

2012

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Recommended Citation

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 (2012).

Available at: <http://digitalcommons.law.utulsa.edu/tlr/vol48/iss2/17>

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**CONSTITUTIONAL SYSTEMS THEORY:
A RESEARCH AGENDA MOTIVATED BY VERMEULE,
THE SYSTEM OF THE CONSTITUTION AND EPSTEIN,
*DESIGN FOR LIBERTY***

Jenna Bednar*

ADRIAN VERMEULE, *THE SYSTEM OF THE CONSTITUTION* (2011). Pp. 220.
Hardcover \$35.00.

RICHARD A. EPSTEIN, *DESIGN FOR LIBERTY: PRIVATE PROPERTY, PUBLIC
ADMINISTRATION, AND THE RULE OF LAW* (2011). Pp. 233. Hardcover \$17.79.

ABSTRACT

This review considers Adrian Vermeule's *The System of the Constitution*¹ and Richard Epstein's *Design for Liberty*.² Vermeule's contribution to the study of constitutions applies some essential tenets of systems thinking that are barely evident in legal analysis and almost nonexistent in political science, and so if the book is widely read in both fields it has the potential to alter the trajectory of constitutional analysis for the better. As (nearly) the opening move, the field remains wide open for future research, and in this essay I offer some suggestions for new avenues. Epstein's concerns for the fate of individual liberty and an expanding bureaucracy are evaluated in terms of Vermeule's approach. Ultimately, what may rescue the United States from the over-regulatory fate implied by Epstein's analysis is something not yet developed in Vermeule's thesis: a constitutional culture, emerging within the public and defended by it, which draws the line to preserve liberty and innovation.

I. INSTITUTIONAL ANALYSIS AND CONSTITUTIONAL SYSTEMS

Constitutions are important because they shape what is possible for a society, whether it be economic growth, peace with its neighbors, or civic harmony. Or so we think. A key scholarly interest in constitutional design is to develop an understanding of how (and whether) the constitution affects the welfare of its subjects. Without question,

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1. ADRIAN VERMEULE, *THE SYSTEM OF THE CONSTITUTION* (2011).

2. RICHARD A. EPSTEIN, *DESIGN FOR LIBERTY: PRIVATE PROPERTY, PUBLIC ADMINISTRATION, AND THE RULE OF LAW* (2011).

constitutions structure governments, and government performance influences — for better or worse — economic stability and growth, peace between nations (domestic or foreign), and liberty and social welfare. The problem with this theory is that the empirical correlation between constitutions and social outcomes is not neat; every constitutional form — democratic or authoritarian, majoritarian or consociational, presidential or parliamentary — has some examples of solid performance and somewhere society suffers. To understand how and why constitutions are effective, we must dig deeper into the constitutional form to consider how the components of the constitution interact to shape social welfare.

In this essay I will review two recent books that examine the operation of the constitution on social outcomes. For Vermeule, the contribution is in thinking about how the components of government intersect to create a system, a constitutional order;³ in Epstein's case, he also presents a theory of the way that the institutions of government interact, but does so to judge the product of the system.⁴ Vermeule is positive, Epstein is normative, and both offer interesting insights into the way that government affects social welfare. I will consider Vermeule first.

To understand Vermeule's contribution, it is necessary first to understand the essence of positive political theory ("PPT") because his book is rooted in it, but Vermeule's main contribution is the way that he leaves PPT behind.⁵ PPT's intellectual ancestry is in microeconomic theory.⁶ Like microeconomics, it begins with the analysis of individual agent behavior, and then from this foundation it builds a theory of social outcomes.⁷ The choices that individuals make are purpose-driven and (in most interesting cases) interdependent: what one agent chooses to do depends on what he or she expects other agents to do.⁸ These decisions are often made with limited information, either about the preferences of other agents or about the consequences of one's actions.⁹ Social welfare is a product of the aggregation of individual decisions according to some rule of aggregation, and individual satisfaction with the social outcome is based on a rule of distribution, or how the social good is shared among the members of the society.¹⁰

For example, the U.S. presidential election is a product of individual actions — votes — but different ways of compiling those votes can lead to different outcomes. The U.S. Electoral College distorts the vote count in presidential elections, aggregating votes at the state level rather than nationally. Different electoral systems count votes (individual actions) in different ways. In turn, another function determines the value of a social product to each individual. Budget surpluses or shortfalls are easily understood to have differential distributional consequences: expenditures or revenue responsibilities can be targeted to hit different populations in different ways.

3. VERMEULE, *supra* note 1, at 3.

4. See EPSTEIN, *supra* note 2, at 8.

5. See VERMEULE, *supra* note 1, at 6–7.

6. For an overview of microeconomic theory, see ANDREU MAS-COLELL, MICHAEL D. WHINSTON & JERRY R. GREEN, MICROECONOMIC THEORY (1995).

7. See *id.* at 1–16 (discussing the study of individual decision-making and the resulting assumptions from these decisions).

8. See *id.* at 11–14.

9. See *id.* at 170–71.

10. See *id.* at 117–21.

In PPT, the study of these rules of aggregation and distribution is referred to as institutional analysis: these rules are institutions that determine the consequences of an agent's action.¹¹ Therefore, we think of institutions as creating or shaping the incentive environment. Different institutions will lead to different individual behaviors and, therefore, to different collective outcomes.

All laws and all policies are institutions. Putting some bones on all of this abstraction, institutions can be as specific as a law — say, the Equal Employment Opportunity Act of 1972¹² (“EEOA”) — or as broad as Congress. To simplify the concepts of rules of aggregation and distribution, one might think of institutions as encouraging behavior through carrots and sticks: inducements to encourage behavior or punishments for failing to conform to the desired behavior. In the case of the EEOA, the institution, a statute, provides incentives (and disincentives) to alter behavior; the institution has a purpose, “to further promote equal employment opportunities for American workers,”¹³ and to reach that social outcome the EEOA mandates that employers advertise positions and adopt hiring practices that are free from bias against a variety of population categories, including race.¹⁴ Violations are punishable through fines and related remedies.¹⁵

A law is itself a product of an earlier collective choice, that of individual representatives acting in the institutional context of Congress. Viewing Congress as the institution, it is a rule of aggregation (votes will be compiled in two separate assemblies, requiring a majority of each, or a supermajority should the executive veto¹⁶). It is also a rule of distribution: each product — legislation — has distributional consequences for the congressional members in terms of whether each member's constituents or campaign backers are pleased with the legislation and the legislator's vote on it.

Given these foundations, institutions are associated with the production of political goods. In economics, products are physical, whether pins or iPods. The goal is efficiency. Productive efficiency is defined as a plan for the economy that produces the most goods without requiring the input of any additional resources. In politics, products are often less tangible and resources (apart from money) are almost always intangible. Products may be measurable: poverty alleviation, growth, trade, budget deficits; or not: liberty, justice, satisfaction. Many are only imperfectly measurable: peace, racial or gender equity, representative responsiveness, transparency. One of the most quantitatively elusive categories is also our most important: democracy. Valiant attempts to codify relative levels do not end the comparative controversy with the United States maxing out on the democracy index and yet still subject to important criticisms for democratic failings.¹⁷

11. See VERMEULE, *supra* note 1, at 15–16.

12. Equal Employment Opportunity Act of 1972, Pub. L. No. 92–261, 86 Stat. 103 (codified as amended at 42 U.S.C. §§ 2000e–200e–17 (2012)).

13. *An Act*, EEOC.GOV, http://www.eeoc.gov/eeoc/history/35th/thelaw/eo_1972.html (last visited Jan. 18, 2013).

14. 42 U.S.C. § 2000e-2(a)(1) (2012).

15. 42 U.S.C. § 2000e-2(n)(3) (2012).

16. U.S. CONST. art. I, § 7, cl. 2.

17. See, e.g., WILLIAM H. RIKER, *FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE* 62–63, 142–43 (1964) (arguing that federalism protects racist policies). See also ROBERT A. DAHL, *HOW DEMOCRATIC IS THE*

To understand the effect of particular components of a constitution on its performance — evaluated by its correlation with the fulfillment of some social goal — PPT analysts often proceed as good microeconomic game theorists would: in the behavioral equilibrium of a particular institutional context, what is the effect of varying one of the inputs — one of the constitutional components? North and Weingast's seminal article in the field argued that it was the invention of a sovereign Parliament and an independent judiciary that made the king more effective because once he was limited he could credibly commit to repay money he would borrow.¹⁸ Therefore, lenders were willing to extend credit, paying for the expansionist policies that built the British Empire.¹⁹ Other important examples of the institutional analysis of constitutions include Shugart and Carey, comparing presidential and parliamentary systems;²⁰ Cox, analyzing electoral rules;²¹ Diermeier and Myerson on the effect of bicameralism on legislative organization;²² and Weingast, highlighting the role that federalism plays in promoting economic growth through market preservation.²³

Empirical evidence for some of the theoretical propositions is thin, perhaps because scholars sometimes mistakenly equate institutional functionality with institutional forms.²⁴ More recent work has responded by expanding the scope of analysis; rather than varying one institution at a time, scholars trace the interdependence of institutions. Independent judiciaries rely on competitive political environments,²⁵ the efficacy of federalism depends upon the underlying distribution of authority between federal and state governments,²⁶ the aggregation of constitutional components produces either divergent or consensual politics, which in turn has real effects on policy,²⁷ and where policy stagnates as the number of constitutionally-provided veto players

AMERICAN CONSTITUTION? (2001), and Alfred C. Stepan, *Federalism and Democracy: Beyond the U.S. Model*, 10 J. DEMOCRACY 19 (1999), which both criticize the representation of the states in the American electoral and legislative institutions coming at the expense of popular representation, and LAWRENCE LESSIG, *REPUBLIC LOST: HOW MONEY CORRUPTS CONGRESS — AND A PLAN TO STOP IT* (2011) (warning that special interest money biases democratic outcomes toward the privileged).

18. Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth Century England*, 49 J. ECON. HIST. 803, 804–05 (1989).

19. *Id.* at 805.

20. MATTHEW SOBERG SHUGART & JOHN M. CAREY, *PRESIDENTS AND ASSEMBLIES: CONSTITUTIONAL DESIGN AND ELECTORAL DYNAMICS* 55–75 (1992).

21. GARY W. COX, *MAKING VOTES COUNT: STRATEGIC COORDINATION IN THE WORLD'S ELECTORAL SYSTEMS*, 37–139 (1997).

22. Daniel Diermeier & Roger B. Myerson, *Bicameralism and Its Implications for the Internal Organization of Legislatures*, 89 AM. ECON. REV. 1182 (1999).

23. Barry R. Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 J. L. ECON. & ORG. 1 (1995).

24. *See, e.g.*, TORSTEN PERSSON & GUIDO TABELLINI, *THE ECONOMIC EFFECTS OF CONSTITUTIONS* (2003) (taking care to state precisely what effects they measure to find support for a variety of more detailed claims about constitutional effects); Robert J. Barro, *Democracy and Growth*, 1 J. ECON. GROWTH 1 (1996) (finding mixed support for the theory that democracy promotes growth); Adam Przeworski & Fernando Limongi, *Political Regimes and Economic Growth*, 7 J. ECON. PERSP. 51 (1993) (same); Dani Rodrik, *Getting Institutions Right* (Apr. 2004), available at http://www.wcfia.harvard.edu/sites/default/files/807_ifo-institutions%20article%20_April%202004_.pdf (arguing that effective institutional outcomes do not map into unique institutional designs).

25. Matthew C. Stephenson, "When the Devil Turns . . .": *The Political Foundations for Independent Judicial Review*, 32 J. LEGAL STUD. 59, 61 (2003).

26. Weingast, *supra* note 23, at 4–5.

27. *See* ROBERT D. COOTER, *THE STRATEGIC CONSTITUTION* 4–6 (2000).

increases.²⁸

Perhaps the most interesting work, in terms of upside promise, is that which melds the insights of interacting institutions with the legal culture, as Tushnet does in defining the constitution as more than the text and the set of institutional arrangements to include also the guiding principles for their operation.²⁹ As these guiding principles change they usher in new constitutional orders, as in the transition from a pursuit of justice through law during the New Deal to Great Society period, to one that relies more heavily on individual responsibility and market forces during the latter two decades of the twentieth century.

II. VERMEULE, SYSTEM EFFECTS

It is against this backdrop of an emergent interest in institutional interdependence that Vermeule steps forward with a series of works on constitutional system effects, culminating in the book *The System of the Constitution*, under review here.³⁰

In a conceptual style reminiscent of Schelling³¹ or modern complex systems theorists, Vermeule builds a vision of constitutionalism from the bottom up: individuals interact with one another, their interactions shaped by a common institution.³² In turn, multiple institutions coexist, and their compiled force generates a constitutional order.³³ Playing out within this vision of two-level systems comprising the constitutional order are familiar concepts such as selection mechanisms and the influence of the invisible hand,³⁴ but also less familiar concepts, especially irreducibility and the theory of the second best.³⁵ I will highlight these second two as I think that they have the most to offer constitutional analysis.

A. Second-Best Institutionalism

With an emphasis on the second best and irreducibility, Vermeule makes a clear break with his PPT compatriots. The theory of the second best, first described formally by Lipsey and Lancaster,³⁶ has been largely ignored by PPT scholars, even though it may capture what they are groping toward, particularly when one invokes political feasibility constraints.³⁷ The theory of the second best works as follows. Suppose there is

28. See GEORGE TSEBELIS, VETO PLAYERS: HOW POLITICAL INSTITUTIONS WORK 161–206 (2002).

29. MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER 1 (2003) (“I think it productive to think about constitutional orders in the United States that go beyond judicial doctrine and the written Constitution to encompass relatively stable political arrangements and guiding principles.”).

30. VERMEULE, *supra* note 1. Vermeule is maddeningly productive. One can find him probing different aspects of the general topic of constitutional system effects in a number of works over the past decade. Some of my favorites include THE MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN WRIT SMALL (2007), LAW AND THE LIMITS OF REASON (2009), and *Forward: System Effects and the Constitution*, 123 HARV. L. REV. 4 (2009).

31. See THOMAS C. SCHELLING, MICROMOTIVES AND MACROBEHAVIOR (2d ed. 2006).

32. VERMEULE, *supra* note 1, at 3.

33. *Id.*

34. *Id.* at 65.

35. See *id.* at 29–35.

36. R. G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11 (1956–1957).

37. Illuminating exceptions include Bruce Talbot Coram, *Second Best Theories and the Implications for Institutional Design*, in THE THEORY OF INSTITUTIONAL DESIGN 90 (Robert E. Goodin ed., 1996); JON ELSTER,

some determination about the optimal mix of institutions for governing a population: say, in order to promote economic growth, one follows Weingast's prescriptions for market-preserving federalism.³⁸ The institutional prescription includes a federal system where states set fiscal policy and the national government protects property rights.³⁹ Suppose that in order to maintain this balance, an independent judiciary is necessary to umpire the boundaries of federalism.⁴⁰ Suppose Stephenson is right and an independent judiciary requires a competitive political system.⁴¹ Summing it together, in our hypothetical example we would have an optimal institutional prescription of federalism, an independent judiciary, and a competitive party system.

With a prescription for an optimal institutional arrangement designed for fiscal restraint in hand, one can ask: What happens if the party system is not competitive, if one party dominates? That is, more generally, what happens to the components in our optimal system if one component is unavailable? The theory of the second best says that it is possible that if one variable is constrained (here, the competitive party system) then the second best institutional arrangement may require alterations to the other variables.⁴² In our hypothetical case, the lack of a competitive party system may make an independent judiciary unobtainable, and if there is no functional replacement for the judiciary, then federalism may need to be abandoned and the economy managed centrally.

Vermeule invokes the theory of the second best to emphasize its corollary: the approximation fallacy.⁴³ If one cannot achieve the optimal arrangement of institutions, then one might think that the best strategy is to set the institutional arrangement to be as close as possible to optimal. In our hypothetical, the constitutional designer would forge ahead with federalism and set up a court and hope for the best in the absence of the competitive party system. That approach would be theoretically misguided and potentially disastrous in practice. If one component is constrained, or even missing, then it could cause another component to behave in an unanticipated way. Returning to the example above, if political competition is necessary for an independent judiciary, and there is no political competition, then having an ineffective judiciary — or one beholden to the national government — may cause greater problems than if judicial safeguards of federalism were absent and federal skirmishes were more transparently the purview of politics.⁴⁴

Vermeule contrasts the systems theory approach to one that he dubs "piecemeal": criticisms of the American system as being undemocratic or unworkable that point to the

EXPLAINING SOCIAL BEHAVIOR: MORE NUTS AND BOLTS FOR THE SOCIAL SCIENCES (2007); Dani Rodrik, *Second-Best Institutions*, 98 AM. ECON. REV. 100 (2008); Adrian Vermeule, *Hume's Second-Best Constitutionalism*, 70 U. CHI. L. REV. 421 (2003).

38. See Weingast, *supra* note 23, at 3.

39. *Id.* at 4-5.

40. See *id.* at 19-21.

41. Stephenson, *supra* note 25, at 61.

42. VERMEULE, *supra* note 1, at 29-30 ("[T]he failure to satisfy optimality conditions on one variable means that other variables must take on suboptimal values as well, in order to compensate for the initial failure.").

43. *Id.* at 30.

44. For more examples along these lines, see my book *THE ROBUST FEDERATION*, *supra* note *, at 147-68.

democratic deficit or inefficiencies in virtually every component of the system.⁴⁵ Vermeule points out that if one diagnoses the ills of democracy in the United States component-by-component, one is naturally inclined to attempt to improve the functioning of democracy in whatever way possible.⁴⁶ Incremental improvements include increasing the number of elected offices, reducing the number of elections, adding regulation that encourages party organizations (or not), or expanding judicial elections. Each of these adjustments may have effects that spill over to other system components.

The piecemeal approach implicitly ascribes to a linear model, where the sum of the parts is exactly equal to the whole. In a linear model, marginal improvement to one component necessarily improves the whole. In a complex system, where the components are interdependent, aggregation effects can be non-linear; incremental improvements could make the whole *much* better than the marginal change to the component. But it could also make it worse, perhaps much worse.⁴⁷ While the problem is appreciated in economics, it is perhaps especially an issue in political or legal systems because of the non-independence of the institutions.

Institutional arrangements may be twitchy: political and legal systems may be particularly prone to discontinuities that would create large leaps in the institutional space between first and second best institutional arrangements. This observation leads to two implications worthy of future study. First, constitutions should not be written by a subcommittee, with one group writing the section on the judiciary and another on the legislature, or even one writing on the institutions of governance and another on individual rights. As a system, the constitution must be appreciated as a whole.

Second, if one institutional structure is suddenly rendered ineffective, it can have massive reverberations throughout the system. For this reason, constitutional scholars need to study resilience of constitutional systems. Resilience studies should include knock-out experiments: what happens to the rest of the system if one component is rendered ineffective? Knock-out experiments are common to ecological studies and uncommon, perhaps to the point of absent, in constitutional studies.

B. Irreducibility

Systems theorists accept that the system may have properties that are distinct from its components. Vermeule again phrases this lesson in terms of a warning: one must not be tempted to infer that because a system has particular characteristics — say, transparency, or democratic responsiveness — that each component of the system will have that characteristic.⁴⁸ It is more intuitive to accept that the whole may differ from the parts, which perhaps is why Vermeule does not need to spend much space illustrating that phenomenon. The canonical example of irreducibility is the existence of the unelected judiciary within the American democracy. It is the sort of contradiction that confounds the public and great scholars alike: an unelected, unrepresentative,

45. VERMEULE, *supra* note 1, at 6–7.

46. *Id.* at 55.

47. *See id.*

48. *Id.* at 27.

unaccountable body of nine can block the intentions of the public's political agents. And yet, the judiciary is heralded as one of our democratic system's three key pillars, with a popularity rating regularly triple that of Congress.⁴⁹

An interesting offshoot from the concept of irreducibility is that it affects how we think not only about individual components, but about individual agents within any institution. Consider judges: a sensitivity to irreducibility ought to shape our evaluation of individual judges. Just as no individual can be diverse — it does not make sense to say it — Vermeule would argue on the same grounds that no individual can be intrinsically valuable.⁵⁰ The value of any public official (here, judges, particularly) depends on the others in the group.⁵¹ A determination of the desirability and efficacy of any one judge requires consideration of the full group.⁵² Recruitment and selection strategies cannot be based upon individual characteristics alone, but how those characteristics fit within the fuller system, whether it be a set of individuals or institutions. The beauty of a star is based on its position relative to others within a constellation. Systems emphasize relational context.

Selection effects are a terrific trope that Vermeule uses to illustrate interdependence.⁵³ Vermeule also develops an interesting thesis regarding the way that constitutional rules generate a selection mechanism that can change the set of candidates for public positions.⁵⁴ He introduces the theory of a screening mechanism, which acts as a filter on the whole pool of potential applicants (or candidates).⁵⁵ Like the irreducibility and second order effects, the theory is most interesting when it generates nonobvious conclusions. He focuses particularly on the effect of compensation rules.⁵⁶ The Constitution has very similar rules about compensation for Congress and the judiciary, with one key difference: in Congress, sitting members cannot vote themselves a raise.⁵⁷ They can vote for a raise for future Congresses.⁵⁸ This mechanism clearly disincentivizes voting for raises, which of course was its purpose.⁵⁹ But as long as judicial raises are tied to congressional ones, the amendment exacerbates the unintentional consequences of the compensation rules.⁶⁰ Judicial salaries are falling even farther behind the compensation in private practice.⁶¹ The theory of selection mechanisms complements the theories of irreducibility and second order effects well.

49. Adam Liptak, & Allison Kopicki, *Approval Ratings for Justices Hits Just 44% in New Poll*, N.Y. TIMES, June 8, 2012, at A1, available at http://www.nytimes.com/2012/06/08/us/politics/44-percent-of-americans-approve-of-supreme-court-in-new-poll.html?pagewanted=all&_r=0 (noting that even though the Supreme Court's current approval rating is low, it is still higher than Congress's approval rating).

50. See VERMEULE, *supra* note 1, at 111–12.

51. *Id.* at 110–11.

52. See *id.* at 132.

53. See *id.* at 131–33.

54. *Id.* at 123–31.

55. *Id.* at 114–16, 123.

56. *Id.* at 124–25.

57. See U.S. CONST. art. III, § 1; VERMEULE, *supra* note 1, at 124.

58. VERMEULE, *supra* note 1, at 124.

59. *Id.*

60. *Id.*

61. See *id.*

C. Further applications

I would like to highlight two more applications. Vermeule skewers hopes of accountability through the ballot box, but then revives hopes by introducing an alternative: a self-regulating system of internal accountability.⁶² In the complexity of the American system, one might already hold the opinion that electoral accountability — causing public officials to serve the public interest or be removed from office — is inefficient at best, and perhaps nonexistent, given that the vote itself is a very crude message, the lackadaisical attitude of most Americans to all but the most salient electoral choices, and the ability of special interests to control information. Vermeule squashes any lingering glimmer of hope that electoral accountability is possible.⁶³ The components are too interrelated to assign responsibility accurately.⁶⁴

In fact, Vermeule goes even farther: not only is it hopeless to imagine that electoral accountability is possible, but it is explicitly not so by design.⁶⁵ In a second-order system, no political agent can be evaluated independent of the other agents.⁶⁶ Taken to its extreme form, the Vermeule thesis even might refuse to accept graft, abuse of power, or golfing through the workday as an indication that an individual ought not be reelected: perhaps the graft causes him to work harder or realigns the interests of others beneficially; perhaps power-grabbing improves the orientation of authority; perhaps society is better off when a political agent is inactive, at least during a Wednesday afternoon golf league. Vermeule offers another possibility for accountability: through internal regulation or self-regulation.⁶⁷ The components may effectively check one another; Madison's "auxiliary precautions" may in fact be what maintains our democracy.⁶⁸ Or, it may be that popular safeguards are inactive for ordinary politics; with a theory of institutional complementarity (another element in systems analysis), they may be inactive but the possibility of electoral punishment makes other safeguards — judicial, political, and the fragmented structure of government — more effective than they would be absent effective electoral constraints.⁶⁹

Vermeule provides us a framework for judging the efficacy of one system against another.⁷⁰ Dahl and Stepan reject the complexity of the American system, ultimately due to one principle: it fails on electoral accountability grounds.⁷¹ Rather than emphasizing the failure of each component — given Vermeule's convincing work that is insufficient criterion for rejecting the whole system — instead, their objection should be phrased in terms of the agency of the individual; in a democratic society, the individual should feel authority over government. In which system, the British, unified and majoritarian, or the American, fragmented and federal, does policy more closely align with the public will?

62. *See id.* at 123–31.

63. *Id.* at 131–33.

64. *See id.* at 133.

65. *Id.* at 132.

66. *Id.* at 70.

67. *Id.* at 117–23.

68. *See id.* at 38–43.

69. *See* THE ROBUST FEDERATION, *supra* note *, at 147–212.

70. *See* VERMEULE, *supra* note 1, at 14–37.

71. DAHL, *supra* note 17, at 99–119; STEPAN, *supra* note 17.

The instruments that drive the alignment differ between the two cases: on the one hand, there is electoral accountability, supported through responsible parties; on the other, the system is self-regulating. This review is not the place to conduct this comparison, but the proper way to proceed, it seems to me, is to consider both the capacity and likelihood of both at heeding the public interest, but also, and quite importantly, the likelihood that either would fail to reach it and perhaps fail egregiously. That is, the appropriate method of comparison would consider the resilience of the system; its ability to resist tyranny or exploitation for private gain. I suspect that a full analysis will conclude that there is no absolute ranking of the two systems — that their performance is conditional, and it would be most helpful to know those conditions.

Perhaps Vermeule's most ambitious application is a fresh interpretation of the changes in the distribution of federal and state authority from the nineteenth to the twentieth centuries.⁷² He starts with a few cases that, if developed fully, could be interesting alternatives within American political development scholarship.⁷³ The interpretation rests on a theory of self-stabilizing and self-undermining selection rules. Vermeule links the expansion of federal power, noted by many students of federalism, not as predetermined constitutionally (as Riker argues⁷⁴), not as fatalistically inevitable, and not as a product of the federal government intentionally stealing power from the states. Instead, he seeks an explanation rooted in the incentives of the individual, augmented by selection effects.⁷⁵ Industrialization, war, and the Depression created a national perception that the federal government was more effective than the states at solving the nation's great problems.⁷⁶ The opportunity for enhanced power at the federal level led candidates who were *individually* power hungry to seek office; they valued not only the salary, but the power.⁷⁷ My assessment: I do not know if I buy it, but it is a provocative, original explanation, and it is extremely hard to find in a well-trod literature.

Vermeule raises two topics that read as placeholders for future research. The first is the theory of norms, including their emergence.⁷⁸ In chapter three, on invisible hand, Vermeule addresses the theory of norms.⁷⁹ While parts of the chapter are excellent, like the distinction between designing an institution and designing an outcome,⁸⁰ overall, the clarity of the other chapters is lacking here. The good news is that Vermeule may continue to work on it, because by invoking theorists like Tushnet, he makes clear that the effect, emergence, and evolution of norms is key to a full theory of constitutional order, where conventions ride equally alongside law.⁸¹

72. See VERMEULE, *supra* note 1, at 161–68.

73. See *id.* at 28–36.

74. RIKER, *supra* note 17, at 11–25.

75. VERMEULE, *supra* note 1, at 29–37.

76. See *id.* at 38–43.

77. See *id.* at 110–16.

78. *Id.* at 66.

79. *Id.*

80. See *id.* at 79–80.

81. See *id.* at 94–100.

A second topic ripe for expansion is the theory of constitutional evolution.⁸² If one stitched pieces together from the book, one would have a decent foundation for a new theory of constitutional change. To explain change, Vermeule switches gears from emphasizing the distinctness between components and system at one point in time to their coevolution.⁸³ The system, after all, is built by the components, so it makes sense that the system would change as components change, although that change may be unanticipated and happen much more quickly than one would expect. To theorize fully about constitutional evolution using systems analysis, one will need to map out theoretically and empirically how the components are connected — how loose or tight they are — and develop a theory of feedback within constitutions to understand how the constitutional system might tip from one state to another.⁸⁴ It is quite possible that norms or constitutional culture (Tushnet's principles⁸⁵) are what bind components together. If so, given that much constitutional change comes through reinterpretation,⁸⁶ understanding the diffusion of constitutional ideas will be necessary in building the theory of constitutional change.

The book is first and foremost a work of constitutional theory, but to show the application of these concepts, Vermeule peppers the text with quick examples developed in a few sentences or sometimes extending to a few pages.⁸⁷ I have highlighted a few in this essay. None are meant to represent definitive empirical support of his model, but instead are used to illustrate the logic through familiar examples. The sheer number of illustrations invites the reader to think of many more. Vermeule tends to stick closely to the relationship between political institutions and questions of representation, making only brief remarks about rights (freedom of the press, voting rights, especially of black Americans).⁸⁸ But one can imagine applications to gender equality, marriage equality, privacy, war powers, emergency powers, etc. It is the best kind of creative force, one that bubbles over with enthusiasm for the work of others and tosses in so many ideas and examples that the reader cannot help but get caught up in the act and generate ideas and examples of her own.

III. EPSTEIN

An important feature of Vermeule's argument is the pains that he takes to emphasize that theory is non-deterministic and that the American system, in particular, may be dysfunctional.⁸⁹ After a fairly bullish beginning, laying out why non-democratic components can create a democratic system (and even may be necessary for one, in the case of countermajoritarian judicial review⁹⁰), Vermeule backs away from what might

82. *See id.* at 97–99.

83. *See id.* at 102–33.

84. *See* P. J. Lamberson & Scott E. Page, *Tipping Points*, 7 Q. J. POL. SCI. 175 (2012) (outlining the concept of constitutional tipping).

85. TUSHNET, *supra* note 29, at 8–33.

86. *See* Sanford Levinson, *Designing an Amendment Process*, in CONSTITUTIONAL CULTURE AND DEMOCRATIC RULE 271 (John Ferejohn, Jack N. Rakove & Jonathan Riley eds., 2001).

87. VERMEULE, *supra* note 1, at 22–23, 92–93, 115.

88. *Id.* at 90, 118–19.

89. *See id.* at 36–37, 63–64, 94–100, 131–33.

90. *See id.* at 58–63.

have been interpreted as a case for the optimality of the American system.⁹¹ It was wise to withdraw, for too many smart people like Epstein would shoot arrows his way.

Epstein makes the case that the American government has grown beyond its usefulness, and such growth is not only undesirable but inevitable.⁹² While the argument is cloaked in strong normative overtones — Epstein is a libertarian, and so perhaps one could see the conclusion coming — it is premised upon a significant claim: the constitutional system is incapable of self-limitation.⁹³ Regulation introduces discretion, and public administrations cannot manage discretion well.⁹⁴ Regulatory agencies will grow, stifling the innovation that makes continued growth possible.⁹⁵

Limited government, in Epstein's model of the constitutional system, depends upon effective judicial monitoring, and Epstein recognizes that judges are inevitably imperfect, although he wishes it were not so.⁹⁶ He writes: judges should take "exceptional care to guard against actual bias,"⁹⁷ a sweet sentiment that can go exactly nowhere. Epstein's dependence on the elusive rule of law echoes Hayek, where an independent judiciary is a citizen's last line of defense against an encroaching bureaucracy.⁹⁸ In essence, Epstein makes the opposite argument of Wittman, who argued that economic markets are no more efficient than political markets, and that the set of institutions in the American democracy protect liberties and property just as well as market could.⁹⁹ Epstein flatly disagrees.¹⁰⁰

There are several ways that we might use the Vermeule book to consider Epstein's conjecture. Vermeule would counter first that given the rule of irreducibility, it is possible to have a functional system even if the parts are (somewhat) broken.¹⁰¹ Epstein would use Vermeule against himself here: the claim is only one of existence, not inevitability; just because a well-functioning system is possible does not mean that it will be obtained (or, one should add, maintained).¹⁰²

Vermeule would respond (along with a chorus of other legal theorists) that the citizen is protected in many ways, not just through the courts.¹⁰³ There are alternatives that might counter a regulatory zeal, including the people themselves. The rise of the Tea Party is a recent example of popular safeguards at work.¹⁰⁴ Perhaps it is the lack of

91. *See id.* at 145–49.

92. EPSTEIN, *supra* note 2, at 5–6.

93. *Id.* at 6–7.

94. *Id.*

95. *Id.* at 7. There is, in Epstein's addition, the notable absence of the justification for regulation. When it corrects market imbalances, regulation can be socially productive, a counterweight that might bring the net benefit of regulation above zero, despite administrative costs and other inefficiencies.

96. *Id.* at 18.

97. *Id.*

98. EPSTEIN, *supra* note 2, at 17–18; F. A. HAYEK, *THE CONSTITUTION OF LIBERTY* 208–14 (Univ. of Chic. Press 1960).

99. DONALD A. WITTMAN, *THE MYTH OF DEMOCRATIC FAILURE: WHY POLITICAL INSTITUTIONS ARE EFFICIENT* 87–114 (1995).

100. *See* EPSTEIN, *supra* note 2, at 55–57.

101. *See* VERMEULE, *supra* note 1, at 29–37.

102. *See* EPSTEIN, *supra* note 2, at 16–17.

103. *See* VERMEULE, *supra* note 1, at 117–31.

104. For a discussion of the rise of the Tea Party, see Rebecca E. Zietlow, *Popular Originalism? The Tea Party Movement and Constitutional Theory*, 62 *FLA. L. REV.* 483, 488–91 (2012).

reliability of the political system — and the recent strategic fizzling of the Tea Party, taking the Republican Party down with it¹⁰⁵ — that causes assurances of the sufficiency of popular and political safeguards to fall flat.

Vermeule might also suggest (again, continuing to accept the claim that the United States is overregulated), that we are in a bad cycle, using the selection mechanism part of Vermeule's theory. Vermeule focuses on compensation, qualifications, and on incentives at the individual level.¹⁰⁶ The application requires deeper analysis, but it is possible that feedback in the system leads to overregulation. The strongest application relating individual incentives to regulation points in the opposite direction: the revolving door theory of bureaucracy says that bureaucrats move in and out of industry and anti-regulatory lobbying agencies. Career incentives dampen the bureaucrat's enthusiasm for regulation. However, to support Epstein, they may channel regulatory efforts in a biased way, one that is socially inefficient.

Given Vermeule's treatment of constitutions as systems, Epstein offers a useful counterpoint. I think it serves as a reminder of the importance in understanding not just the institutional components of a constitutional order, but the guiding principles as well. Ultimately, a full appreciation of the American system, for better or for worse, will only come once we have a proper theory of constitutional resilience. With it, we might either confirm or reject Epstein's conjecture.

IV. FINAL THOUGHTS

Science is cumulative, and so good work does not aim to answer all questions, but instead, opens new pathways for research. Work should be judged at least as much based upon what is now possible because this work exists as upon what the work answers. I titled this review a *Proposed Research Agenda*, which I mean. It may be easy to see where I see intellectual potential to move forward with a systems theory approach to the study of constitutions given Vermeule's opening waltz and the opportunities for applying systems thinking to evaluate claims of constitutional failure, as Epstein offers. Systems thinking brings tools and a perspective that encourages scholars to note the interactive effects; sometimes interactions make institutions even more powerful, sometimes less so, sometimes just different. Taking full measure of the theory of second best institutions ought to be the standard practice in PPT. Going beyond the immediate text of these books, interesting questions concern institutional codependence and complementary and, perhaps most tantalizing, a fresh understanding of legal evolution and dynamics, which can lead us toward an understanding of constitutional resilience.

105. See Ariel Edwards-Levy, *Tea Party Hits Record Level of Unpopularity in Public Opinion Poll*, THE HUFFINGTON POST (Jan. 7, 2013, 2:34 PM), http://www.huffingtonpost.com/2013/01/07/tea-party-poll_n_2425833.html.

106. See VERMEULE, *supra* note 1, at 101–17.
