# Articles

# Incomplete Designs

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*Many legal rules are designed to address the imperfections of real-world institutions. Rules of justiciability and deference, statutes setting administrative deadlines, multinational treaties that protect foreign nationals—all are designed, at least to a degree, to minimize and correct the limitations of courts, agencies, and self-interested states at making the decisions the law requires of them.*

*But these and countless other efforts at institutional design are subject to a subtle yet pervasive problem. Rules intended to reallocate or restructure institutional authority typically cannot be made without further decisions of their own—to fill in details, to develop supporting structures, or to apply rules in individual cases. There is no assurance that an institution will be capable of making those decisions any more competently than it makes those decisions that the design is intended to improve. And the risk—indeed, the inevitability—that institutions will often make such decisions poorly has in practice undermined or negated the effectiveness of many proposed institutional reforms.*

*This Article explores this critical but underrecognized characteristic of institutional design, which it calls "incompleteness." It details a number of real-world and academic designs in which incompleteness has generated significant or fatal problems that might have been avoided if this feature had been identified at the outset. It describes the unique problems presented by delegating institutional decisions to downstream actors, from circularity to imperfect veils of ignorance to entrenchment to system effects. And it develops the rudiments of a toolkit that might be used to engage in more complete and effective institutional design in the future.*

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## Introduction

A central concern of modern law is the manner in which real-world institutions make decisions. Judges regularly craft legal doctrine with an eye toward the limitations of future interpreters.[1] Legislatures write statutes in order to constrain administrative agencies they believe to be imperfect or unfaithful.[2] Scholars from disparate schools of thought have converged on a loosely shared belief that answers to many persistent legal questions can be answered in large part by examining the comparative strengths and weaknesses of the decision makers involved.[3] A common (and common-sense) insight underlying this institutional turn in law is that the qualities and capabilities of decision makers—their expertise and biases, their composition and processes—inescapably shape the substantive decisions with which the law is ultimately concerned.

1. *See* Neil K. Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. CHI. L. REV. 366, 393–97 (1984); Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 31 (2004); Richard A. Posner, *Reply: The Institutional Dimension of Statutory and Constitutional Interpretation*, 101 MICH. L. REV. 952, 953 (2003).

2. *See* Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 432 (1989).

3. *See* Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1395 (1996).

There is, however, a subtle but pervasive problem with this widespread effort to introduce institutional considerations into law. In trying to ensure that legal institutions make better *substantive* decisions, reformers have frequently imposed new and difficult *institutional* decisions on downstream actors. That is, reformers typically attempt to improve an institution's decision making by establishing new processes or rules for making decisions. But those processes and rules typically cannot be implemented without further decisions of their own: filling out details, developing supporting structures, or applying rules in individual cases. There is no assurance that an institution will be capable of making these decisions more competently than it makes the substantive decisions that the reformer seeks to improve. And the risk—indeed, the inevitability—that many institutions will make such decisions poorly has in practice undermined or negated the effectiveness of many proposed institutional reforms.

Consider a few examples. The Supreme Court has long sought to prevent judges from deciding cases thought to be outside their expertise or proper institutional role, such as abstract legal questions, political disputes, and matters of policy. In order to address this problem, the Court has developed doctrines like standing, the political question doctrine, and the rule of *Chevron*[4] deference that seek to channel such cases out of the judicial system. But none of these doctrines is self-executing or even particularly simple; in practice, each one requires judges to exercise a great deal of judgment. And there is widespread cynicism that judges regularly misuse that judgment, knowingly or not, to achieve favored substantive ends. If this diagnosis is correct, then the Court's efforts to cure one set of decision-making problems (overreaching by judges) has generated a different set of decision-making problems (the misuse of procedural rules for substantive goals) that the doctrines make no serious effort to address.

Or consider a problem endemic to international agreements that protect foreign nationals from unfair treatment. The Vienna Convention on Consular Relations attempts to combat states' tendencies toward localism by requiring them to grant procedural rights to foreign nationals who are arrested in their borders. In order to implement these requirements, American state and local governments often must make significant reforms to their legal systems. But such governments, due in part to the very localism the treaties are designed to combat, often see little benefit in protecting foreign nationals, and so have repeatedly failed to implement adequately the necessary reforms—resulting in serious breaches of the underlying treaty.

Or consider one of many representative academic proposals for institutional reform. In a recent thoughtful analysis, Matthew Stephenson has attempted to identify ways that principals may encourage their agents to

4. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

collect information required to make informed decisions.[5] Stephenson's proposed solution is for principals to adopt a battery of complicated rules, processes, and reforms to encourage more effective information gathering. But for reasons I will discuss in more detail below, it is quite unlikely that most principals have the resources or judgment necessary to competently implement or administer many of these proposed reforms, or that most agents can efficiently respond to the incentives those reforms create. And if principals and agents cannot realistically carry out the designs on which Stephenson's proposal depends, then of course the proposal itself will fall short in achieving its objective of improving information gathering on the ground.

These examples, and others like them, illustrate how imperfectly institutional considerations have typically been brought to bear on legal problems. Would-be institutional reformers usually exhibit great sensitivity toward institutions' limitations in making substantive decisions. But in prescribing reforms to address those limitations, reformers tend to assume that the necessary institutional fixes will be implemented by perfect institutions and without error. This failure to acknowledge that institutions are fallible at making the decisions needed to implement institutional reforms, just as they are fallible at making other decisions, has greatly diminished the quality of institutional design, both in the academy and in practice. And it has resulted in the absence of any good theory regarding how designs *should* be crafted in order to account for the necessity of such decision making—or how, if at all, the pervasive need for such decision making might affect the wisdom of introducing institutional considerations into law in the first place.

This Article attempts to step into the gap. Part I introduces the theory of institutional design and describes how theorists have overlooked the concept of *incompleteness*—that is, the implicit delegation of institutional decisions to downstream actors. It explains that incompleteness may arise because a design is expressed as a standard, because it pertains to only one part of an interrelated set of institutions, or because it sets tasks that cannot be made without the establishment of subordinate institutions. And it observes that where a design is incomplete in any of these respects, its shape and its success depend on the manner in which institutions make the decisions its designer does not.

Part II illustrates the significance of this problem by discussing four designs drawn from law and legal theory. It demonstrates how the effectiveness of a representative academic design—Professor Stephenson's—is likely diminished by its delegation of highly complex and difficult institutional decisions to downstream actors. It argues that the core

5. Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1427 (2011).

institutional justifications for various doctrines of judicial restraint, such as standing and *Chevron* deference, are undermined by the open-ended nature of the decisions those doctrines demand. It argues that the perceived ineffectiveness of three prominent enactments is likely attributable to the pervasive incompleteness of their compliance and enforcement mechanisms. Last, it suggests that Burkean defenses for "historical gloss" arguments in separation of powers cases may be stronger than generally recognized due to the complex and often unseen nature of delegated institutional decision making.

Part III then explores several principles that might be used to analyze and improve the quality of institutional decisions. It considers four respects in which institutional decisions are unlike substantive decisions: they can be peculiarly self-defeating, they must be made behind partial veils of ignorance, they have a special capacity to entrench themselves in the law, and they tend to have widespread and unanticipated system effects. Throughout, it offers tentative suggestions about the ways in which incomplete institutional designs might be altered so as to compensate for or capitalize on these characteristics.

Finally, Part IV considers the broader implications of incompleteness for the deployment of institutional considerations in law. It considers, at one extreme, the possibility that incompleteness is of little concern; then, at the other, that incompleteness casts into doubt the utility, or at least the grandest ambitions, of institutional design. This Article rejects both poles and offers instead the model of the savvy institutional designer—one who is sensitive to the realities of incompleteness and aims to design in recognition of both its drawbacks and its virtues.

## I. Institutional Theory and Incompleteness

### *A. Institutional Design*

One of law's inevitable consequences—and core functions—is that it assigns authority to different decision makers in society.[6] The discipline has thus always required analysis, whether implicit or explicit, of which decision makers would better exercise what authority law assigns. Machiavelli's *The Prince* teems with consideration of what sort of men would best exercise executive power.[7] Federalist 78 argued that the judiciary was best assigned the task of reviewing the constitutionality of statutes because it was the "least dangerous" of the three branches.[8]

6. *See* Frederick Schauer, *The Right to Die as a Case Study in Third-Order Decisionmaking*, 17 J. MED. & PHIL. 573, 576–77 (1992).

7. NICCOLÒ MACHIAVELLI, THE PRINCE chs. VI–VIII (Luigi Ricci, trans., Grant Richards 1903) (1532).

8. THE FEDERALIST NO. 78, at 464 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

William Blackstone defended strict adherence to law over equity on the basis of its anticipated institutional consequences.[9] Still, these were spare and mostly back-of-the-envelope assessments of institutional capacity, ones that did not receive the kind of central attention their significance warranted.

In the past several decades, this sort of rough-and-ready institutional analysis has matured into a more rigorous discipline. In part, scholars acquired from economics, public choice theory, and other social sciences a deeper skepticism about the capabilities of institutions.[10] Whereas formalists and Legal Process scholars of an earlier era had assumed a sort of heroic quality on the part of many institutions, modern institutionalists took the perspective that every institution is in its own way imperfect.[11] In part, too, scholars did the theoretical legwork of showing that it is often myopic to imagine that legal questions can be analyzed in the abstract, apart from the institutions that they involve. Because the institutions that create and administer the law are so often imperfect, biased, or ill-suited to particular functions, law is an inevitable captive of these imperfections. The most theoretically appealing interpretive theory is worthless if its benefits can be realized only by error-free courts;[12] tort law cannot meaningfully deter negligence if actors do not adequately recognize and internalize risk;[13] and constitutional protections would indeed be "parchment barriers" if their enforcement depended on democratic structures that could readily be manipulated or circumvented.[14]

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9. *See* Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 893–94 (2003) (describing Blackstone's insight as "an early attempt to introduce institutional considerations and ex ante effects into interpretive theory" (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *62)).

10. *See* Rubin, *supra* note 3, at 1398–99. As is generally the case in the institutional literature, I use the term "institution" to refer to decision makers and decision-making bodies. *See, e.g.*, Stephenson, *supra* note 5, at 1423–25 (discussing the Legal Process tradition and its focus on how to allocate authority among different potential decision makers). The use of the term differs somewhat from its definition in some social science writing as "the rules of the game in a society or, more formally, . . . the humanly devised constraints that shape human interaction." DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 3 (1990).

11. *See* Rubin, *supra* note 3, at 1398–99; Sunstein & Vermeule, *supra* note 9, at 902. *See generally* Komesar, *supra* note 1. The formalism that elicited condemnation from institutional theorists supposed that legal questions have largely determinate answers that can be discovered through logical and linguistic deduction. This should be distinguished from the type of formalism that advocates deciding legal questions on the basis of precise and rigidly applied rules, which is not incompatible with institutional design. *See* Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510–11 (1988) (contrasting these varieties of formalism).

12. *See* Sunstein & Vermeule, *supra* note 9, at 886.

13. Richard B. Stewart, *Crisis in Tort Law? The Institutional Perspective*, 54 U. CHI. L. REV. 184, 187 (1987).

14. Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 659–60, 662 (2011).

Relying on these observations, institutional theorists concluded that the law could be improved by more rigorous attention to the comparative capabilities of the institutions to which it assigns authority. They produced a raft of analyses identifying the limitations and biases of institutions charged with a wide range of legal decisions.[15] And they suggested two sorts of solutions that may address those imperfections. One is to change the law itself, so as to better fit it to the institution—if courts cannot handle source-rich purposivism, say, then make them formalists.[16] The other is to alter the identity or structure of an institution so it makes better legal decisions—if courts are bad interpreters, then change the rules by which they vote or give the task to administrative agencies.[17] In each case, the response is a type of *institutional design*: a proposal to adjust the responsibilities of institutions in order to improve the quality of their decisions.[18]

This approach has proven enormously influential both within the legal academy and beyond. It has offered a common starting point and methodology for disparate schools of thought, from critical legal studies to law and economics, that believe a realistic evaluation of the motivations and capacities of legal actors is fundamental to a meaningful assessment of legal rules.[19] And it has provided a toolkit for real-world designers of legal institutions.[20] Contemporary judges seem to examine the institutional implications of their doctrinal decisions with increasing regularity.[21] Congress and the Executive Branch—grappling as they are with the vast

15. *See generally* Komesar, *supra* note 1 (describing comparative institutional analysis). For a few prominent examples of this sort of analysis, see Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331–46 (2001); David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97 (2000); Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1039–49 (2006).

16. *See* Sunstein & Vermeule, *supra* note 9, at 920–25.

17. *See* Stephenson, *supra* note 5, at 1461 (observing that "much recent work in institutional design theory has moved beyond the simple question of which among several possible agents should have principal responsibility for a particular policy decision to the more complex question of how to arrange decisionmaking systems that entail input from many different agents"); Sunstein & Vermeule, *supra* note 9, at 925–27. It is important to bear in mind the word "better." All institutional choices are bound to be imperfect to varying degrees, and so the only meaningful institutional analysis is comparative. *See generally* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994).

18. *E.g.*, Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1076–77 (2011) (contrasting institutional design and institutional choice).

19. *See* Rubin, *supra* note 3, at 1394.

20. *Id.* at 1425–29.

21. *See, e.g.*, Eric Berger, *Deference Determinations and Stealth Constitutional Decision Making*, 98 IOWA L. REV. 465, 494 (2013); Komesar, *supra* note 1, at 380–425.

modern administrative state—have likewise enacted many statutes and rules that by necessity take into account the comparative capabilities of the multifarious institutions of the federal government entrusted with application and enforcement of the law.[22]

### *B. Incompleteness*

For all of the virtues of institutional theory, however, it is often incomplete. In both analyzing institutions and designing improvements to them, theorists and real-world actors frequently overlook a set of decisions that are implicit in nearly all institutional designs and crucial to their efficacy.

Consider the manner in which institutional design is usually performed in the public law context. To start, some actor—a theorist, a judge, Congress—will examine how the law structures or assigns authority over a particular set of decisions. Although the nature of the decisions assigned by the law varies widely, for simplicity let us call them all *substantive decisions*. Based on that analysis, the actor will assert that the current institutional design produces poor or suboptimal substantive decisions—perhaps by assigning those decisions to the wrong institutions, or by subjecting those institutions to inadequate constraints, or even by making the decisions themselves too difficult. He will then determine that some different design would, if implemented, result in better substantive decisions. And having shown that, he will propose either that the responsible institutions implement that design, or perhaps, if he is empowered to do so, directly command them to do so.[23]

Stripped to its essentials, this method of analysis thus hinges on a comparison between the manner in which two designs—the real-world design and the hypothetical one—structure and allocate substantive decisions. And the metric of success is whether the proposed design would, if implemented, result in better substantive decisions.

The crucial elision in this approach is captured in the phrase *if implemented*. For the implementation of a design is rarely automatic or nondiscretionary. Rather, implementation of an institutional design typically entails a host of implicit decisions—let us call them *institutional decisions*—that must be made properly in order for a design to actually

22. *See, e.g.*, Kagan, *supra* note 15, at 2249–51; Stephenson, *supra* note 5, at 1463–64.

23. For just a few prominent examples of this familiar approach to institutional analysis, see Komesar, *supra* note 1, at 366–67 (proposing that courts should "allocat[e] institutional responsibility" by comparing the "strengths and weaknesses of [different] institutions *to address the social issue involved*" (emphasis added)); Stewart, *supra* note 13, at 185–86 (identifying a "crisis" in tort law and concluding that "[a] satisfactory resolution of the crisis will depend upon" analysis of the strengths and weaknesses of different institutions "in pursuing particular goals with respect to different types of injuries in different settings"); Sunstein & Vermeule, *supra* note 9, at 920–48 (offering numerous recommendations along these lines).

achieve its intended improvements to substantive decision making. These decisions, like all decisions, may be made poorly. And that risk may in turn undermine or negate a design's efficacy in achieving any of its goals.

There are various ways in which an institutional design may be incomplete, and thus require further decisions in order to be implemented. One familiar way is by articulating its instructions through standards rather than rules.[24] By its nature, a standard entrusts discretion to its interpreters and requires the exercise of judgment to be applied.[25] Designers often insert standards into their designs precisely because they want to defer some implementation decisions to later actors: they may expect the designs to apply in a variety of diverse contexts, where subtle factual differences may call for different approaches; or they may recognize that they lack enough information about on-the-ground realities to give more precise specifications. In any event, the existence of such standards requires downstream actors to make decisions in order to actually implement the design.[26]

A second reason that a design may be incomplete is because it addresses some but not all of the institutions with relevant decision-making authority. Oftentimes multiple institutions share authority over a single substantive decision, whether because they exercise the same authority concurrently—think multiple agencies with overlapping jurisdiction[27]—or because they play different roles in formulating that decision—think of the separation of powers between one institution that makes a legal rule and

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24. Komesar, *supra* note 1, at 377–78; *see also* Jacob S. Hacker, *Privatizing Risk Without Privatizing the Welfare State: The Hidden Politics of Social Policy Retrenchment in the United States*, 98 AM. POL. SCI. REV. 243, 247 (2004) (noting that the decisions of later actors are comparatively more important in shaping an institution where those actors exercise discretion over its administration).

25. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177 (1989) (describing standards as those legal rules that "leave ample discretion for the future"); Kathleen M. Sullivan, *The Supreme Court 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58–59 (1992) (standards "giv[e] the decisionmaker more discretion than do rules"); *see also* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1688 (1976) ("The application of a standard requires the judge both to discover the facts of a particular situation and to assess them in terms of the purposes or social values embodied in the standard.").

26. For a very partial list of designs that include standards, see generally Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1211–14 (2001); William N. Eskridge, Jr. & John Ferejohn, *Constitutional Horticulture: Deliberation-Respecting Judicial Review*, 87 TEXAS L. REV. 1273, 1275 (2009); Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1102 (2005); Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 93–94 (2008); Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1736 (2005).

27. *See* Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1133 (2012) (explaining that "lawmakers frequently assign overlapping and fragmented delegations that require agencies to 'share regulatory space'").

another that applies it.[28] Designs that address decision making by only one such institution will implicitly require the other to make decisions before the decision can be fully implemented.[29]

Yet a third reason that a design may be incomplete is because it instructs an institution to perform some task, but does not address the subordinate decisions that are necessary to execute that task. Some tasks simply cannot be executed unless an institution makes additional decisions: telling a prosecutor's office to share all material exculpatory evidence with defendants, for instance, in practice requires that office to establish systems for training prosecutors and reviewing potentially relevant evidence.[30] Where the designer imposes such tasks on downstream actors, he implicitly demands subordinate institutional decision making before the design may be carried out.[31]

In each of these circumstances—where the design is articulated through standards, where it addresses some but not all relevant institutions, or where it sets tasks that require subordinate decision making—the designer cannot simply assume that the design will be implemented as he envisions. Rather, the manner and ultimate success of the design's implementation will turn on the way in which downstream actors make the institutional decisions it delegates.

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28. Another example of this phenomenon occurs in the adjudication of federal rights: Congress and the federal courts control matters like the rules of pleading and liability, but state legislatures and state courts decide other crucial institutional questions, like statutes of limitations and forfeiture rules. Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1130–31 (1986). As federal courts scholars have long recognized, the fact that states control these procedural tools has substantial effect on the success—and therefore the proper design—of federal-level institutions. *Id.* at 1131–32. Likewise, the Supreme Court's review of federal claims that originate in state courts is often contingent on state waiver doctrines and other adjudicative mechanisms. *See, e.g.*, Felder v. Casey, 487 U.S. 131, 138 (1988); Testa v. Katt, 330 U.S. 386, 393–94 (1947). *See generally* Laura S. Fitzgerald, *Suspecting the States: Supreme Court Review of State-Court State-Law Judgments*, 101 MICH. L. REV. 80, 87–89 (2002); Matthew I. Hall, *Asymmetrical Jurisdiction*, 58 UCLA L. REV. 1257, 1259–61 (2011).

29. For examples of such designs, see William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 705 (1974) (arguing that Delaware corporate law has spurred a "race for the bottom"); Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 426 (2009) ("Greater acknowledgment of th[e] reciprocal relationship [between internal and external constraints] holds import both for fully understanding the separation of powers role played by internal constraints and for identifying effective reform strategies."); Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CALIF. L. REV. 1655, 1699 (2006) (noting that the proper design of congressional intelligence-oversight committees depends upon the structure of intelligence agencies).

30. *See* Connick v. Thompson, 131 S. Ct. 1350, 1359 (2011).

31. For examples of such designs, see Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PENN. L. REV. 1, 99–100 (2008) (proposing a framework for a new consumer financial protection agency but noting that "a central challenge will be the design of enabling legislation that provides this crucial combination of authority and motivation"); Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277, 1317 (2001) (proposing a design that would require the creation of several new offices in Congress).

And there is no assurance that those decisions will be made well. The same types of institutional problems that affect all decision making—indeed, the same types of institutional problems the design *itself* is intended to resolve—can surely recapitulate themselves in institutional decision making. Actors may make institutional decisions incompetently, to achieve undesirable ends, or at excessive cost. At the extreme, a design may require downstream actors to make decisions that are so inherently difficult or prone to error that no one will be able to make them successfully.

Institutional designers cannot ignore that risk. From a practical standpoint, a design that implicitly relies upon institutional decisions that will not or cannot be made successfully is unlikely to achieve its objectives—that is, it will not actually improve substantive decision making. The need for such decisions may even render the design counterproductive: A design that delegates institutional decisions that downstream actors are likely to abuse for normatively undesirable ends, for instance, may harm, rather than improve, substantive decision making. And a design that delegates institutional decisions that are highly costly to make but do little to generate substantive improvements will simply be a drag on the institutions it is intended to help.

From a theoretical standpoint, too, designers cannot bracket the risk that delegated institutional decisions will be made poorly. The necessary premise of all institutional design is that decisions are subject to error and captive to the limitations and biases of the institutions that make them. It is incoherent for a designer to at once acknowledge these limitations as they pertain to *substantive decisions* while ignoring or overlooking the identical risk as it pertains to *institutional decisions*. In doing so, designers commit a kind of "inside/outside fallacy": acknowledging the limitations of a system when diagnosing its problems, but ignoring those same limitations when prescribing a solution.[32] If a designer considers the risk of error with respect to the decisions he seeks to improve, he must consider the same risk of error with respect to the decisions he generates.

In sum, institutional design as practiced typically skips over an important step. Designers consider what allocations of institutional authority would be optimal, but they often do not consider what decisions would need to be made in order to achieve those allocations of authority. Accordingly, they do not adjust their designs to protect them from the risk of error in the latter set of decisions, and as a consequence the designs themselves—and the substantive decisions they seek to improve—undoubtedly suffer.

32. *See* Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1745 (2013).

### *C. A Few Clarifications*

Before illustrating the application of this concept in concrete cases, I should offer a few clarifications regarding its scope.

First, incompleteness is not universal. It is possible to express institutional designs in a manner that leaves no meaningful discretion to downstream actors, and thus delegates them no institutional decisions. A design may, for instance, be expressed as a crisp rule, like Cass Sunstein's and Adrian Vermeule's suggestion that judges decline to consult legislative history in interpreting statutes.[33] A rule of this kind leaves little room for judgment in its application, and thus no meaningful risk of error. In such a case, there is unlikely to be incompleteness of the kind I have observed.

Second, it is analytically important to distinguish between decisions *internal* to a design, which I believe make a design incomplete, and those *external* to it, which do not. For the reasons discussed above, a designer cannot coherently ignore the consequences of some decisions that his design generates while acknowledging others. But he might rationally ignore the decisions that precede the design. In particular, a designer may reasonably choose to bracket questions regarding his own competence at institutional design. Such meta-questions are of limited practical value: decision makers typically do not gain much from second- and third-order self-reflection of this type.[34] And they threaten to pose an infinite regress; if a designer questions her competence to design, she might feel equally compelled to question her competence to evaluate her competence, and so on down the line.[35]

Likewise, a designer need not consider the *likelihood* that an institution will choose to implement his design. Feasibility questions of this kind turn on predictive judgments that theorists are often ill-suited to make, and a design may be of some academic or practical interest even if it would never be implemented. That question differs from whether a design is, even on its own terms, capable of achieving the sought-after improvements to substantive decision making.

Third, although it is a problem for theorists to ignore incompleteness, incompleteness is not intrinsically problematic. As will become clearer in the balance of this Article, it is inevitable that many designs will be incomplete. A savvy designer may take advantage of that characteristic, by delegating institutional decisions to more competent downstream actors,

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33. *See* Sunstein & Vermeule, *supra* note 9, at 922.

34. *See* Barton L. Lipman, *How to Decide How to Decide How to . . . : Modeling Limited Rationality*, 59 ECONOMETRICA 1105, 1108 (1991).

35. None of this is to say that there are not some circumstances in which it would be productive for a designer to consider her comparative institutional competence: As I note in Part IV, a designer sometimes will get better results by varying the incompleteness of her design based on the comparative competence of herself and the institutions implementing it.

perhaps, or intentionally leaving certain context-specific questions undecided. Like all decisions, in other words, institutional decisions may be made well or poorly, and it is only the failure to properly account for those decisions, not the existence of the decisions themselves, that should be objected to.

Finally, although I believe that the institutional literature has largely neglected to consider the problem of incompleteness, it has not entirely missed it. Frederick Schauer, for instance, has perceptively observed that the design of certain "devices of democracy," such as campaign finance rules, depends crucially on the institutions that implement them.[36] Similarly, Bruce Cain has critiqued designs intended to improve the "political process," such as ballot access reforms, on the ground that they can only be implemented by institutions of suspect motives or competence.[37] These theorists' work is excellent and vitally informs my analysis here.[38] But it is necessarily subject-specific, and merely poses, but does not answer, broader questions about the nature and significance of incompleteness.

## II. Illustrations and Applications

Having sketched out the basic issue, I now turn from the general to the specific. In order to illustrate the significance of design incompleteness, both on a practical and theoretical level, I consider four institutional design problems: a prominent academic institutional design proposal to improve information acquisition; the Supreme Court's efforts to restrain judicial decision making; the malfunction of several congressional efforts to rationalize government administration; and the proper use of historical practice in separation-of-powers cases. In each case, I observe the incompleteness immanent in the relevant designs and suggest several

36. Frederick Schauer, *Judicial Review of the Devices of Democracy*, 94 COLUM. L. REV. 1326, 1329–30 (1994).

37. *See* Bruce E. Cain, *Garrett's Temptation*, 85 VA. L. REV. 1589, 1593 (1999). For the proposals that Cain critiques, see Elizabeth Garrett, *The Law and Economics of "Informed Voter" Ballot Notations*, 85 VA. L. REV. 1533, 1581 (1999). For responses to his arguments, many of them persuasive, see Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605, 1625 (1999).

38. For other authors who have gestured toward this problem, see Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1295 (2006); Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 7 (2013); Komesar, *supra* note 1, at 368–69, 369 n.3; Levinson, *supra* note 14, at 670; Yair Listokin, *Learning Through Policy Variation*, 118 YALE L.J. 480, 485, 529–33 (2008); Adrian Vermeule, *The Supreme Court, 2008 Term—Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4, 61 (2009).

insights that flow from this observation. My discussion of each point is necessarily limited; I aim only to illustrate the prevalence of incompleteness in academic theory and law, and to show how attentiveness to the problem of incompleteness can generate useful improvements.

### *A. Stephenson and Information Acquisition*

I begin with a prominent example of academic institutional design: Matthew Stephenson's article *Information Acquisition and Institutional Design*.[39] I do not select this article because it is especially vulnerable to criticism. Quite the contrary, I hope to show that even an exceedingly sophisticated academic design like Stephenson's omits considerations of incompleteness, and appears to fall short of its highest aspirations as a result.

*Information Acquisition and Institutional Design* seeks to address a widespread decision-making problem: how to optimize the quantity and quality of information possessed by public institutions when they make decisions.[40] Applying public choice theory, Stephenson suggests different rules and procedures that principals can adopt to incentivize their agents, from the President to administrative agencies to judges, to gather more information.[41] For instance, Stephenson proposes that where a principal and an agent would both prefer a particular policy choice *ex ante*, the principal might incentivize the agent to research other policies more carefully by prohibiting the *ex ante* preferred choice.[42] Alternatively, where the principal wants to engage multiple agents to gather information, but fears that some will free ride off the work of others, he may establish a tournament system under which each agent is rewarded for convincingly advocating its favored policy.[43] Many more proposals of this flavor can be found in Stephenson's thoughtful and rigorous work.

Crucially, a principal persuaded to adopt one of Stephenson's proposals could not simply make it so and then reap its benefits. Rather, these proposals require real-world actors to make two further—and quite complex—sets of decisions before they can be put into effect.

First, a *principal* must make a number of decisions in order to implement any of Stephenson's proposals. He must decide which of the various strategies Stephenson suggests is appropriate to his circumstance: some of those strategies work to encourage information gathering where a principal and his agent share preferences, but discourage it where they

39. Stephenson, *supra* note 5.
40. *Id.* at 1430–31.
41. *Id.* at 1427–29.
42. *Id.* at 1442–43.
43. *Id.* at 1481–82.

disagree;[44] some accomplish their ends where a principal seeks complementary pieces of information, but backfire where the information is substitutable.[45] Then, having chosen a strategy as best he can, a principal must make further decisions in order to put it into place. If the principal has opted to rule out policy choices *ex ante*, for example, he must determine at the outset which options are on and off the table (with all that requires in terms of a new process for winnowing policy choices).[46] If the principal has decided to adopt a tournament system, he will need to design an institution capable of competently reviewing the quality of the agents' arguments and selecting a winner (say, a new bureau in an agency's front office, with all that entails in terms of staffing, funding, and oversight).[47]

And even once all those decisions have been made, an *agent* under Stephenson's design must make its own, second set of decisions. Each agent must decide, in response to the principal's actions, "whether to invest an additional unit of effort in attempting to acquire decision-relevant information."[48] That choice, like the principal's, will often turn on complicated assessments of the expected biases of other agents, the complementarity of the information being gathered, and the likely policy consequences of engaging in more research.[49] And once the agent has made those assessments, it inevitably must also decide *how*, in practical terms, it is going to change its behavior and processes in order to gather more information. If the agent is a complex institution like Congress or an administrative agency, it will need to decide which activities should be curtailed to free up resources for more information gathering, what new oversight measures should be put into place to oversee the information gatherers, and how the new or different information being gathered should be reviewed and consolidated.

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44. For instance, Stephenson's proposal that a principal prohibit the agent's most preferred option to encourage it to explore alternatives, *see id.* at 1442–44, would have the opposite effect if the principal erred and prohibited one of the agent's less preferred options.

45. *See id.* at 1468 (reasoning that "[w]hen different types of information are substitutes . . . then dividing the responsibility for acquiring information . . . will tend to dampen research incentives," whereas "dividing responsibility for researching complementary types of information may strengthen research incentives").

46. *See id*. at 1442–43; *see also id.* at 1440 (suggesting that a principal "decid[e] how much discretion to delegate" based on a "weigh[ing] [of] the potential informational gains of delegation against the costs associated with potential agency bias").

47. *Id.* at 1447 (suggesting that "a regulatory agency might be permitted to adopt a stringent regulation only if it provides to some oversight body (for example, a court or review board) detailed scientific and economic data establishing that the regulation's likely benefits outweigh its costs").

48. *Id.* at 1435.

49. *See id*. at 1436 (recognizing that an agent will consider likely policy consequences); *id*. at 1467–68 (discussing how principals and agents will consider the complementarity of the information); *id*. at 1471–74 (illustrating how motivation to research can shift in heterogeneous groups based on expected biases of other agents).

In short, Stephenson's design cannot be brought into effect, or achieve any of its aims, unless real-world actors make a number of decisions about how that design will be implemented. Given the complexity of those decisions, there is reason to think that principals and agents are likely to make some of them poorly: they may err in assessing other actors' preferences; choose incorrectly between subtly different strategies; or establish institutions for oversight and review that are incompetent, biased, or poorly informed. If principals or agents do blunder in making these decisions, then Stephenson's design will inevitably fail to actually improve information gathering on the ground. And so, for all the sophistication of his analysis, Stephenson ignores a crucial component essential to his design's success: the institutional competence of principals and agents at making the decisions his design demands.[50]

Yet Stephenson does not seriously acknowledge this possibility. More importantly, he does not adjust the design to account for it—does not, for instance, appear to try to make the necessary decisions easier or assign those decisions only to competent institutions. Indeed, the article exhibits a kind of theoretical schizophrenia. It is deeply institution-sensitive in diagnosing the potential errors that may infect substantive decision making.[51] But like so many other academic proposals, it reverts to a frictionless world of perfect institutions when prescribing designs to solve those problems, apparently assuming that actors will be able to make the necessary institutional decisions without error. This unfortunate blind spot cannot help but detract from the utility of the proposal.

### *B. Constraints on Judicial Authority*

Debates about judicial authority in both popular polemic and judicial and academic writings often center around courts' comparative institutional competence. Federal courts are composed of unelected and unaccountable lawyers who are limited to deciding matters one case at a time, based on the presentations of the parties before them. The political branches, in contrast, have deep claims to democratic legitimacy and are (or at least can be)

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50. Stephenson does briefly allude to this issue at a few points, although only in passing. *See id.* at 1442, 1445–46. The most significant treatment of it occurs in a footnote in which Stephenson acknowledges that some agents may be unable to estimate the probability that different policy choices are correct, *see id.* at 1436 n.31 (distinguishing between "risk" and "uncertainty"), but concludes that this problem does not hold in all cases, and that in any event it "would at most limit the scope of the analysis developed in this Article." *Id.* Even if Stephenson is correct that this problem is limited to a subset of cases—a questionable though difficult to disprove claim—that would still suggest that a principal must determine whether his agents operate under a condition of decision-making uncertainty that renders the article's analysis inapplicable. This would be yet another difficult institutional decision on the principal's already full plate.

51. *See id.* at 1428–31.

informed by a wide array of experts, interest groups, and voters.[52] Although nearly all agree that courts have the authority and duty to review at least some democratic decisions for constitutionality, widespread anxiety about the comparative capabilities of courts and the political branches has led the Supreme Court to design many formal and informal restraints on judicial authority.

These restraints take a variety of forms. Some are embodied in justiciability doctrines—standing, mootness, ripeness, and the political question doctrine—that seek to limit courts to live cases and controversies that present solely legal issues.[53] Others are contained in abstention doctrines that require federal courts to refrain from hearing cases that may be heard in a different and putatively better forum.[54] Still others are rules of deference, such as *Chevron* and the act-of-state doctrine, that instruct courts to defer to decisions made by more expert or accountable bodies.[55] And lurking behind all of these formal doctrines is a set of informal norms admonishing courts to avoid deciding unnecessary questions, respect democratic decision making, and exercise their powers of judicial review only sparingly.[56]

Many judges and commentators vigorously defend these restraints in institutional terms. They argue that rules of this kind are necessary to limit properly judicial authority and to ensure that judges do not impose their

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52. *See, e.g.*, Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1353 (2006) ("By privileging majority voting among a small number of unelected and unaccountable judges, [judicial review] disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights.").

53. *See* Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1528 (2013); Zivotofsky v. Clinton, 132 S. Ct. 1421, 1432 (2012) (Sotomayor, J., concurring) ("The second and third *Baker* [*v. Carr*, 369 U.S. 186 (1962),] factors reflect circumstances in which a dispute calls for decisionmaking beyond courts' competence.").

54. *See* Younger v. Harris, 401 U.S. 37, 44 (1971) (justifying abstention in cases calling into question state criminal prosecution on the ground that "the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways"); R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 501 (1941) (justifying abstention where a state-law question might resolve a case on the basis of a "'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary").

55. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) (stating that deferring to an administrative agency gives interpretive authority to "those with great expertise and charged with responsibility for administering the provision"); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964) (explaining that the act-of-state doctrine "concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations").

56. *See, e.g.*, Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 329 (2006) ("[M]indful that our constitutional mandate and institutional competence are limited, we restrain ourselves from 'rewrit[ing] state law to conform it to constitutional requirements' even as we strive to salvage it." (second alteration in original) (quoting Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 397 (1988))).

comparatively illegitimate and uninformed substantive preferences on government and society.[57]

But these institutional defenses typically do not take into account the decisions necessary to carry out these doctrines. Nearly all of the Court's rules of restraint are open-ended and indeterminate, and judges are often accused of using them to achieve favored substantive ends. Many critics have charged, for instance, that the Court often divides closely and along ideological lines in standing cases in a manner that appears to match up with the justices' views of the merits of the underlying dispute.[58] At least one study contends that judges more frequently defer to agencies under *Chevron* when they agree with the policy being reviewed.[59] And it is frequently alleged that principles like minimalism and avoidance appear most frequently in judicial opinions when they advance a judge's extralegal commitments.[60]

If accurate, these widespread critiques do not simply describe costs of implementing designs intended to restrain the judiciary. Rather, they suggest that the designs themselves are self-defeating. By generating new institutional decisions for courts, these doctrines of restraint may have created new opportunities for courts to decide cases in a manner that favors their substantive commitments. In a legal system without robust restraint

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57. *See, e.g.*, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) ("Filling [statutory] gaps, the [*Chevron*] Court explained, involves difficult policy choices that agencies are better equipped to make than courts."); Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 240 (2002) ("Underlying the political question doctrine . . . is the recognition that the political branches possess institutional characteristics that make them superior to the judiciary in deciding certain constitutional questions."); Sunstein & Vermeule, *supra* note 9, at 928–30 (arguing that, when interpreting statutes, agencies should not be limited by the text to the same degree as are courts, in part because agencies "have a superior degree of technical competence" and "are subject to a degree of democratic supervision"); Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 30 (1996) ("Minimalism becomes more attractive if judges are proceeding in the midst of factual or (constitutionally relevant) moral uncertainty and rapidly changing circumstances . . . .").

58. *See* Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 684 (2006) (noting that "abundant evidence supports th[e] proposition" that "judicial rulings concerning justiciability frequently reflect, are influenced by, or otherwise constitute judgments about a plaintiff's substantive legal rights").

59. *See* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1091 (2008) (describing empirical findings showing "a strong association between judicial ideology and the likelihood of liberal or conservative agency interpretations prevailing"); Patrick W. Pearsall, Note, *Means/Ends Reciprocity in the Act of State Doctrine*, 43 COLUM. J. TRANSNAT'L L. 999, 1009 (2005) (describing concerns that the indeterminacy of the act-of-state doctrine has led to ends-oriented decision making).

60. *See, e.g.*, Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181, 219 (describing a theory that the Court uses "constitutional avoidance and similar doctrines" to "soften public and Congressional resistance to the Court's efforts to move the law in the Justices' preferred policy direction," and citing sources).

doctrines, a judge who substantively disliked a party's claim could generally reject it only by ruling against it on the merits; and assuming the judge to be even minimally constrained by law, he or she would be unable to do so where the claim's legal merits were sufficiently strong. In contrast, in a legal system of robust justiciability, deference, and avoidance doctrines, a judge committed (whether consciously or not) to a particular result has numerous opportunities to rule against a disfavored claimant: denying standing, selectively invoking deference, using avoidance to skew a statute's meaning, and so on. These doctrines thus create the risk of enlarging rather than diminishing judges' authority to achieve their substantive preferences.[61]

It is quite possible that, on balance, the doctrines still come out ahead in terms of restraining judges. The doctrines might, for instance, be determinate enough in many applications that they generally cannot be abused to achieve substantive ends. Alternatively, perhaps these doctrines can be defended solely on noninstitutional grounds as, for instance, necessary elaborations of Article III's case-or-controversy requirement.[62] But those who defend the doctrines on institutional grounds cannot simply ignore the risks posed by the doctrines' incompleteness. Rather, they must factor in the likelihood that judges will make poor institutional decisions into the ultimate success of these doctrines in achieving their desired allocation of institutional authority.

### *C. Underenforcement of Congressional Enactments*

Congress has enacted many laws to improve the quality of government decision making. Several prominent examples are widely believed to be failures: either they have not succeeded in significantly altering the conduct of government entities, or they have fallen short even in securing those entities' compliance. Take three prominent examples:

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61. *See* Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2113 (2015) (contending that "[t]he avoidance canon [was] developed in large part to alleviate the countermajoritarian difficulty," but has been employed in a manner that "can be even more antidemocratic than outright invalidation").

62. It is also possible that the relative malleability of these doctrines is a feature, rather than a bug, insofar as it enables courts to exercise the "passive virtues" and shunt problematic cases out of the legal system where appropriate. *See generally* Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961) (defending the use of jurisdictional doctrines in light of the Court's institutional and practical limitations). But this justification is quite different than and, for the reasons given, in some tension with the claim that these doctrines restrain the power of courts.

- Many statutes set deadlines by which federal agencies must take administrative actions.[63] The Freedom of Information Act, for instance, requires each agency to respond to requests for records within twenty days.[64] Yet agencies routinely flout these deadlines,[65] and courts, despite their undoubted power to do so, rarely issue orders compelling agencies to abide by the statutes.[66]
- Article 36 of the Vienna Convention on Consular Relations, a multilateral treaty approved by the Senate in 1969, requires that each U.S. law enforcement entity inform arrested foreign nationals of their rights under the Convention, including the right to have the national's consulate notified of the arrest.[67] Over the course of decades, states arrested, convicted, and sentenced to death fifty-one Mexican nationals without informing them of their rights to consular notification.[68] The International Court of Justice and the President instructed states to remedy these breaches by reviewing and reconsidering each conviction, but the states refused, and the Supreme Court affirmed their authority to do so.[69] Subsequently, the states executed several of the nationals, in the teeth of persistent warnings that doing so would provoke serious foreign-relations consequences.[70]
- The National Emergencies Act sets rules and procedures to rein in the President's use of emergency powers.[71] It provides that the President may not invoke statutes

63. *See* Jacob E. Gersen & Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923, 939–40, 980–81 (2008) (enumerating deadlines).

64. 5 U.S.C. § 552(a)(6)(A)(i) (2012).

65. *See* Gersen & O'Connell, *supra* note 63, at 945–49 (noting a small (albeit statistically significant) difference in time within which agencies take actions covered and not covered by statutory deadlines); *id.* at 964 (noting that "many agencies almost never meet the[] statutory deadlines" in the Freedom of Information Act).

66. *See* Telecomms. Research & Action Ctr. v. FCC, 750 F.2d 70, 79 (D.C. Cir. 1984) (holding that an agency's violation of a mandatory statutory deadline must be "egregious" to warrant an order compelling action).

67. Vienna Convention on Consular Relations art. 5(i), Apr. 24, 1963, 596 U.N.T.S. 261.

68. *See* Medellín v. Texas, 552 U.S. 491, 502 (2008).

69. *Id.* at 498–99, 503; Request for Interpretation of Judgment of 31 March 2004 in Avena and Other Mexican Nationals (Mex. v. U.S.), Order, 2008 I.C.J. Rep. 311, ¶ 80 (July 16).

70. *See, e.g.*, Garcia v. Texas, 131 S. Ct. 2866, 2868 (2011) (declining to stay execution of one such national, despite the Administration's claim that "grave international consequences . . . will follow from [the] execution").

71. 50 U.S.C. §§ 1601–1651 (2012); *see* S. REP. NO. 94-1168, at 2 (1976) (noting that, prior to the Act, the United States had been in a near-continuous state of national emergency for forty years).

> granting emergency powers without publicly declaring that a national emergency exists.[72] Furthermore, it makes any such declaration effective for only one year, subject either to renewal by the President or termination by Congress.[73] Commentators who agree on little else agree that this statute has failed to meaningfully alter presidential practice; as before its enactment, presidents routinely declare and indefinitely renew national emergencies, and neither chamber of Congress, evidently, has ever met to consider terminating such emergencies.[74]

Whatever one's views on the merits of each of these enactments, from an institutional design perspective it seems crucial to understand why they misfired in these ways. What explains each enactment's failure to fully succeed in its goal of regularizing administrative action, securing compliance with the nation's treaty obligations, or restraining the President? And should these enactments have been designed differently to prevent such results?

Incompleteness offers some insight into both questions. First, each enactment appears to have failed in large part because it was incomplete—indeed, doubly so. On the *compliance* side, each of the enactments requires entities to make a host of subordinate institutional decisions before it may be implemented: agencies need to reallocate resources, often drastically, to meet tight deadlines;[75] law enforcement entities must develop new rules for training, arrests, and court procedure to satisfy their Vienna Convention obligations;[76] and the National Emergencies Act requires the President to figure out how to operate the federal government with much less regular recourse to emergency powers. Meanwhile, on the *enforcement* side, each statute leaves some crucial institutional matter undecided. The deadline statutes do not typically prescribe a penalty for breach;[77] the Vienna Convention does not specify who, if anyone, can demand compliance of states; and the National Emergencies Act leaves it entirely to Congress's discretion to determine when, if ever, to check the President.

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72. 50 U.S.C. §§ 1621(b), 1631.

73. *Id.* § 1622(d).

74. ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 86 (2010); Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1080 (2004).

75. *See* Gersen & O'Connell, *supra* note 63, at 933.

76. *See* Janet Koven Levit, *Does* Medellín *Matter?*, 77 FORDHAM L. REV. 617, 626–28 (2008).

77. This type of incompleteness is quite common and has generated difficult tasks for courts. Consider the voluminous case law attempting to discern whether a given statutory deadline is jurisdictional, a claims-processing rule, or neither. *See* Dolan v. United States, 560 U.S. 605, 610–11 (2010).

Such incompleteness need not have been damaging to the statutes' and treaty's designs, but in each case the drafters made the further decision to delegate the unmade institutional decisions to institutions that lacked motivation to carry them out in accord with the designers' aims. The entities charged with compliance—agencies, states, and the President—enjoy few direct benefits from these enactments but incurred most of their costs.[78] And the institution charged with enforcing each enactment (where one exists) had limited incentive to do so. The courts, entrusted with enforcing the deadline statutes, are typically reluctant to second-guess or reorder agency priorities,[79] while Congress only rarely attempts to overrule the President on matters of war and exigency.[80] It thus is not surprising that each of these entities used the authority delegated to it in a manner that limited, and in some cases undermined, the effectiveness of the underlying designs.

Note that this explanation diverges from some standard explanations for legal or institutional failure. The problem was not that these enactments were expressed as standards, a common culprit where theorists find that discretion has been misused.[81] Although standards can also be a source of incompleteness, Congress delegated discretion in these cases through a more subtle set of choices (or non-choices)—it implicitly required regulated entities to make subordinate decisions to comply with its commands and compelled institutions not directly addressed by the design, such as courts, to make enforcement decisions in response. Moreover, the problem was not that any design's allocation of *substantive* decision-making authority was in error, as institutional theorists often contend.[82] There is nothing to indicate that the application of deadlines, the granting of consular notification rights, or the use of emergency authorities themselves led to problems; it was the manner in which entities adhered to or applied the allocations of decision-making authority that was problematic.

Second, incompleteness gives reason to question whether these designs in fact failed. From a rule of law perspective, the answer seems an easy yes: the spirit, and in some cases the letter, of each of these enactments was repeatedly flouted. But from a purely institutional perspective—that is, considering whether the designs resulted in good allocations of decision-making authority—the answer is less clear. In at least two of the three cases, downstream actors resisted the designs' commands for reasons that Congress may not have anticipated, and with which it perhaps would have

78. *See, e.g.*, Levit, *supra* note 76, at 619 ("The gravamen of the *Medellín* litigation stems from a gap between treaty text and on-the-ground practice, exacerbated by a deeply entrenched federalist system.").

79. *See* Gersen & O'Connell, *supra* note 63, at 973–74.

80. *See* POSNER & VERMEULE, *supra* note 74, at 86–87.

81. *See, e.g.*, Sunstein & Vermeule, *supra* note 10.

82. *See supra* notes 25–26 and accompanying text.

sympathized had it foreseen them. Some statutory deadlines may well be too strict and costly to comply with; emergency powers granted by statute may well be needed far more regularly than Congress thought. It is more difficult to defend states' defiance of the Vienna Convention, but many may share states' evident feeling that the cost of remedying their procedural violations, and so rolling back fifty-one capital convictions, was not adequately justified by the relatively diffuse benefits treaty compliance would deliver to American nationals abroad.

In short, by riddling these enactments with incompleteness, Congress left its designs, and ultimately the effectiveness of those designs, in the hands of downstream actors. That may or may not have been to the good. But it seems undeniable that a recognition of such incompleteness would have been crucial to crafting such enactments, at the outset, in a manner that achieved Congress's aims—and in crafting future designs in a manner that does not lead to the same sorts of failures.

### *D. Historical Gloss Arguments*

A recurring mode of argument in separation of powers cases is the argument from "historical gloss."[83] This line of reasoning holds that long-standing and settled practices by the President and Congress can fix the meaning of ambiguous constitutional provisions in a way that courts should be loath to undo.[84] In *National Labor Relations Board v. Noel Canning*,[85] for instance, the Court relied heavily on the President's long-standing practice of making, and the Senate's history of accepting, two contested types of recess appointments in concluding that those appointments were lawful under the Recess Appointments Clause.[86]

Courts and theorists have struggled to justify the prevalence of this mode of argument in separation of powers cases. One frequent justification for historical gloss arguments is that practices accepted by both the

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83. *See* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 412 (2012) (calling such arguments "a mainstay of debates about the constitutional separation of powers").

84. Justice Frankfurter gave the classic statement of this argument in his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*:

> Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them. In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on "executive Power" vested in the President by § 1 of Art. II.

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

85. 134 S. Ct. 2550 (2014).

86. *Id.* at 2567, 2573.

President and Congress reflect an interbranch agreement as to the lawfulness of those practices.[87] But as Curtis Bradley and Trevor Morrison have observed, it is often fanciful to imagine that the branches (and particularly Congress) have actually considered and agreed on the question at hand, especially where the only evidence for such a compromise is one branch's inaction in response to the other's assertion of authority.[88] Another frequently offered justification for such arguments is that structural provisions tend to be highly indeterminate, and so historical practice offers the firmest available basis for giving them some fixed content.[89] But this "least-worst option" type of argument is inherently frail, as it offers little affirmative reason for respecting historical practice where some other interpretive value—text, original meaning, or a contemporary democratic enactment—favors another result.

Incompleteness suggests that a third argument, founded in Burkean caution, may provide a firmer justification than is generally appreciated. As the argument from Edmund Burke's theory of conservatism is usually presented, a settled interpretation of the Constitution represents the accumulated wisdom of generations, formed over a long period of time by many minds.[90] Because a single present-day decision maker is unlikely to possess comparable experience or to aggregate the wisdom of as many minds, it should be reluctant to second-guess that interpretation.[91] This usual formulation of the argument thus focuses on the comparative competences of the present-day decision maker and historical decision makers in interpreting the Constitution—that is, in making the *substantive* decision at issue in a separation of powers case.

But this formulation of the Burkean argument is overly narrow, for it overlooks the wealth of subordinate *institutional* decisions that any settled practice necessarily entails and that represent a further repository of

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87. *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654, 686 (1981) (inferring from congressional practice that "Congress may be considered to have *consented* to the President's action in suspending claims" (emphasis added)).

88. Bradley & Morrison, *supra* note 83, at 438–47; *see Noel Canning*, 134 S. Ct. at 2617 (Scalia, J., concurring in the judgment) (critiquing the historical-gloss approach on the ground that it permits "the Executive [to] accumulate power through adverse possession").

89. *See* Bradley & Morrison, *supra* note 83, at 428; Mark Tushnet, *Legislative and Executive Stare Decisis*, 83 NOTRE DAME L. REV. 1339, 1339–41 (2008).

90. *E.g.*, Bradley & Morrison, *supra* note 83, at 455–56; *see Noel Canning*, 134 S. Ct. at 2560 (describing the need to "hesitate" before "upset[ting] the compromises and working arrangements that the elected branches of Government themselves have reached").

91. *See* EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 76 (J.G.A. Pocock ed., 1987) (1790) ("We are afraid to put men to live and trade each on his own private stock of reason, because we suspect that this stock in each man is small, and that the individuals would do better to avail themselves of the general bank and capital of nations and of ages."); Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 370 (2006) ("[Burke] contends that reasonable citizens, aware of their own limitations, will effectively delegate decision-making authority to their own traditions.").

accumulated wisdom. The Constitution's structural provisions allocate authority only in bare outlines, through broad phrases like "the executive Power,"[92] "Recess of the Senate,"[93] and "receive Ambassadors."[94] Different branches therefore must make a host of institutional decisions to put any of these provisions into effect. They must of course give the commands themselves a fixed meaning. But they also must establish numerous supporting institutions to carry out those commands—setting up departments, developing practices and customs, and creating a web of subordinate legal rules. Moreover, each branch must make numerous institutional decisions in response to the others', often in an iterative and highly complex way. In *Noel Canning*, for instance, Congress and the President settled on a meaning of the Recess Appointments Clause only after presidential legal advisers made controversial assertions of power; Congress withheld pay for appointments it considered illegitimate; and the Senate redefined recesses in several ways to block the most aggressive uses of the President's power.[95]

The likelihood that any settled interpretation of the Constitution will carry with it these sorts of institutional decisions enlarges the Burkean rationale for deferring to history. A Burkean-minded judge deciding whether to upset a settled interpretation of a clause cannot contend just with history's judgment that the interpretation of the clause itself is correct. She must also recognize history's judgment that numerous institutional decisions that likely surround it—and which the judge may be unable to identify, let alone evaluate—are useful, workable, and correct as well. Burke's counsel for humility seems at its height in that context.

This argument, I note, is not just a standard appeal to reliance. Burkean-minded judges should not defer to long-standing interpretations of structural provisions merely because departing from them would upset settled practices (although that, too, is an important consideration). Rather, they have a heightened reason to defer to such interpretations because they in fact consist of a multitude of decisions, each of which carries with it the same presumptive wisdom to which Burkeans assign most settled practice. Incompleteness exposes, in other words, the inherent complexity of any settled institutional arrangement and accordingly compels a heightened respect for those incomplete designs that have proved stable and durable.

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92. U.S. CONST. art. II, § 1, cl. 1.

93. *Id.* art. II, § 2, cl. 3.

94. *Id.* art. II, § 3.

95. *See Noel Canning*, 134 S. Ct. at 2572–73 (describing Congress's enactment of the Pay Act of 1863 and the Pay Act of 1940); *id.* at 2563 (describing Congress's adoption of a "functional" definition of "recess" to prohibit appointments during instantaneous recesses); *id.* at 2573 (describing the Senate's practice of holding *pro forma* sessions to block recess appointments).

These examples illustrate, I hope, the degree to which incompleteness affects the efficacy of academic, judicial, and legislative designs, and how indispensable a consideration it is in formulating and applying institutional theory. If institutional design is to be practiced effectively, designers cannot ignore the existence of downstream institutional decision making. And an effective designer must anticipate the risks and benefits such decision making may present.

## III. Characteristics of Institutional Decision Making

I therefore turn to consider how designers *ought* to account for incompleteness. This Part is structured around four unique characteristics of institutional decision making that are likely to be important in crafting and evaluating most designs. I do not contend that these four characteristics establish a comprehensive list of what makes institutional decision making unique. I omit, for instance, any discussion of legitimacy or cognitive challenges, which would almost certainly be fruitful sources of insights.[96] Nor do I attempt to exhaust the implications and permutations of these characteristics. I aim only to identify the most prominent characteristics of institutional decisions and to draw out their major implications in a way well grounded in existing literature.

To offer a brief preview, the characteristics I discuss are the following. First, institutional decisions are subject to unique *circularity* problems, in that they sometimes cannot be made well due to the very institutional flaw they are intended to correct. I offer the example of a constitutional convention, which must make fair and representative decisions in the absence, definitionally, of institutions that can ensure the convention itself was selected fairly. Second, institutional decisions must be made behind a partial *veil of ignorance* that may cause actors to manipulate such decisions to achieve first-order ends. I have already offered several examples of this problem—for instance, the charge that courts invoke notionally neutral rules like standing and deference to achieve substantive legal goals—and I return to them here. Third, institutional decisions are subject to *entrenchment*, both in the sense that they are difficult to change and that, once changed, those changes endure for long periods of time. Attempts at reforming longstanding bureaucracies like the Internal Revenue Service often confront problems arising from this attribute. Fourth and last, institutional decisions are uniquely subject to *system effects*, meaning that institutions desirable in isolation may become problematic when considered in conjunction with other, interrelated institutions. Interdependent

96. *See, e.g.*, Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 554–55 (2002) (approaching institutional design from a cognitive perspective); Schauer, *supra* note 6, at 583–85 (discussing questions of legitimacy in the context of decisions concerning the right to die).

structural provisions of the Constitution or different applications of a complex institutional doctrine provide illustrative examples.

In the following subparts, I consider the ways in which institutions may have special difficulty making institutional decisions—or be especially *good* at making institutional decisions—because of these four characteristics.[97] I also consider different design adjustments an institutional designer might adopt to compensate for each of these decision-making characteristics. While my focus is on the implications of these characteristics for the effectiveness of incomplete designs, this discussion should also be of interest to theorists interested in the competence of designers to craft institutional rules in the first place.

### *A. Circularity*

To start, consider a legislature that is meeting for the first time, and that lacks any rules governing debate, committee power, agenda setting, or minority influence. The legislature must set such rules in order to operate fairly and efficiently.[98] But it faces a problem: it cannot fairly and efficiently make decisions about such rules without already having rules of debate, committee power, agenda setting, and minority influence in place. In their absence, a bare majority could set unfair institutional rules over the objection of the rest of the legislature. Or legislators could fall back on default rules like rule by seniority or unanimous consent that are not conducive to good legislative decision making.[99] In short, the legislature is hobbled in setting good institutional rules because it lacks good institutional rules in the first place.[100]

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97. While by necessity the following subparts often analyze institutions individually, the reader should bear in mind that such analyses can be cashed out only through comparative analysis. *See* KOMESAR, *supra* note 17, at 6. In other words, institutional problems are meaningful only insofar as there exists some superior alternative, whether in the form of a different decision maker, different constraints, or a different kind of decision. I return to these alternatives in subpart IV(C), *infra*.

98. *See* Aaron-Andrew P. Bruhl, *Using Statutes to Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of Proceedings Clause*, 19 J.L. & POL. 345, 346 (2003) (describing "parliamentary procedures" and "a committee system" as examples of "the multitude of things necessary for a legislature to function").

99. *Cf.* James E. Fleming, *Toward a More Democratic Congress?*, 89 B.U. L. REV. 629, 639–40 (2009) (arguing that proposals to dilute the "undemocratic" power of small states in Congress are self-defeating because they would require the assent of the small states themselves); Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1694 (2002) (noting that changes to the filibuster rule are impeded by the filibuster).

100. *Cf.* Jon Elster, *Arguing and Bargaining in Two Constituent Assemblies*, 2 U. PA. J. CONST. L. 345, 359 (2000) (contending that an assembly is "obviously incapable" of deciding matters such as its own composition); Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 367 (2004) (noting problems inherent in an institution's process for deciding upon a voting system used to select a more permanent voting system). In practice, legislatures can usually be expected to overcome this hurdle by coordinating around procedures that are familiar to them and that appear reasonably fair. *See, e.g.*, Gerald Gamm &

This kind of circularity is characteristic of incomplete designs. The circularity arises through the interaction of two propositions. The first is that institutional designs are always undertaken to improve legal rules that are somehow suboptimal in the way they allocate or constrain decision making. If institutions were perfect, institutional design would be unnecessary. The second is that incomplete designs (definitionally) require further decisions by downstream actors. By the interaction of these two propositions, there is a limited but nontrivial set of circumstances in which incomplete designs are self-defeating: namely, those cases in which the decisions necessary to complete the design are subject to the decision-making defects the design itself is intended to fix.[101]

As the example of the legislative body illustrates, one way for an institution to fall prey to this paradox is for it to attempt to make institutional decisions about *itself*.[102] Several legal theorists have observed that courts can suffer from this type of circularity when attempting to improve their own decision making. As Christopher Peters has noted, courts may attempt to behave as minimalists by trying to avoid decisions that entail a high risk of error or moral uncertainty.[103] Yet making the decisions necessary to avoid morally or empirically uncertain decisions may itself entail a high risk of error or moral uncertainty—something that minimalism itself hypothesizes courts should avoid.[104] Similarly, Scott Brewer has noted that courts are often unable to decide which scientific expert to defer to because they themselves lack scientific expertise.[105]

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Kenneth Shepsle, *Emergence of Legislative Institutions: Standing Committees in the House and Senate, 1810-1825*, 14 LEGIS. STUD. Q. 39, 43–44 (1989). But this solution may trade problems of circularity for problems of entrenchment, discussed *infra* subpart III(C).

101. This paradox resembles the "antinomy of destabilization" described in George P. Fletcher, *Paradoxes in Legal Thought*, 85 COLUM. L. REV. 1263, 1284–92 (1985). It is also analogous to William Riker's observation that institutions are likely to inherit the instability of majority preferences exhibited by their designers. *See* William H. Riker, *Implications from the Disequilibrium of Majority Rule for the Study of Institutions*, 74 AM. POL. SCI. REV. 432, 443–44 (1980).

102. Adrian Vermeule has dubbed designs that call for this kind of self-binding "self-defeating proposals." Adrian Vermeule, *Self-Defeating Proposals: Ackerman on Emergency Powers*, 75 FORDHAM L. REV. 631, 637 (2006). He argues that Bruce Ackerman's idea of an Emergency Constitution, which would entail Congress tying its own hands to prevent itself from overreacting in emergencies, is such a proposal. *Id.* at 649.

103. Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454, 1533–34 (2000).

104. *Id.* Mark Tushnet has claimed that a similar paradox undermines efforts to decide legal problems according to neutral principles. *See* Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 785 (1983) (arguing that it is impossible to develop neutral principles without the existence of a shared social understanding that the theory presupposes society lacks).

105. Scott Brewer, *Scientific Expert Testimony and Intellectual Due Process*, 107 YALE L.J. 1535, 1538 (1998). Circularity problems of this kind can be seen as instantiations of the broader problem of law's "self-reference," whereby a general legal claim (in this case, the inadequacy of courts' decision-making capacity) ultimately disproves itself. *See* Gunther Teubner, *"And God*

Institutions may fall prey to the problem of circularity even when they are not making decisions about themselves. They might merely be making decisions about institutional rules to which they are subject. For instance, every constitutional convention is a product of the society that convenes it. Yet at the time of convening, society invariably lacks rules that enable it to select a representative set of delegates—like fair elections and accountable representation—because (by hypothesis) it requires the convention to design those things.[106] An unrepresentative set of delegates will, in turn, be suboptimal at making the value-laden and difficult trade-offs involved in designing good rules of representation and accountability.[107] Critics of the United States Constitution have often traced its perceived flaws to representation failures in the Convention, such as the alleged overrepresentation of creditors and landowners.[108] Whether they are right in the particulars of that critique is not important for these purposes; the point is that constitutional conventions are invariably subject to society's imperfect rules for selecting a representative body, and this flaw will in turn affect its ability to make optimal institutional decisions.

For a final example of this phenomenon, consider Stephenson's article on information acquisition.[109] As noted earlier, that article calls on principals to make judgments about matters like an agent's *ex ante* preferences and the expected benefit of certain policies in order to improve their ability to acquire useful information from their agents. But it is quite possible that a principal lacks enough information to make even *those* judgments.[110] After all, it is lack of information that motivates the principal

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*Laughed . . .": Indeterminacy, Self-Reference and Paradox in Law*, 12 GERMAN L.J. 376, 377–80 (2011) (articulating the many paradoxes that arise from the self-referential nature of the law).

106. *But see* Jon Elster, *Beyond Rational Self-Interest: Authors and Actors in French Constitution-Making*, *in* RETHINKING POLITICAL INSTITUTIONS: THE ART OF THE STATE 260, 274–75 (Ian Shapiro et al. eds., 2006) (describing the advent of the French Constitution of 1958).

107. *See* EDWARD SCHNEIER, CRAFTING CONSTITUTIONAL DEMOCRACIES: THE POLITICS OF INSTITUTIONAL DESIGN 20–21 (2006) (describing the problem of establishing the people's concrete assent to a new order in the absence of any legitimate means of acquiring their assent); Walter F. Murphy, *Designing A Constitution: Of Architects and Builders*, 87 TEXAS L. REV. 1303, 1313 (2009) ("Paradoxically, architects of a new constitution usually purport to derive their authority from the people, but such an entity may not exist until after designers have claimed to act in the 'people's' name." (footnote omitted)).

108. *See* Michael J. Klarman, *The Founding Revisited*, 125 HARV. L. REV. 544, 553–54 (2011) (book review) (surveying these views). Less controversially, some of the structural provisions of the Constitution were clearly reflective of the significant power wielded by small states during the convention. *See* Elster, *supra* note 100, at 362 (stating that "debates at the Convention remained, to some extent, under the shadow of the state legislatures" and that "delegates were certain to be part of the power establishment").

109. Stephenson, *supra* note 5.

110. One reason this may be the case is that the principal itself is also an agent underincentivized to gather information. Congress is a good example. *See, e.g.*, Devins, *supra* note 26, 1188 (considering "Congress's institutional incentives to get the facts right").

to undertake Stephenson's design to start with. A principal may not be able to design Stephenson's information-acquisition mechanisms well because of the very absence of such mechanisms in the first place.[111]

And yet in spite of all this, legislatures set good rules for themselves, minimalism yields good results, and constitutional conventions succeed all the time. So this kind of circularity must be superable. Indeed, I think it is subject to at least two qualifications that lead, in turn, to design solutions.

First, an incomplete design may be subject to circularity only in particular cases. For instance, it is quite clear that only some principals, attempting to apply only some of Stephenson's information-acquisition strategies, will be hobbled by circularity. Other strategies that Stephenson proposes do not require principals to have any information at all,[112] while still others require principals to have so little information that principals could be expected to perform them despite their inability to gather optimal information from their agents.[113] This stands in contrast with constitution-drafting exercises, which would seem to always entail a degree of circularity. It is virtually inconceivable that a society drafting a new constitution would already have in place optimal mechanisms for selecting representatives and resolving macro-level distributional disputes.

Thus, a solution to circularity in cases like Stephenson's (but not the convention) may be to narrow the design's scope to situations in which the downstream institution will not face circularity problems. In Stephenson's case, this fix could be achieved by a well-meaning principal itself, through the simple expedient of avoiding strategies that place excessive informational demands on it. In other cases, it could be achieved by imposing limitations in the design and constraining it to situations in which circularity is not present.[114]

Second, some designs permit decision makers to leverage their imperfect institutional competence into designs that will fix or compensate for that comparative incompetence. In Stephenson's design, for instance,

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111. *Cf.* Michael B. Rappaport, *Reforming Article V: The Problems Created by the National Convention Amendment Method and How to Fix Them*, 96 VA. L. REV. 1509, 1514 (2010) (arguing that the "flaws in Article V . . . could be corrected by adding another amendment method to the Constitution"); Mark Tushnet, *Legislation and the Law of Politics*, 46 HARV. J. LEGIS. 211, 212 (2009) (critiquing, on similar grounds, the notion that voters should press for political change to enable meaningful substantive reform).

112. *See, e.g.*, Stephenson, *supra* note 5, at 1466–67 (discussing a "rule of thumb" when managing multiple agents).

113. *See, e.g.*, *id.* at 1468–71 (arguing that supermajority rules are appropriate under non-fact-intensive premises).

114. Yair Listokin, who has been uncommonly sensitive to the problem of incompleteness, placed caveats of this kind in his article *Learning Through Policy Variation*, *supra* note 38, although he was not addressing problems arising from circularity specifically. *See id.* at 529–33 (discussing cases in which institutions may lack the capacity to carry out a strategy of policy variation successfully).

the principal is not asked to gather voluminous information and make fact-laden policy judgments. He is instead asked to make a series of informed guesses, which can in turn be used to generate tools that encourage much greater information acquisition.[115] In other words, a designer weakly able to gather information could suffice to create a design that strongly enabled the gathering of information. By contrast, a design like the constitutional convention requires mediating decision makers to make decisions that are *especially* hobbled by the absence of good institutions. A convention, after all, is typically thought of as a pact to abide by commitments from which society would otherwise from time to time prefer to depart, and thus requires the exercise of extraordinary representativeness and fairness.[116]

This distinction has bearing on what sort of institutions, subject to which constraints, will be able to overcome the decision-making defect that leads to circularity. In what might be called a "leverage design" like Stephenson's, the design requires quantitatively less of the desired characteristic than the design itself provides, and so it is likely that some imperfect decision maker or inferior design is both available and sufficient to overcome that defect. For instance, while simply providing a decision maker with more resources is a clunky and ineffective way of ensuring information acquisition in a matter of course,[117] it may be a good enough way to enable an information-poor principal to generate the information necessary to design good information-acquisition mechanisms. By contrast, in what might be called an "echo design" like the constitutional convention, the downstream institution must possess more of the desired characteristic than the design is expected to furnish. In such cases, the designer likely must turn to a mediating device or decision maker that is preferable to the ultimate design but ordinarily infeasible. One solution to the problem of constitutional conventions is to turn on its head Madison's famous aphorism, that "[i]f men were angels, no government would be necessary."[118] Government by angels is considered a first–best solution that is preferable to any constitution, albeit a solution that ordinarily fails for obvious practical reasons.[119] Yet in the constitutional context, it may be that extraordinary, angel-approximating individuals are actually necessary to execute the design task reasonably well.[120] More realistically, the

115. *See* Stephenson, *supra* note 5, at 1446–47.

116. *See, e.g.*, Levinson, *supra* note 14, at 709. One notable consequence of this distinction is that whereas a design like Stephenson's facilitates further similar acts of design in the future, a design like the convention does not.

117. *See* Stephenson, *supra* note 5, at 1434.

118. THE FEDERALIST NO. 51, at 319 (James Madison) (Clinton Rossiter ed., 1961).

119. *See* Vermeule, *supra* note 38, at 25.

120. *See* Adriaan Lanni & Adrian Vermeule, *Constitutional Design in the Ancient World*, 64 STAN. L. REV. 907, 937 (2012) (discussing the desirability of having a constitution drafted by "a Nelson Mandela figure").

convention may need to operate by deliberation-forcing procedures—unanimity rules, drawn-out debates—that would be infeasible in ordinary decision making but are necessary to force distributive fairness in the convention setting.[121]

### *B. Veils of Ignorance*

The fact that most decision makers cannot be expected to have perfect foresight and fairness is relevant to another important institutional characteristic. Institutional decisions are invariably made behind at least a partial veil of ignorance.[122] They have general and prospective application,[123] and one can never fully anticipate their first-order effects. Institutional decisions might be thought of (in Daryl Levinson's apt terminology) as "bundles of probabilistic policy outcomes" that can be expected to lead to different outcomes with varying degrees of likelihood.[124] Because a single institutional decision affects multiple substantive decisions in unanticipated ways, such decisions are both particularly potent and maddeningly imprecise tools for designers whose goal is to achieve particular substantive ends.

This makes the calculus for the designer of an incomplete design quite complicated. The designer and the institution that completes his design may differ along two axes. First, the designer and the downstream institution may be subject to different veils of ignorance, in that one may be able to foresee the substantive effects of its decisions more clearly than the other.[125] Second, the designer and the downstream institution may each

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121. *See* Saul Levmore, *More than Mere Majorities*, 2000 UTAH L. REV. 759, 765–67 (arguing that constitutional conventions use supermajority voting to avoid rent seeking); John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383, 388–89 (2007) (arguing that the "double supermajoritarian process" used to draft and ratify the Constitution was "consensus-forcing" and "generated some of the most distinctive and praised features of our Constitution"). *See generally* John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEXAS L. REV. 703 (2002) (noting virtues of supermajority voting rules).

122. Levinson, *supra* note 14, at 693–94 ("[P]olitical actors might view and assess decisionmaking institutions largely as bundles of probabilistic policy outcomes."). *See generally* JOHN RAWLS, A THEORY OF JUSTICE 136–42 (1971).

123. Michael A. Fitts, *Can Ignorance Be Bliss? Imperfect Information as a Positive Influence in Political Institutions*, 88 MICH. L. REV. 917, 967 (1990); Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399, 407–08 (2001). By contrast, substantive decisions are sometimes, but not always, made behind a partial veil of ignorance.

124. Levinson, *supra* note 14, at 693–94.

125. *See* Vermeule, *supra* note 100, at 370 (noting that the framers acted behind a greater veil of ignorance than Congress in crafting rules of congressional procedure). In an incomplete design expressed as a standard, the downstream actor will almost always be subject to a lesser veil of ignorance than the designer, given that the downstream actor is making less general decisions. But in designs that that are incomplete because they merely involve part of an interlocking set of institutions, or require the creation of additional subordinate institutions, it is quite possible that the downstream institution will be subject to a greater veil than the designer.

hold different substantive preferences and so use their respective design authority, to the extent possible, to favor different outcomes.[126]

Let us take the first potential axis of divergence first. The Vienna Convention, discussed above, was adopted pursuant to an almost-total veil of ignorance. Every nation is a potential beneficiary of the Convention's guarantees to its citizens and missions abroad, yet every nation might be forced to bear the costs of compliance in individual cases.[127] In the United States, however, the downstream actors charged with making institutional decisions to implement the treaty—by and large, individual states—are subject to hardly any veil of ignorance at all. States internalize essentially none of the benefits of reciprocity from treaty partners, but bear all the costs of providing more stringent protections for foreigners in their jurisdictions.[128] Thus, it should hardly be a surprise that some American states have refused to adopt institutions that reliably vindicate the consular-notification rights of foreign nationals convicted in their jurisdictions.[129] The substantive implications of protecting consular-notification rights are clear and one-sided to these states, and they have designed their institutions accordingly.[130]

This pattern, whereby a designer sets rules behind a veil of ignorance, but an institution not subject to that veil implements the design according to its substantive goals, is not unusual in incomplete designs. As noted above, it is widely believed that institutionally motivated doctrinal rules without any obvious ideological valence, like rules of standing and stare decisis, can assume a strongly ideological cast in cases in which their first-order implications are clear.[131] Even constitutional conventions, which are

126. It is important to note an implicit premise underlying this second axis of divergence: either the designer or the mediating actor must feel empowered to act upon policy preferences. If neither does—if both are conscientious judges, for instance—then they will not peek beyond the veil to try to achieve those preferences.

127. *See* Medellín v. Texas, 552 U.S. 491, 537 (2008) (Stevens, J., concurring in the judgment) (noting "the modest cost of compliance"); Sandra Babcock, *The Limits of International Law: Efforts to Enforce Rulings of the International Court of Justice in U.S. Death Penalty Cases*, 62 SYRACUSE L. REV. 183, 196 (2012) (describing reciprocal benefits of the right to consular notification).

128. *See* Joan Fitzpatrick, *The Unreality of International Law in the United States and the LaGrand Case*, 27 YALE J. INT'L L. 427, 432–33 (2002) (noting that the fear of retribution by treaty partners "poses no real concern to officials in a position to affect U.S. practice regarding consular notification").

129. *See Medellín*, 552 U.S. at 500–04 (describing Texas's failure to provide consular notification or remedy its violation with respect to fifty-one Mexican nationals convicted of capital crimes).

130. Cassandra Burke Robertson, *Transnational Litigation and Institutional Choice*, 51 B.C. L. REV. 1081, 1109–12 (2010).

131. *See* Citizens United v. FEC, 558 U.S. 310, 414 (2010) (Stevens, J., concurring in part and dissenting in part) (contending the majority ignored stare decisis because of its views on the merits of the case at hand); Massachusetts v. EPA, 549 U.S. 497, 548 (2007) (Roberts, C.J., dissenting) (charging that the majority "devise[d] a new doctrine of state standing to support its

generally called for the purpose of achieving public goods like stability, peace, and the rule of law, are often converted to first-order ends by delegates who craft particular provisions with the expectation that those rules will benefit them.[132]

In situations like these, the most complete solution available to a designer is to attempt to pin a veil of ignorance back on the eyes of the institutions charged with implementing the design. There are several suggestions in the literature for how this might be done. Adrian Vermeule has argued that veils can be constructed by lengthening time horizons, adopting rules of generality and prospectivity, and randomizing outcomes.[133] Paul Pierson, a skeptic of institutional design as a general matter, has observed that veils usually exist because there is a wide range of potential first-order consequences of a particular decision.[134] A designer can accordingly attempt to create a veil of ignorance by parceling out a few, general design tasks that do not so easily map onto substantive outcomes; for instance, Congress could require the Supreme Court to adopt procedural rules through rulemaking rather than in individual cases to foreclose the risk of doctrinal manipulation.[135] In addition, these characteristics can be used to identify and assign institutional decisions to mediating actors already subject to veils of ignorance. In line with this strategy, the federal government has attempted to assume the obligation of ensuring compliance

result"); Lawrence v. Texas, 539 U.S. 558, 592 (2003) (Scalia, J., dissenting) (describing the majority's prior invocation of stare decisis as a "result-oriented expedient"); Barkow, *supra* note 57, at 331 (arguing that the modern political question doctrine enables "unprincipled application" based on "policy preferences"); Jonathan T. Molot, *Principled Minimalism: Restriking the Balance Between Judicial Minimalism and Neutral Principles*, 90 VA. L. REV. 1753, 1835 (2004) ("Minimalism sends a message to judges that they can reach their preferred outcomes in pending cases so long as they confine their holdings to those cases.").

132. *See* Klarman, *supra* note 108, at 569–70 (describing the manner in which different groups' first-order aims affected the design of the U.S. Constitution); Ethan J. Leib, *Supermajoritarianism and the American Criminal Jury*, 33 HASTINGS CONST. L.Q. 141, 183 (2006) (speculating that "[p]ersonal cost considerations" played a role in the adoption of a supermajority voting rule for impeachments (emphasis omitted)); *cf.* McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180, 180 (1999) (arguing that the Administrative Procedure Act was designed to entrench liberal political objectives).

133. Vermeule, *supra* note 100123, at 407–26.

134. *See* PAUL PIERSON, POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS 115–22 (2004).

135. *Cf.* Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 118 (2009) (Thomas, J., concurring in part and concurring in the judgment) (arguing that making appealability determinations case by case "forces the reviewing court to subordinate the realities of each case before it to generalized conclusions about the 'likely' costs and benefits of allowing an exception to the final judgment rule in an entire 'class of cases,'" and suggesting that rulemaking is a better mechanism for making such decisions).

with the Vienna Convention itself.[136] Likewise, convention designers could make an effort to pick delegates to a constitutional convention who will not later run for office subject to the convention's rules.

Veils of ignorance may create problems even when firmly pinned on both the designer and the downstream institution. One example arises in the context of procedural rules jointly crafted by the states and the federal government. Congress and the federal courts have crafted certain procedural rules with particular substantive goals in mind. While federal statutes of limitations, implied rights of action, burdens of proof, and tolling doctrines have been adopted behind a partial veil of ignorance, they have nonetheless been designed (at least historically) to aid federal claimants.[137] States, by contrast, have adopted most of their rules without the federal government's first-order goals in mind. In practice, therefore, some of these rules—including, say, harsh forfeiture standards or notice-of-claim requirements—have occasionally impeded the vindication of federal rights.[138] In these situations the *problem* is that the states acted subject to a veil of ignorance. What the federal designers wanted was a downstream actor who would attempt to peek beyond the veil of ignorance to achieve their first-order goals.[139]

In situations like this, it is crucial for the designer to find a way to align the downstream decision maker's cares with his own. In some cases, the designer may select institutions that share its substantive goals or impose constraints that force those institutions to internalize the designer's preferences.[140] Actually bridging the gap, however, is not always

136. *See* Medellín v. Texas, 552 U.S. 491, 523–32 (2008) (rejecting President Bush's attempt to order states to comply with the Vienna Convention); Harold Hongju Koh, *Remarks: Twenty-First-Century International Lawmaking*, 101 GEO. L.J. 725, 736–37 (2013) (describing the federal government's subsequent efforts to achieve compliance).

137. *See* Maine v. Thiboutot, 448 U.S. 1, 8–9 (1980); Mitchum v. Foster, 407 U.S. 225, 238 (1972).

138. *See* Felder v. Casey, 487 U.S. 131, 141–42 (1988) (holding that ordinary state notice-of-claim rules undermine § 1983's "uniquely federal remedy" (quoting *Mitchum*, 407 U.S. at 239)); Brown v. W. Ry. of Ala., 338 U.S. 294, 296 (1949) ("This federal right [of trial] cannot be defeated by the forms of local practice."); Davis v. Wechsler, 263 U.S. 22, 24 (1923) ("Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.").

139. *Cf.* Hacker, *supra* note 24, at 246 (arguing that actors who operate within an institutional structure they dislike will use what levers of control they do have to convert the institution toward new purposes). It is also possible, in some circumstances, that a downstream actor will refuse to make any second-order decisions where doing so would not advance its first-order goals. *See* Alicia L. Bannon, Note, *Designing a Constitutional-Drafting Process: Lessons from Kenya*, 116 YALE L.J. 1824, 1852 (2007) (describing how supporters of Kenya's president balked at negotiations on a new constitution when it appeared the document would weaken the president's existing powers).

140. *See, e.g.*, Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 907–13 (2009).

necessary. Because institutional decisions embody bundles of substantive outcomes, it is possible that both the designer and downstream institution will be content with the same decisions even if they have different and even contradictory first-order goals, so long as both of their preferred outcomes are enabled by the institution.[141] In this way, institutions may act as a "common carrier" for the two different actors' aspirations.[142]

None of this is to suggest that any differences between the designer's and downstream actors' veils of ignorance are always problematic. A designer subject to a veil of ignorance may prefer to defer decisions to actors who will be able to discern more clearly the consequences of their institutional decisions.[143] A designer acting subject to particular exigencies may be reluctant to hardwire institutional choices that may prove ill-suited to later problems. Or he may want to reap the benefits of a downstream actor's expertise, without suffering too much the costs of that actor's partiality.[144] Any divergence between a designer's and a mediating actor's veils of ignorance need not, then, be a cause of concern. It can be an important tool in the hands of a savvy designer.

### *C. Entrenchment*

Turning to a third characteristic of institutional decision making, recall the oft-noted—at one time, almost axiomatic—observation that institutions tend to be long lasting.[145] Even as precedents are overturned, statutes are repealed, and regulations are allowed to expire, institutions like the courts and Congress endure. Daryl Levinson has moved this observation from the axiomatic and the anecdotal to the theoretical by convincingly theorizing many of its root causes.[146] Institutional arrangements, unlike many policies, establish predictable sets of rules around which actors with different first-order preferences can coordinate; they encourage fixed investments incurred in reliance on them; they empower supporters and weaken detractors in ways that enlarge their political constituencies over time; and

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141. *See* Levinson, *supra* note 14, at 670.

142. ERIC SCHICKLER, DISJOINTED PLURALISM: INSTITUTIONAL INNOVATION AND THE DEVELOPMENT OF THE U.S. CONGRESS 13 (2001).

143. *See* Vermeule, *supra* note 100, at 370 ("The cost of [the constitutional framers'] relative impartiality, though, is that [they] act in ignorance of post-enactment developments that might provide useful information in the choice of legislative procedures.").

144. Subjecting the actor to veto points or oversight, or to a collaborative committee of actors with different first-order interests, may be good ways of doing so. The tools proposed in Stephenson, discussed *supra* subpart II(A), may be helpful in crafting such designs.

145. *See* Levinson, *supra* note 14, at 681 (recounting how theorists tend to assume that institutions are "relatively durable structures and processes of political decisionmaking, in contrast to the particular policies and programs that emerge as outcomes from these decisionmaking processes").

146. Levinson, *supra* note 14, at 681–91.

they engender other game-theoretic advantages.[147] In other words, actors in a position to change institutional designs generally refrain from doing so because they tend to reap significant benefits from the institutional status quo.[148]

By definition, however, incomplete designs require downstream actors to change the institutional status quo. Accordingly, entrenchment effects can pose a substantial impediment to putting such designs into effect. The most vivid examples can be found in failed efforts to reform the institutions of government. Time and again, blue-ribbon commissions and crusading agency heads have proposed ambitious plans to reform government agencies. Quite often, these efforts have met defeat when entrenched bureaucracies or powerful constituencies that benefited from existing agency structures used their design authority to kill or slow walk the reforms.[149] This same resistance to institutional change may help explain the reluctance of states to modify their procedural rules to comply with

147. *Id.*; *see also* Douglass C. North, *Institutional Change: A Framework of Analysis*, *in* INSTITUTIONAL CHANGE: THEORY AND EMPIRICAL FINDINGS 35, 45 (Sven-Erik Sjöstrand ed., 1993) ("The economies of scope, complementarities, and network externalities of an institutional matrix make institutional change overwhelmingly incremental and path dependent."); Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251, 259 (2000) (discussing how processes of increasing returns and collective action problems "render processes of institutional development path dependent").

148. *See* William H. Riker, *The Experience of Creating Institutions: The Framing of the United States Constitution*, *in* EXPLAINING SOCIAL INSTITUTIONS 121, 122 (Jack Knight & Itai Sened eds., 1995) ("At any point in institutional development, humans start with some preexisting customs that influence new departures."); Tushnet, *supra* note 89, at 1346 ("[M]oving from one equilibrium to another, even an equilibrium that might in the abstract be better, is costly.").

149. *See* PAUL PIERSON, DISMANTLING THE WELFARE STATE? REAGAN, THATCHER, AND THE POLITICS OF RETRENCHMENT 53–54 (1994) (arguing that because Social Security "generated a strong and coherent base of political support," efforts to reform the institution produced "politically costly defeats"); Randolph J. May, *The FCC's Tumultuous Year in 2003: An Essay on an Opportunity for Institutional Agency Reform*, 56 ADMIN. L. REV. 1307, 1316 (2004) (stating that "despite the renaming of offices and shuffling of titles" occasioned by a 1999 reform blueprint, "the FCC is little different today than it was then"); Thomas O. McGarity, *Regulatory Reform in the Reagan Era*, 45 MD. L. REV. 253, 268 (1986) (describing a "rout" of the Reagan Administration's proposed regulatory reform by "beneficiary groups [that] attempted to stem the tide of regulatory reform"); Joseph J. Thorndike, *Reforming the Internal Revenue Service: A Comparative History*, 53 ADMIN. L. REV. 717, 777–78 (2001) (describing how the IRS Commissioner's 1998 blueprint for reform had little effect on the "local office").

international treaties or to assist the vindication of federal rights.[150] It also may help explain why the Senate has rejected perennial calls to abandon the filibuster.[151]

Let us call this type of entrenchment that impedes institutional change "backward-looking entrenchment." One strategy by which designers can overcome backward-looking entrenchment is to delegate only incremental institutional decisions that do not upset the stability afforded by existing institutions.[152] Garrett and Vermeule incorporate this insight into their proposal that Congress adopt a modest suite of reforms in order to aid its consideration of constitutional issues.[153] The authors contend that such incremental proposals are best because "most of the large structural choices about Congress are irrevocably fixed and . . . any design improvements that are practically attainable will come only at the margins."[154] Another strategy by which designers can overcome backward-looking entrenchment is to delegate institutional decisions to actors who are minimally subject to the entrenchment effects of the institutions they are asked to reform. Government reform proposals that run through Congress or the White House, rather than agencies themselves, may have a better track record because they do not require the cooperation of actors deeply entrenched in the status quo.[155]

Entrenchment, moreover, is double-edged. While entrenchment makes institutional change difficult, it also makes institutional changes highly durable once in place. "Forward-looking entrenchment," as this latter phenomenon might be called, locks the institutional decisions of mediating actors into place for comparatively long periods of time. Constitution drafting is an obvious example: once enacted, constitutions have a staying power that exceeds the people's allegiance to any first-order commitments.[156]

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150. *See* Medellín v. Texas, 552 U.S. 491 (2008); Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359, 368 (1952) (Frankfurter, J., dissenting) ("The State judges and local lawyers who must administer the Federal Employers' Liability Act in State courts are trained in the ways of local practice; it multiplies the difficulties and confuses the administration of justice to require, on purely theoretical grounds, a hybrid of State and Federal practice in the State courts as to a single class of cases.").

151. *See* Aaron-Andrew P. Bruhl, *The Senate: Out of Order?*, 43 CONN. L. REV. 1041, 1054–57 (2011) (describing senators' individual incentives to preserve existing procedures).

152. *See* Hacker, *supra* note 24, at 247 (identifying as an example of a stable institution public retirement programs, which "virtually run themselves").

153. *See* Garrett & Vermeule, *supra* note 31, at 1282.

154. *Id.*

155. *See, e.g.*, Thorndike, *supra* note 149, at 779 (noting that "Congress has always been the instigator of reform" of the Internal Revenue Service).

156. *See* Levinson, *supra* note 14, at 697 ("Constitutional law is both a *mechanism* of political commitment and *itself* a political commitment.").

Forward-looking entrenchment can hold significant advantages, as well as drawbacks, for the designer of an incomplete design. On one hand, forward-looking entrenchment encourages downstream actors who will be subject to the consequences of their institutional decisions to make high up-front investments in getting those decisions correct.[157] Furthermore, long time horizons tend to generate veils of ignorance that may discourage efforts to manipulate institutions to achieve first-order ends.[158] On the other hand, forward-looking entrenchment may doubly paralyze a decision maker from acting: just as backward-looking entrenchment makes actors reluctant to upset settled practices, forward-looking entrenchment may cause rational actors to delay or refrain from making any decision for fear of its having severe and irreversible consequences.[159] Moreover, forward-looking entrenchment heightens the cost of delegating an institutional decision to an incompetent or poorly incentivized actor.[160]

In sum, like veils of ignorance, entrenchment can be a virtue or a vice from the perspective of an institutional designer. But designers that ignore the implications of entrenchment are likely to suffer from problems in implementation that they did not anticipate—or overlook potential advantages on which they might have capitalized.

### *D. System Effects*

Finally, institutional decisions cannot be considered in isolation. Decisions that are advisable when viewed independently may prove counterproductive or ineffective when aggregated with other, inter-dependent decisions.[161] These so-called system effects may occur because decision makers set inconsistent or jointly incoherent rules, or because one institutional rule induces strategic responses that undermine the rule's

157. *See* Cass R. Sunstein, *Irreversible and Catastrophic*, 91 CORNELL L. REV. 841, 859 (2006) (describing how a rational actor will make high up-front investments before a decision that holds potentially irreversible consequences); *see also* Listokin, *supra* note 38, at 524–25.

158. *See* Vermeule, *supra* note 123, at 415–19 (noting that when long-term policy making is cast in general terms, decision makers "will be pushed toward impartial [decisions], or at least moderate ones").

159. Sunstein, *supra* note 157, at 855–56.

160. *Cf.* Elster, *supra* note 106, at 268–69, 273 (describing instances of constitutional drafters who wrote constitutions with only short-term effects in mind).

161. *See* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEXAS L. REV. 15, 45 (2010) ("Thus, the lesson with respect to funding independence—as it is with all elements of agency design—is that no one particular feature can be viewed in isolation."); Jenna Bednar, *Constitutional Systems Theory: A Research Agenda Motivated by Vermeule*, The System of the Constitution *and Epstein*, Design for Liberty, 48 TULSA L. REV. 325, 325–29 (2012) (book review) (cataloguing the "emergent interest in institutional interdependence"); Vermeule, *supra* note 38, at 15 (explaining that "the interaction among institutions itself creates a system at the second level, one that may have very different properties than do the institutions that compose it").

intended purpose.[162] While substantive decisions can sometimes be subject to system effects,[163] judges, legislatures, and policymakers appear to be able to perform most tasks reasonably well without engaging in systems analysis. Considering any aspect of an institutional design in isolation, by contrast, would assuredly amount to institutional design malpractice.

For the creators of incomplete designs, this has two important implications. The first might be called the problem of "design-internal system effects." Often mediating actors are asked to make design decisions that will interact with each other in consequential ways. Constitutions, for instance, tend to consist of a single "fixed basket of institutions."[164] A constitution that established an energetic executive but not a powerful congress, or federalism but not a supremacy clause, would probably be deeply problematic.[165] As a consequence, drafters who horse trade institutions, or design different constitutional institutions in isolation without a good process for combining them, are likely to end up with a very poor charter. Similarly, the *Chevron* doctrine has been developed case by case, but ultimately aggregates into a single, collective allocation of decision-making authority.[166] In the eyes of some, *Chevron* decisions that appeared sensible individually have collectively resulted in an incoherent allocation of authority because they are mutually irreconcilable, or set inscrutable *ex ante* incentives for relevant institutions.[167]

Designers can combat design-internal system effects of this kind by reducing the number of mediating actors charged with design tasks. Constitutions that are drafted by a single trustworthy drafter, or by small sets of decision makers unlikely to resort to unprincipled bargaining, can be

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162. *See* Huq, *supra* note 38, at 36 ("[I]nstitutional designers must look not only to the immediate effects of a proposed change, but also cast an eye downstream to ask how other elements in the system will respond strategically to a change.").

163. *See, e.g.*, Vermeule, *supra* note 38, at 41.

164. Donald L. Horowitz, *Constitutional Design: An Oxymoron?*, *in* DESIGNING DEMOCRATIC INSTITUTIONS 253, 261 (Ian Shapiro & Stephen Macedo eds., 2000).

165. *See id.* at 261–62 (arguing that the intended effect of a constitution is only achieved through "an elaborate set of interlocking structures").

166. *See* Vermeule, *supra* note 38, at 14–15 (describing the "doctrinal paradox," which leads to problems of this nature).

167. *See, e.g.*, Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overrruled*, 42 CONN. L. REV. 779, 782–84 (2010) (cataloguing alleged inconsistencies and conflicts within the *Chevron* doctrine that render it incapable of allocating interpretive authority properly); Jacob E. Gersen & Adrian Vermeule, Chevron *as a Voting Rule*, 116 YALE L.J. 676, 679 (describing the uncertainty and unpredictability of *Chevron*); *cf.* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2143 (2002) (explaining that because "the Court can only develop canons one by one, common law canons will be devised ad hoc, and will inevitably fail to form a coherent set"). *See generally* SCHICKLER, *supra* note 142, at 15–16 (describing how new institutions may be layered on top of old institutions in a way that creates conflicts).

expected to be more internally coherent.[168] In addition, designers can impose processes on downstream actors—like requirements of drawn-out debate, discussion, and reconciliation—that reduce the likelihood of inconsistent decisions.[169] More drastically, designers can reduce the complexity of incomplete designs.[170] A doctrine that involves the application of a straightforward rule is unlikely to result in an inconsistent and incoherent body of decisions. Of course, there may be great cost to simplifying an incomplete design, but the cost of complexity may be greater if it results in multiple actors constructing moving parts that fail to combine into a single working system.

System effects may present another problem for incomplete designers. "Design-*external* system effects" can arise where mediating actors must make decisions that interact with institutions outside the design in complex ways. As an example, courts are often concerned that their decisions will abet the disenfranchisement of minorities, aggrandize one political branch at the expense of another, or lend the court's legitimacy to improper ends.[171] But performing these analyses often requires a sophisticated understanding of the ways the court's decisions may affect political movements or disputes between the political branches.[172] Courts may be unable to

168. Lanni & Vermeule, *supra* note 120, at 937 (articulating the advantages of a single outside constitution maker, who would have "no need to engage in protracted bargaining, or to appease obdurate delegates with provisions that, taken together, render the overall document causally incoherent or unworkable"); Riker, *supra* note 148, at 131–43; *see also* Horowitz, *supra* note 164, at 270 ("Bargaining has much to commend it, but coherence is not among its virtues."); *cf.* Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1130–31 (1999) (explaining that multinational coordination is best solved through international agreement rather than a decentralized approach); Rosenkranz, *supra* note 167, at 2143 (arguing that "[c]ongressionally adopted [interpretive] canons could form a true 'regime'—a set of background interpretive principles with internal logical coherence").

169. *See* PIERSON, *supra* note 134, at 115 (describing the problem of "overload" where designers are subject to "time constraints, scarcities of information, and the need to delegate decisions"); Elizabeth Garrett, *Who Chooses the Rules?*, 4 ELECTION L.J. 139, 145 (2005) (observing that the method of posing questions regarding the design of electoral institutions by ballot initiative "does not allow for consideration of complex issues or of trade-offs inherent in governance").

170. *See* SCHICKLER, *supra* note 142, at 14 (explaining how "[a] change in one element of a complex reform proposal may affect other elements of the proposal in significant ways," so "the conflicts among competing collective interests may result in institutions that are poorly suited to achieving some widely shared objectives").

171. *E.g.*, United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); *see, e.g.*, Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 239 (1995) (stating that "high walls and clear distinctions" are necessary in establishing structural constitutional safeguards "because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict"); Bickel, *supra* note 62, at 48 (indicating that, in selecting cases, the Supreme Court considers whether its decision may lend legitimacy to an otherwise "intolerable" piece of legislation).

172. *See* Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 7 (1964) ("And even if legitimation were an adequate descriptive concept, it would be an unacceptable source of normative standards: it would endorse conjecture about the complexities of political reactions as a

perform such complex strategic analysis reliably and thus may reach the wrong result. Likewise, Stephenson's information-acquisition design forthrightly requires that principals engage in a form of strategic thinking in some cases.[173] In particular, Stephenson argues that principals with multiple agents should anticipate the effects their design decisions will have on institutional dynamics among the agents themselves.[174] This, too, is a difficult analysis that may tax the competence of relatively unsophisticated principals.

It is thus necessary for downstream actors facing design-external system effects to be minimally competent at both systems analysis and strategic behavior.[175] At least two characteristics appear to be essential for engaging in such tasks. First, the downstream actor must have some reasonable understanding and knowledge of the institutions with which he is interacting.[176] A judge who knows nothing about how political movements work in practice will not be good at anticipating when his decisions will stymie the political process.[177] In addition, the actor cannot be so rigidly committed to a particular methodology or course of action that he could not adjust his decisions if he discerned that his decisions might lead to problematic system effects.[178] The actor must be able to engage in strategic decision making where appropriate.

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The four attributes just listed are only a few of the characteristics important to evaluating and crafting incomplete institutional designs. I hope they seem to a degree familiar. Everyone recognizes that it would be foolish to let one of the players of a game make the rules, or to have a reactionary bureaucrat be the one in charge of shaking up his agency. This familiarity hopefully bolsters the sense that thinking about institutional decision making is an intuitive enterprise, part and parcel with crafting good designs. No doubt there are many more tools necessary to account

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primary ingredient of Court deliberations."); Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1049–50 (1980) (arguing that performing the political analysis required by political process theory inevitably invites arbitrary or value-ridden judgments).

173. *See* Stephenson, *supra* note 5, at 1461–62 (indicating that principals must address the "complex question of how to arrange decisionmaking systems that entail input from many different agents").

174. *Id.*

175. *See* Vermeule, *supra* note 38, at 71 (noting that it is "psychologically demanding to be so relentlessly flexible and systemically minded").

176. *See* Horowitz, *supra* note 164, at 268–69 (noting the importance of on-the-ground experience).

177. *Cf.* Huq, *supra* note 38, at 7 (arguing that questions of removal should be left to "elected officials who are more attuned than judges to the complex interaction effects and strategic responses that can arise in response to changes in basic agency design").

178. *See* Vermeule, *supra* note 38, at 44–45 (describing the costs of "principled" decision making in an institution characterized by problems of collective action and system effects).

fully for the existence of incompleteness. But the guideposts just provided should, I hope, establish the outlines of engaging in theoretically complete institutional design.

Before moving on, two loose ends are worth attending to. First, attentive readers may have noticed that the preceding discussion centered, implicitly, around a particular paradigm of the actor who makes institutional decisions. In this paradigm, the actor was unitary, coherent, and intentional; it held substantive goals, exhibited degrees of competence, and so on.

Such a paradigm, however, is a poor fit for the types of *collective* entities that often hold important institutional decision-making authority in the real world. As Neil Komesar has observed, two of the most important institutional decision makers in society are the free market and the political process, both of which consist of numerous atomistic decision makers.[179] Occasionally one of these collective entities will be delegated institutional decisions through a formalized process like a referendum. But more frequently the market and the political process hold institutional decision-making power through complex and difficult-to-analyze processes like the price mechanism and public opinion. I think it likely that the characteristics I have described—particularly system effects—remain relevant to understanding the decisions these collective entities make. But I am far less confident that the implications I have drawn out in this Part continue to hold true in those contexts. For instance, it may be all but impossible for a designer concerned about divergences in the veil of ignorance to anticipate the substantive goals of a collective entity like the free market. For now, I simply note the existence of such entities, anticipating that their existence holds implications for incomplete designs that I cannot fully consider here.

As for the second loose end, the preceding discussion assumed at times that institutional design is a static enterprise. This Article has repeatedly suggested that designers should make their best efforts to put *ex ante* restraints and decision makers in place to avoid negative entrenchment or system effects. But it is the rare designer who will have only a single shot at getting his institution right. Designers like the Supreme Court, Congress, academics, and treaty makers are usually empowered to revisit their work, take stock of it, and make adjustments as necessary. By the same token,

179. *See* KOMESAR, *supra* note 17, at 53–122; NEIL K. KOMESAR, LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS 16–22 (2001) (analyzing and comparing markets and the political process from an institutional perspective). To a lesser degree, Congress too is a collective entity that lacks knowledge or intention in the sense that individuals possess them. *See generally* Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992).

downstream actors are usually able to revise their decisions if at first they do not succeed in achieving their goals. In reality, designers and mediating actors are probably engaged in an iterated game of institutional decision making and refinement.

These observations introduce an important dynamic element into incomplete designs.[180] Once again, however, the implications of such dynamism are far from clear. In some cases, dynamism may relieve the pressure on designers to make good decisions in the first place; if the Supreme Court doesn't nail the *Chevron* doctrine the first time around, it can make refinements later on. But in other cases, this dynamism may render institutional design a moving target, requiring designers to engage in ever more complex and speculative analysis about the behavior of mediating actors.[181] Because the generalizable effects are so unclear, I bracket the question of dynamic institutional design for the remainder of the Article, leaving its implications, too, to be explored another day.

## IV. Implications

Thus far this Article has identified a gap in the theory and practice of institutional design—the problem of institutional incompleteness—and then proposed some attendant problems and solutions. These problems and solutions have admittedly been micro-level observations, potentially useful in individual design cases. Before concluding, then, I return to what all this means at the macro level. How should incompleteness inform the enterprise of institutional design writ large? In this Part, I offer three hypotheses and some tentative conclusions on each.

### *A. Should Designers Ignore Incompleteness?*

One potential response is that, in spite of everything said thus far, focusing on incompleteness is unproductive or even self-defeating. Of course designs require further decisions to be implemented—that much seems inarguable. But, the argument might go, demanding that designers focus on those implementation decisions removes them much too far afield from the actual substantive decisions with which a designer is ultimately

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180. *See* Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 U. CHI. LEGAL F. 111, 130–31 (describing the view that institutions develop "towards a dynamic ideal in a sometimes nonlinear fashion," whereby institutions "discarded in earlier historical periods can be rediscovered as the solutions to subsequent problems"); Gamm & Shepsle, *supra* note 100, at 40–41 (describing a "rational view" of institutional design that casts designers as intelligent actors who learn from their experience). This dynamic model may interact in interesting ways with collective institutional decision makers. Institutions like the market and the political process may learn from and react to past institutional performance differently than unitary actors.

181. Another implication of this dynamism is suggested by Listokin's *Learning Through Policy Variation*, *supra* note 38, at 483–84, which proposes that policies be adopted in part to elicit information useful to later reforms. The same might well be true of institutions.

concerned. And the payoff might be too limited to be worth it; designers cannot realistically anticipate the identities, biases, competences, and processes of downstream actors, and their designs are probably likely to work tolerably well if they just bracket that question and design around it.

This objection, I think, proves too much. Real-world designers do not have the luxury to turn a blind eye to the costs of implementation: Treaty makers cannot pretend that hostile states will design the institutions necessary to carry out treaty obligations, nor can the Supreme Court simply assume that doctrines of restraint will advance judicial restraint if in fact they will do the opposite. Although institutional decision making does not directly concern matters of substance, it is often dispositive of how those substantive matters will be decided. It follows that theorists who hope to craft useful designs or accurately understand existing designs must take those decisions into account.

The question of how they do so is more difficult. Should designers engage in ad hoc intuitive balancing to allocate institutional decision making? Or should they engage in more rigorous institutional analysis? This may sound like a tendentious way of phrasing the question, but I do not intend it to be. Sometimes a comprehensive analysis of the latter sort is more costly and yields little in the way of practical returns over and above what could be gotten with more back-of-the-envelope techniques.[182]

Yet as much of the foregoing discussion illustrates, intuition about institutional decision making—if it is consulted at all—is often faulty. One can identify designs that, to the blissful ignorance of the designer, are largely self-defeating, or highly susceptible to manipulation, or bound to be stymied by entrenched institutions. Moreover, it is possible to identify simple fixes capable of substantially curing these problems. Where that is the case, the costs associated with addressing incompleteness—the chance of error and the decisional burdens of complex analysis—are likely to be quite small. This Article cannot, of course, resolve whether the systemic costs of third-order analysis outweigh the systemic burdens over the whole domain of cases.[183] For now, the fact that such analysis is both inevitable and demonstrably useful from time to time suggests that it cannot be dismissed out of hand.

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182. *See* Steven J. Burton, *Normative Legal Theories: The Case for Pluralism and Balancing*, 98 IOWA L. REV. 535, 554 (2013); Kenneth Kress, *Legal Indeterminacy*, 77 CALIF. L. REV. 283, 332 (1989).

183. Such empirical uncertainty is hardly new to this field. *Cf.* Stephenson, *supra* note 5, at 1430 n.15 ("These examples, and most of the discussion in this Article, involve situations where research might reduce *empirical* uncertainty."); Sunstein & Vermeule, *supra* note 9, at 919 ("We do not suggest that these empirical projects [necessary to generate empirical insights] would be simple to execute, or that they would lead to uncontroversial normative recommendations."); Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 76 (2000).

### *B. Is Effective Institutional Design Impossible?*

Alternatively, perhaps the existence of incompleteness, and the nature of the problems it creates, poses a serious, even dire, problem for the enterprise of institutional design. This hypothesis might proceed from the recognition that institutional design is at heart a rationalizing project, motivated by the belief that a clear-eyed view of the limitations of different decision makers can generate improvements in the law. The fact that so many designs are incomplete undercuts this hope. Incompleteness may expose the futility of much institutional design, and there is nothing to guarantee that the adjustments available to correct incompleteness are up to the task.

In some situations, this pessimism is probably well placed. There may be designs for which incompleteness poses an incurable problem. Suppose an institutional design is circular, and that there is no way to overcome the circularity through the use of exceptional mediating actors or temporary designs.[184] In these cases, recognition of incompleteness does not lead to alternative designs or ameliorative improvements; it simply sounds the design's death knell. There is no way to know how many designs suffer from problems of this type, but assuming that number is nontrivial, incompleteness does indeed reduce the set of viable designs.

Furthermore, incompleteness may render effective institutional design prohibitively difficult in some cases. Adequately responding to incompleteness involves recognizing what institutional decisions a design leaves unmade, foreseeing who will make those decisions, and correctly discerning those mediating actors' relative veils of ignorance, entrenchment, susceptibility to system effects, and so on. Having made these judgments, the designer then must figure out what design adjustments are appropriate, in the course of which she might be required to balance certain incommensurable values, like the importance of a long-lasting design versus the importance of immunity from first-order manipulation. Any errors the designer makes—either in the task of analysis or in the task of institutional design—might then be magnified and multiplied across every application of that design.

If this complexity is not a good reason for abandoning any consideration of incompleteness, however, then it is an even worse reason for abandoning institutional design itself. Institutional design, remember, is unavoidable. It is embedded in law and the analysis of law. We simply do not have the luxury to abandon it because it is too hard and designers lack perfect perspective. At most, then, the comparative complexity of

184. *See, e.g.*, Vermeule, *supra* note 102, at 649 (contending that Ackerman's proposal of an "emergency constitution" is such a design).

addressing the problems raised by incomplete designs may be a good reason for crafting designs that are comparatively less incomplete (a matter to which I'll return in a moment).

It is true that incompleteness may cast doubt upon the capacity of institutional design to achieve some of its most ambitious goals. Some scholars contend that institutional design is capable of enabling a sort of ceasefire between actors with different ideological commitments. The logic goes that disagreements that are salient from a first-order perspective—such as whether originalism is a theoretically defensible mode of interpretation—may evaporate when questions of institutional competence are taken into account.[185] Similarly, it has been argued that institutional design is a rational response to the complexity of certain first-order decision making. By this reasoning, an actor who may not know the right answer to a certain question may be able much more easily to figure out who can supply the right answer.[186]

The difficult, discretionary decisions necessary to address incompleteness call both hypotheses into question. As the discussion in Part III shows, ideological disagreements may reassert themselves through the decisions necessary to address incompleteness. Different designers may favor different mediating actors because of their respective first-order commitments. Designers of different substantive commitments also may have different tolerances for the types of tradeoffs involved in combatting incompleteness: assigning the role of bureaucratic reform to the White House may reduce the costs of backward-looking entrenchment, for instance, but at the cost (or, from some designers' standpoint, the benefit) of increasing unitary control over the Executive Branch. There is reason, then, to suspect that the fact of incompleteness reduces, though it surely cannot eliminate, the utility of institutional design.

### *C. A Middle Path*

In the end, however, incompleteness should probably serve as a source of cautious optimism. While many designs may be incomplete, the problems posed by incompleteness generally seem to be solvable. Part III identified adjustments capable of addressing problems of circularity, imperfect veils, entrenchment, and system effects taken individually. These adjustments suggest the existence of a broader toolkit—which further analysis could make yet more useful—for recognizing and addressing third-order problems. Though no tool in this toolkit is perfect, collectively these tools may enable the improvement of institutional designs in a significant

185. *See* Sunstein & Vermeule, *supra* note 9, at 915–16 (discussing the possibility of incompletely theorized agreements in this context).

186. *See generally* Vermeule, *supra* note 183.

set of cases. Briefly, then, let us collect and review what these tools might be, as a way of paving the way forward for theoretically complete institutional design.

One tool might be called second-order institutional choice. Designers are familiar with the strategy of first-order institutional choice, whereby substantive tasks are assigned to the actor comparatively most competent to perform them.[187] Many of the solutions discussed in the previous Part amount to recapitulating this tactic at the second-order level.[188] The designer of a constitutional convention can evade society's lack of representative institutions by selecting outsiders, or exemplary individuals, as constitutional drafters.[189] Reformers can prevent entrenched bureaucracies from derailing administrative reform by empowering Congress or the White House to carry it out.[190] Congress can choose to deprive state courts of design authority over federal claims by creating exclusive federal causes of action.[191] Second-order institutional choice provides designers a focused way of thinking about each actor in the train of decision making who has influence over his design. A designer can then use this tactic to direct his design's development, selectively empowering the best institutional decision makers to perform residual design tasks he leaves undone.

Like first-order institutional choice, second-order institutional choice of course has its limits. For some designs it is quite impossible to specify precisely who will make certain institutional decisions. The drafters of an international treaty like the Vienna Convention cannot reach down far enough into each member nation's affairs to decide who will restructure procedural rules. Likewise, some academic proposals cover such a wide range of decisions that it would defeat the purpose of the proposal to limit them to particular decision makers. Heather Gerken's proposal that some institutions might constitute themselves so as to achieve second-order diversity is intended to be a universal rule of institutional design.[192] If it were limited to only some institutions—juries but not legislatures, say—it would lose much of its force. Moreover, in some cases, the implication of the problems discussed above is that none of the potential decision makers

187. *See, e.g.*, Neil K. Komesar, Commentary, *The Perils of Pandora: Further Reflections on Institutional Choice*, 22 LAW & SOC. INQUIRY 999, 999 (1997).

188. *See* Thomas W. Merrill, *Institutional Choice and Political Faith*, 22 LAW & SOC. INQUIRY 959, 991–93, 993 n.31 (1997) (mentioning the problem of "second-order comparative institutional analysis," and observing that it is "endemic to any project setting forth a normative theory of comparative institutional choice"); Schauer, *supra* note 6, at 577–78 (proposing institutional choice regarding second-order decision makers).

189. Lanni & Vermeule, *supra* note 120, at 937.

190. *See* Thorndike, *supra* note 149, at 779 (arguing that Congress and the White House carried out the most dramatic and successful IRS reforms).

191. *Cf.* Meltzer, s*upra* note 28, at 1131–32.

192. *See* Gerken, *supra* note 26, at 1102.

will be able to make the necessary institutional decisions capably.[193] The problem of entrenchment may lead to the conclusion that member states will be unable to alter their court systems adequately to comply with certain international agreements. There is no "institutional choice" that could be made to evade this problem; either the member states can make decisions capably or they can't.

Designers may thus turn to a second tool to optimize the competence of downstream actors. Rather than selecting the best possible institutional decision makers, designers might attempt to redesign those institutions so as to improve their institutional decision making.[194] This strategy might be called second-order institutional design. As an example, designers of constitutional conventions can avoid internal incoherence and circularity by adopting rules like supermajority voting and drawn-out debate.[195] Likewise, federal courts can guard against wayward state procedural rulings by enabling *ex post* review of those rulings.[196] Sometimes second-order designs will be temporary, in place just long enough to enable actors to perform tasks of institutional design and then disappear. These restraints essentially use the ordinary tools of institutional design at a meta level to compensate for difficulties in carrying out institutional-design tasks themselves.

Second-order institutional design is not perfect, either. Engaging in such design places considerable new decisional burdens on the institutional designer himself. It makes the resulting design more complex. Furthermore, it has the potential of merely displacing but not eliminating design problems, including problems of incompleteness. For instance, by relying on *ex post* review of state procedural decisions, the Supreme Court might generate difficult new institutional tasks for itself.[197] By attempting to impose good institutional rules on a constitutional convention, the designers of that convention may themselves fall prey to circularity problems if they are required to make contested distributional choices in the absence of any institutions that ensure they make them well.

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193. *See* Merrill, *supra* note 188, at 963 (noting that institutional-choice analysis may lead to the conclusion that no decision maker is competent to carry out the relevant tasks).

194. *See* Garrett & Vermeule, *supra* note 31, at 1278 (turning to a strategy of institutional design rather than institutional choice because "the institutional-choice question has largely been settled" in that context).

195. *See* SCHNEIER, *supra* note 107, at 27 (describing how designers of the 1787 Constitutional Convention imposed "downstream constraints" which forced consensus and a balancing of different regions' first-order interests); Ziyad Motala, *Constitution-Making in Divided Societies and Legitimacy: Lessons from the South African Experience*, 15 TEMP. POL. & C.R. L. REV. 147, 151–53 (2005) (describing the interim constitution adopted to enable drafting of a permanent constitution in postapartheid South Africa).

196. Hall, *supra* note 28, at 1291.

197. *See* Fitzgerald, *supra* note 28, at 88 (arguing that the Court has "defaulted to an inconsistent hodge-podge of guidelines" in carrying out this responsibility).

There is a final potential tool that evades the pitfalls of both institutional choice and institutional design—one to which I have alluded several times before. This tool might simply be called eliminating incompleteness. It is not uncommon for designers to express designs as rules, in a manner that essentially frees mediating actors of any institutional design responsibilities.[198] The system effects created by a complex doctrine, such as *Chevron*, can be reduced by making the doctrine comparatively simpler and more predictable.

Before one infers that incompleteness invariably can be solved through the deployment of rules rather than standards, however, it is worth recognizing the limitations of this approach. Incompleteness often exists for a reason. Some designs leave discretion to later decision makers because variations in institutional needs are numerous and subtle, and a design will be successful only if it acknowledges and responds to those differences case by case. Hence, efforts to simplify *Chevron* and the political question doctrine have often foundered on the inevitable complexities involved in deciding when it is appropriate to defer.[199] Moreover, the effects of incompleteness can in many circumstances be virtues. It may be desirable for a designer to defer institutional decisions precisely because those decisions are likely to become entrenched. Entitlement programs that generate numerous institutional investments by states and private parties are likely to build a broader base of support, and thus have greater longevity, than ones that conduct all the institution building at the federal level.[200] Similarly, differences in the veil of ignorance between a designer and a mediating institution can be to the designer's advantage. The designer's watchword should thus be sensitivity, rather than aversion, to institutional incompleteness.

## Conclusion

Proposals for institutional reform are not immune from the institutional problems that motivate them. Academic blueprints, judicial doctrines, treaties and statutes, and countless other institutional designs in the law and legal literature rely upon the decisions of downstream actors in order to be brought into effect. Those actors may err or manipulate, and the designs will suffer as a result. Designers can anticipate these problems, and they

198. *See, e.g.*, Scalia, *supra* note 25, at 1177–78 (favoring rules for their ability to constrain the discretion of downstream actors); Sunstein & Vermeule, *supra* note 99, at 887–88 (favoring rule-like formalism as a remedy for limited institutional competence of downstream actors).

199. *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 236–37 (2001) (noting that "the range of statutory variation has led the Court to recognize more than one variety of judicial deference," and that it has chosen to "tailor deference to variety").

200. *See* Hacker, *supra* note 24, at 243.

frequently have the tools at their disposal to fix them—or, where they do not, to recognize the fact and trim back their designs as necessary. I do not contend that my prescriptions are the final word on the subject. But I am confident that they point in the right direction, toward a law shaped in complete recognition of the limitations to which human institutions, whether deciding matters of substance or institutional design, are invariably subject.