

*Adrian Vermeule, The System of the Constitution*, New York: Oxford University Press, 2012, 220 pp, hb, £22.50

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In *The System of the Constitution*, Vermeule's underlying aim appears to be to outline a new way of analysing constitutional systems at the aggregated levels of individual-institutional, and institutional-system relationships. The constitutional system is thus said to consist of two levels of aggregation (individual-institutional, institutional-system) (p.27). The members of the system can consist of people and institutions (p.23) but also 'propositions of fact, morality or law' (p.24). The analysis is developed through a form of systems theory that will be unfamiliar to many European systems theorists; who may more commonly associate systems theory thinking with autopoiesis. This approach is applied to the narrower goal of the book in order to show the limitations of traditional ways of examining the constitutional arrangements of the United States of America, allowing Vermeule to offer his version of systems analysis as a method not inhibited by such limitations.

It should be said from the outset that systems theory is a somewhat ambiguous term both in general and in particular within Vermeule's book. It can refer to a variety of approaches including autopoiesis, complexity theory, and general systems theory. Vermeule appears to adopt a systems theory approach based on one reading of complexity theory, although this is not explicitly stated. One can infer that this is a complexity approach based on his references to 'emergent properties' (p.3), the importance of 'interaction' between individuals, institutions, and the constitutional system as a whole (p.8), how the whole system is 'not reducible' to the sum of its parts (p.8), and the assertion that 'selection effects' and 'systemic feedback' are important to a complete understanding of a constitutional system (p.116).

However, as will be discussed in more depth later, it is not explicitly stated that this is the approach being applied.

The book comprises five chapters the first of which outlines the systems theory being promoted, and the following three chapters see the different elements introduced in the first chapter expounded. The final chapter then applies much of this reasoning to the example of constitutional adjudication. Throughout there is a helpful intermixing of theory alongside contextual examples to explain its practical utility. For those outside of the United States some of the contextual examples will seem, superficially at least, largely irrelevant; particularly the discussion of how the theory applies to US-specific theories of constitutional adjudication (Chapter 5). However, in general, the underlying theoretical thrust of the book has transferable lessons both for UK and European constitutional theory, which will be outlined later, as do many of the examples.

Chapter one is concerned with defining the meaning of system effects and the composition of systems. The first is that of ‘fallacies of division and composition’ (p.15), which questions assumptions about aggregation and reductionism in constitutional systems. Vermeule explains that the relationships between and behaviours of members and their host institutions, and institutions and their host constitutional system are often assumed to align so that ‘what is true of the aggregate must also be true of the members’ (p.15). Vermeule’s systems analysis suggests a counterintuitive conclusion could be more appropriate, so that it is often correct to say that ‘what is true of the members of an aggregate is not true of the aggregate’ or *vice versa* (p.15). The second effect, connected with the first, is that of the invisible hand (following Adam Smith). Where ‘some kind of order ... arises at the group level even if none of the individuals who comprise the group is attempting to create that order’, this will be taken as an invisible hand effect (p.16). A supporting caution, which relies on two preceding effects, related to the two central system effects is that of so-called second-best

solutions. According to Vermeule it will not always be best to compromise so as to satisfy only some of the conditions viewed as necessary for optimum performance in the aggregate institution or constitutional system (p.29), as this may result in unexpected negative outcomes (p.30). Importantly, Vermeule does not treat his systems perspective as the only tool necessary for understanding constitutional systems, but does say that ‘system effects are analytically inescapable’ (p.36).

Chapter two sees the initial application of the systems approach outlined in chapter one. The chapter offers some counter-intuitive conclusions on commonplace procedural and structural elements of constitutional orders using compositional and divisional fallacy arguments. For example, on the procedural side, while an individual election permits voter control of elected officials, many elections may, paradoxically, dilute their ability to control power decisively (p.46). It is a fallacy of composition to assume that more elections to more offices equates with enhanced voter control. Structurally, Vermeule convincingly explains how two unrepresentative, undemocratic law-making institutions can still produce democratic outcomes as a consequence of the system effects which emerge out of their interactions (p.50). It is a fallacy of composition to assume that democratic deficits in specific institutions lead to democratic deficits in the aggregated system overall. Under invisible hand arguments, it is possible to ‘generate a kind of *emergent democracy* at the system level, even if the components are not themselves democratic in isolation’ (p.51, original *emphasis*).

This argument, both from a procedural and structural perspective, has clearly transferable lessons for the UK and European constitutional debates. For example, analysis of potential reform to the House of Lords leading to an at least partially elected chamber could produce some counter-intuitive outcomes. On the procedural side, Vermeule’s argument suggests that democratising the upper chamber will not necessarily result in voters being able to exercise more effective control over politicians’ law-making powers. Similarly, although the House

of Lords in isolation offends numerous democratic principles, Vermeule's theory would allow one to make the convincing argument that collectively the constitutional system of the United Kingdom may generate 'a kind of *emergent democracy* at the system level' (p.51), partly as a consequence of its undemocratic components. Turning to Europe, the structural arguments again have the potential to offer a new perspective on the democratic deficit which Europe is often accused of suffering from. Although the various elements which comprise the European Union are in differing ways undemocratic, it does not automatically follow that the system as a whole *must* possess the same characteristics. Certainly some further investigation as to whether the emergent democracy argument can be applied to Europe is necessary before the precise nature of any deficit is declared. Vermeule notes that the 'causal intuition of legal theorists' about structural and procedural relationships 'are suspect' , because they fail to consider the emergent interactive effects revealed by a systems analysis, and do not consider the compositional and divisional fallacies implicit in their arguments (p.64). This is not the same as saying that emergent democracy always exists, merely that there are system effects to address before reaching any conclusions.

In chapter three Vermeule returns to consider invisible hand arguments and their potential limitations, having primarily addressed compositional and divisional fallacies in chapter two. Invisible hand arguments support the notion of emergentism; that interacting components can produce system-level effects not necessarily derivable from its parts. He addresses three challenges to invisible hand mechanisms working effectively in the constitutional system; norms, second-best efforts, and verification problems. Norms 'cannot be perfectly fine-tuned' (p.85), however they are always present, interacting with constitutional structures and actors not necessarily for the (normatively defined) good. Their imperfections or partial adoption can impair invisible hand effects (pp.85-6). Moving to arguments against second-best solutions he states that, although they are potentially problematic, 'partial compliance

with norms might make things worse, not better' in terms of emergent system level outcomes (p.87). However, it is also possible that interaction among sub-optimal elements might come 'as close as possible to the ideal' (p.87). Vermeule acknowledges that it is hard to verify invisible hand arguments (pp.95-6), but remarks that assuming that self-interest individuals must reside in anti-public-spirited systems is a 'straightforward fallacy of composition' (p.97). The whole cannot be understood by the sum of its parts, this is a fallacy of division (p.98). The thrust of the chapter is that, while invisible hand arguments are integral to a systems understanding of the constitutional order, there are problems which cannot be overlooked (pp.99-100).

Although Vermeule acknowledges certain limitations to invisible hand arguments he otherwise adopts the existing understanding relatively uncritically stating that they are 'a striking and important subclass of systemic analysis' (p.99). Much of the early complexity theory literature makes positive references to the emergent elements of Smith's invisible hand argument for economics, but they also caution against its linear understanding of causality, and somewhat reductionist undertones. Vermeule asserts that 'invisible hand justifications face a set of recurring dilemmas', which does infer an acknowledgement of the limitations of Smith's original proposition (pp.99-100). However, these constraints are said to 'arise from the systemic character of their structure' (p. 100). This is not equivalent to stating that the understanding adopted is flawed, only that aspects of its internal composition are self-limiting, which is a weaker critique. Although Vermeule offers some comment on the Smith-inspired invisible hand arguments made by James Madison in *The Federalist No.51*, and recognises a number of limitations to these, he again makes little explicit critique of Smith's theory in this regard.

In addition to the above critique of the use of Smith's theory, there is a further more specific example which is problematic in a complexity theory context. Vermeule adopts the idea of

‘equilibrium arrangements’ (p.3). This idea is a consequence of invisible hand effects. A stylised reading of Smith’s argument is that individual agent interactions will, whether they desire it or not, promote a stable economy for the public good. However, much of the subsequent work on complexity theory indicated that stability might be more appropriately equated with entropy (system death). On the basis of this thinking, rather than being classed as stable, complex systems are to be understood as dynamic, always poised to adapt. While a system might appear stable over the short term, in actuality they were continually re-organising to remain relevant in a changing environment. Thus, over the long term, the initial perception of equilibrium becomes inaccurate. It may simply be that equilibrium was a poor choice of word , because much of Vermeule’s argument in chapter four, on self-stabilising and self-undermining rules, appear to contradict the initial claim that constitutional systems are ‘equilibrium arrangements’ (p.3, see also p.171).

Chapter four discusses the system effects of feedback and selection. The proposition is that constitutional rules can have numerous effects on themselves and other related rules. For example, some rules help to construct the pool of potential candidate office-holders who will be responsible for administering the rules (p.101). This can lead to either ‘self-stabilising’ rules, if the office-holders are selected so as to support the system, or as ‘self-undermining’ (p.123). Neither effect is always good or bad for the system. Sometimes a stabilising rule will act to protect voting rights (p.118), at other times a rule designed to protect judicial independence (the example given is Article III(1) of the US Constitution the ‘compensation clause’), a stabilising rule, may inadvertently discourage lawyers from joining the bench by suppressing salary increases (pp.123-5). Short term policies may benefit from destabilising elements which prevent their running into the long term (p.123), whereas rules protecting free speech may be undermined if they allow extremist views to become established (pp.127-31). Selection effects and feedback are best suited to a long-term analysis (p.131), but will tend to

support the fallacy of composition/division arguments made, and invisible hand explanations of emergent system phenomena. Taken in conjunction with the emergent invisible hand effects, and fallacies of composition and division already noted, the discussion of selection and feedback shows that the interaction among elements of constitutional structures creates unforeseen outcomes which tend not to be visible in the short term. The notions of selection and feedback suggest that constitutional theorists may benefit from considering the ramifications of their theories over longer timescales than they are otherwise accustomed to (pp. 101, 116-7, 131).

In the final chapter Vermeule combines his individual outlines of each element of his theory by applying it to constitutional adjudication, which he justifies as appropriate on the basis that this is ‘the traditional subject of constitutional theory’ (p.135). The essence of the argument is that there are a variety of schools of interpretation which have been identified and which are followed in United States’ constitutional adjudication. However, Vermeule asserts that the systemically minded judge will be able to see beyond any of their own interpretive preferences and will become a ‘legal chameleon’, adapting to suit the context of the judiciary around her (p.135). Outlining a method of ‘principled consequentialism’ (pp.136-7), he brings his fallacy of composition/division and invisible hand arguments to bear to suggest that there can be no single right method of interpretation because ‘what would be best for all’ is not necessarily ‘best for each’ (p.137). Having reviewed a number of methods of judicial interpretation he argues that it is hard to define what is the “best” method of interpretation because what is viewed as the most appropriate method will ‘depend on the judicial and institutional environment in which [the judges] find themselves’ (p.169). Thus the principled consequentialist stance of the legal chameleon is justified. Rebuking Dworkin, he remarks that ‘even a superhuman Hercules must operate in an environment where the behaviour of other judges... [and] institutions, may affect what would otherwise be his best

course of action' (p.169). The judicial chameleon will recognise the limits of her own knowledge and preferred interpretivist stance in the environment (p.170). Thus, it becomes possible for the judicial system to support the proposition that it makes sense to 'hedge the risk that any particular theory is erroneous', and so not approve any single method as the best, or most correct one (p.170). This position echoes much of the recent research published by philosophers studying complexity theory as regards the limitations and locality of knowledge.

There is one further, potentially controversial, claim made within the book which has not yet been discussed. That is, that while systems theory has been used by political scientists 'legal applications are few and far between' (p.8). Following the accompanying note to this statement one reads that Luhmann's autopoietic systems theory 'does not have much to do with systems theory as understood in the social sciences' and goes on to say that the theory is 'notoriously obscure' and 'difficult to cash out in ... [a] pragmatically relevant fashion' (n.3 p.181). There is some truth in this statement if one takes the view that autopoietic theory and complexity theory are relatively unrelated, and finds autopoietic theory needlessly opaque. As to the first claim, it has previously been elsewhere suggested that autopoiesis and complexity theory are closely related, some have even proposed that one could be subsumed under the other theory or *vice versa*. The second claim is primarily a question of perspective. While it may not be the case in the United States, in Europe, because of the vast array of publications considering the utility of autopoietic analysis, it is possible to deploy autopoiesis whether or not one agrees with the theoretical premises. However, it is a weakness of the book as a whole, viewed from a European perspective, that it does not deal with what is a very well established systems theory in law (and the social sciences), both in Europe and to a lesser extent in North America. This criticism is particularly apt because the precise origins of Vermeule's theory are not made clear, making it difficult to situate it in the wider systems theory discourse. Furthermore the theoretical structure, although sketched in the

introduction, is mostly left implicit throughout the text. A fuller account of what aspects of complexity theory were being adopted would greatly aid a reader unfamiliar with systems theory accounts in general. This is particularly so given that the book represents an analysis of the US constitutional system, and thus it is likely to be attractive to constitutional theorists who will not likely be familiar with systems theory.

Having made these criticisms it should be made clear that the broad thrust of the book is to be supported. It cogently applies a theory not commonly used in public law, or legal discourse generally, with fascinating consequences. It is a book which constitutional theorists, and indeed legal scholars in general, would benefit from reading. By adopting a systemic view of constitutional structures and processes Vermeule has shown that it is possible to ‘redefine the questions’ (p.173) we should ask in the debate on constitutionalism. While the outcome of a systems-analytical approach does not necessarily ‘entail particular answers’, its ability to reconceptualise the debate is to be welcomed (p.173). Ultimately ‘the official’, and by relation also the theorist, ‘who thinks systemically will approach matters very differently’ plausibly yielding a different perspective on constitutional questions (p.173). Although this new understanding should not be taken in isolation, it raises important questions about the answers we currently provide to constitutional issues and debates, such as that on constitutionalism.

The book as a whole offers new directions for the discussion of constitutional structures and procedures at the national level and in a European context which should not be dismissed out of hand. It represents a radical shift in perspective suggesting an alternative way of considering constitutional questions. Vermeule is modest about the potential impact of the theory. Although he views his method of systems theory as ‘an indispensable analytical tool’ (p.177), it does not hold all the answers, and does not declare systems analysis conclusive (p.133). From this we can infer two things. First, that Vermeule is open to the possibility of

alternative conceptions of complex systems analysis, and secondly that this does not mark the end of established methods of constitutional analysis.

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