questionable that noble lies can be maintained for any period of time,¹⁰² especially in the case of international relations where states are both the speakers and the audience; and it is difficult to defend them in a democratic system.

Producing information. The most coherent and intellectually satisfying response to the inside/outside fallacy is to cut back on the ambitions of the analyst. Rather than claim (for example) that agents are self-interested and that nonetheless they should heed the analyst’s public-spirited advice, the analyst can limit himself to advice that agents will follow because it advances their self-interest. For example, without succumbing to the fallacy, an analyst could instruct judges to neutrally balance the executive and legislative branch, because if they instead followed the Madisonian prescription of expanding their power, they would lose public support.¹⁰³ Power-maximizing judges would heed the analyst’s advice because it turns out that the best way to maximize (or at least, maintain) their power is to serve as honest brokers.

The main problem with this approach is the analyst’s ability to make public-spirited advice may be scaled down to such a degree as to cease to exist altogether. The opportunity to make such advice depends on a happy confluence of events—where it turns out to be in an agent’s self-interest to act in the public interest, and, for whatever reason, the agent is unaware of this fact. Still, it is easy to think of examples. Academic experts in constitutional design may be

¹⁰¹ See POSNER, *supra* note 78; Strauss, *supra* note 74.

¹⁰² *But cf.* Dan-Cohen Meir, *Decisions Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1983) (arguing that the law-makers can deliberately and successfully design the law to say different things to different audiences). We believe that this is possible only in a fragile and temporary way; over the long run, people are not fooled.

¹⁰³ See discussion *supra* section I.A.

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able to supply local actors with useful comparative information when those actors are engineering a new constitution.¹⁰⁴ Critics of the Bush administration's torture policies argued, among other things, that torture is self-defeating because it causes the subject of interrogation to lie, or because any advantage is offset by harm to the country's reputation.¹⁰⁵ All rule-utilitarian arguments have a flavor of this approach. An act that benefits society in the short-term has negative long-term consequences; therefore, the government should comply with a rule that forbids such acts, despite the sometimes overwhelming temptation to the contrary. The role of the analyst is merely to remind the government of those long-term consequences, or to propose ingenious mechanisms of self-binding that will allow officials to pursue their enlightened long-run self-interests, rather than short-run interests.

The most important version of this approach is the argument that a legal or constitutional reform will produce a Pareto-superior allocation of resources.¹⁰⁶ Consider, for example, frequent proposals to reform the filibuster, which can be used by the minority party in the Senate to block legislation that it disapproves of. Filibuster reform usually fails because the minority party has no reason to give up this power to protect itself, and the majority party wants to retain the filibuster so that it can protect itself next time it is in the minority. The best proposals for filibuster reform argue that, in fact, both parties misperceive their interests, and would benefit over time if they can legislate more often (even if one side loses) than if they cannot. This could be the case if, for example, gridlock in the Senate hurts both parties and clears the way for the rise of a third party. Whether this is in fact true or not is an empirical question, but at least the reform proposal does not fall prey to the determinacy paradox.

Conclusion

The inside/outside fallacy results when analysts or agents do not think carefully about whether their normative proposals, offered from an internal perspective, are consistent with their empirical premises, offered from an external perspective. We do not argue that the inside/outside fallacy -- legal theory's version of the determinacy paradox -- is a necessary feature of academic research, or of real-world systems where agents within a system are expected to improve the system as well. Nothing in our argument is substantive, or empirical; we urge no particular assumptions about the behavior of judges or other actors. Rather, our argument is about consistency.

¹⁰⁴ See Tushnet, *supra* note 5, who discusses (narrow) conditions under which this is possible.

¹⁰⁵ See, e.g., DARIUS REJALI, TORTURE AND DEMOCRACY (2009); Jean Maria Arrigo, *A Utilitarian Argument Against Torture Interrogation of Terrorists*, 10 SCI. ENG'G ETHICS 543 (2004).

¹⁰⁶ For this argument in the economic literature, see Stephen Coate, *An Efficiency Approach to the Evaluation of Policy Changes* 20–21 (Nat'l Bureau of Econ. Research Working Paper No. 7316, 1999), who argues that economists should propose Pareto-superior projects on the assumption that political agents will believe that such projects will be in their self-interest; in the same spirit, Avinash Dixit, *Economists as Advisers to Politicians and Society*, 9 ECON. & POL. 225 (1997).

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The fallacy occurs again and again in legal scholarship, probably because it is so difficult to reconcile the tradition of providing normative recommendations to judges and legislators with the behavioral premises of economics, psychology, and political science, which have had such great influence in the last forty years. If one can predict how judges will decide cases based on exogenous factors such as the party of the President who appointed them, then what is the point of urging them to strike down or uphold Roe v. Wade on the basis of impartial legal considerations? To be sure, one might want or might not want to supply them with straight-faced, legally respectable rationales for the view they will want to adopt anyway, but that is a different sort of enterprise.

Judges are not machines, and it is empirically possible that they will be receptive to certain types of normative arguments, as we have argued throughout. But then the analyst must be clear that those normative arguments are not based on empirical premises that are at variance with the analyst's own assumptions about judicial behavior. Once again, we are making a methodological argument about how legal scholars frequently make inconsistent assumptions; we are not making a substantive argument that "all judges are political" or "all people act in their self-interest" and therefore that it is never worth making public-regarding arguments to them. And thus we are not condemning all legal scholarship, but simply urging scholars to be aware of the way the inside/outside paradox demands greater methodological clarity.

It follows from what we have said that political science and law may have less to say to one another than many constitutional theorists currently suppose. Or, less pessimistically, talk across disciplines constantly threatens to descend into incoherence unless the conversational parties are careful to tidy up their premises. The enterprise of explaining the behavior of actors from the external standpoint is difficult to combine in a coherent way with the enterprise of offering those actors sympathetic advice internal to the morality of the roles the actors adopt. At a minimum, analysts who speak both as political scientists and as legal theorists must be careful not to switch their hats so rapidly that they end up attempting to wear two hats at the same time. The demands of intellectual coherence are that legal theorists must make clear, at any given moment, whether they are adopting an external or internal standpoint, and must ensure that their assumptions about the motivations, beliefs and opportunities of relevant actors are consistent across positive and normative arguments.

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