

University of Chicago Law School

Chicago Unbound

Journal Articles

Faculty Scholarship

1999

What is Constitutional Theory?

David A. Strauss

Follow this and additional works at: https://chicagounbound.uchicago.edu/journal_articles



Part of the [Law Commons](#)

Recommended Citation

David A. Strauss, "What is Constitutional Theory?," 87 California Law Review 581 (1999).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

What Is Constitutional Theory?

David A. Strauss†

*Just what is constitutional theory? How can it be, as Professor Fallon rightly says, that constitutional theory is both descriptive and prescriptive, and is supposed to produce results that seem morally right but also some results that make the theory's proponents uncomfortable? In this Reply, Professor Strauss argues that a constitutional theory tries to draw upon bases of agreement that exist within a legal culture and to extend those agreed-upon principles to resolve more controversial issues. In our culture, for example, there is widespread agreement both on abstract principles—such as the idea that the text of the Constitution is important but that precedent also matters in interpreting the Constitution—and on specific points of law, such as the legitimacy of the decision in *Brown v. Board of Education*. A constitutional theory tries to organize these and other points of agreement in a way that prescribes results in cases where there is no agreement. So understood, a constitutional theory is comparable to an account of the rules of grammar for a language, or perhaps to a theory of scientific or mathematical truth.*

INTRODUCTION

Many people—not just judges and lawyers—have views about how the Constitution should be interpreted. Professor Fallon, in an article that is characteristically both incisive and thoughtful, argues that these people are “making at least implicit assumptions about appropriate methodology.”¹ Or to put the matter another way, they implicitly subscribe to a “constitutional theory.” Other observers are more skeptical, suggesting that constitutional theory, at least in its current form, is arid and pretentious and of little use to anyone interested in deciding real cases.²

Copyright © 1999 California Law Review, Inc.

† Harry N. Wyatt Professor of Law, University of Chicago. I thank the Lee and Brena Faculty Research Fund and the Sonnenschein Fund at the University of Chicago Law School for financial support.

1. Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CALIF. L. REV. 535, 575 (1999).

2. See, e.g., Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1 (1998); see also the discussion in Fallon, *supra* note 1, at 572-74.

But just what is a constitutional theory? Fallon's lucid description of constitutional theory highlights its paradoxical nature. Constitutional theory is prescriptive—it purports to tell people what to do—but it is also descriptive, because it cannot call for a wholesale departure from existing practices.³ Fallon argues persuasively that one legitimate reason for accepting a constitutional theory is that it leads to good results.⁴ But he also says, plausibly, that unless a theory also leads to some results with which the theory's proponent is uncomfortable, one is entitled to suspect that the proponent is not being principled.⁵

Professor Fallon is surely right that constitutional theories should be accepted or rejected, in significant part, on the basis of whether they promote the rule of law, political democracy, and individual rights.⁶ But if those were the only criteria, it would be hard to identify the difference between constitutional theory and straightforward political philosophy that makes no effort to anchor itself in the United States Constitution. How can one reconcile these apparent contradictions in the nature of constitutional theory?

I

CONSTITUTIONAL THEORY AND JUSTIFICATION

We can best understand constitutional theory, I believe, if we see it as an exercise in justification. Specifically, a constitutional theory is an effort to justify a set of prescriptions about how certain controversial constitutional issues should be decided. The justification is addressed to people within a particular legal culture (in the case of the United States Constitution, of course, the legal culture of the United States). A constitutional theory justifies its prescriptions about controversial issues by drawing on the bases of agreement that exist within the legal culture and trying to extend those agreed-upon principles to decide the cases or issues on which people disagree. This is the conception of justification given by John Rawls in *A Theory of Justice*:

[J]ustification is argument addressed to those who disagree with us, or to ourselves when we are of two minds. It presumes a clash of views between persons or within one person, and seeks to convince others, or ourselves, of the reasonableness of the principles upon which our claims and judgments are founded. Being designed to reconcile by reason, justification proceeds from what

3. See Fallon, *supra* note 1, at 540-41.

4. See *id.* at 538.

5. See *id.* at 540.

6. See *id.* at 539. Professor Fallon does suggest that "fit" may be a fourth criterion, see *id.* at 550 n.70, but his principal emphasis is on these three normative criteria.

all parties to the discussion hold in common. . . . [T]he argument . . . proceed[s] from some consensus. This is the nature of justification.⁷

There are many points of agreement within the American legal culture. Some are quite abstract; some are highly concrete. No one denies that the text of the Constitution matters, indeed matters a lot. As Fallon rightly emphasizes, this is simply a fact about our legal culture.⁸ The reason the Constitution is law is not that it declares itself to be law; if that were the reason, any document that declared itself to be law would have to be treated that way.⁹ The Constitution enjoys a legal status in our society that the Articles of Confederation—or, for that matter, the Declaration of Independence—does not; but at bottom, that is just because our culture has come to treat the Constitution that way.

Our legal culture agrees on other fundamental matters as well. On the abstract level, probably everyone agrees that the Framers' intentions count for something, although there is of course a great deal of disagreement about how much they count. Nearly everyone also acknowledges that in interpreting the Constitution, precedent counts for something.¹⁰ There is also agreement about relatively concrete matters. Today, for example, everyone agrees that *Brown v. Board of Education*¹¹ was rightly decided (or at least was not a usurpation or a lawless act by the judiciary).¹² No one seems to question any more that, for the most part, the Bill of Rights applies to the states.¹³ And there is general agreement on the basic contours of, for example, First Amendment doctrine: a theory of judicial restraint that required judges to defer across the board to legislation restricting speech—a theory embraced by Justice Felix Frankfurter a few decades ago¹⁴—would not be acceptable today.

7. JOHN RAWLS, A THEORY OF JUSTICE 580-81 (1971).

8. See Fallon, *supra* note 1, at 544.

9. See Frederick Schauer, *Amending the Presuppositions of a Constitution*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 145, 148-54 (Sanford Levinson ed., 1995).

10. As Fallon notes, *see supra* note 1, at 572, even those who consider themselves originalists generally concede this. See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861 (1989).

11. 347 U.S. 483 (1954).

12. I add this qualification because it may be acceptable within the legal culture to say that the Court should have done something other than invalidate segregation in *Brown*—for example, that it should have allowed segregation but insisted on genuine equality. For this view, see Louis Michael Seidman, *Brown and Miranda*, 80 CALIF. L. REV. 673 (1992). But this is an argument that the Court just made a mistake in the way it decided the case, not that the Court was usurping the power of other branches or was acting wholly outside its authority.

13. For a summary of the current law on this subject, see GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 811-12 (3d ed. 1996). For an important recent discussion, see AKHIL REED AMAR, *THE BILL OF RIGHTS* (1998).

14. See, for example, his separate opinions in *Dennis v. United States*, 341 U.S. 494, 517-56 (1951) (Frankfurter, J., concurring), and *West Virginia State Board of Education v. Barnette*, 319 U.S.

A. *Three Theories and How They Work*

A constitutional theory tries to take such points of agreement and organize them in a way that will satisfy at least two criteria. First, the theory cannot contradict any of the points of agreement within the legal culture that are absolutely rock solid, such as the relevance of the Constitution's text or, today, the legitimacy of *Brown*. Second, the theory should say something about how to approach controversial issues. Otherwise, there is little point in constructing a theory.

Originalist and textualist theories, for example, are based on the very solid agreement on the non-irrelevance of text and the original understandings. Many originalists also emphasize the need to restrain judges¹⁵—another proposition that, to some degree at least, is widely held in our legal culture. Originalists and textualists try to take those points of agreement and extend them to cover controversial cases. They will argue, for example, that capital punishment cannot possibly be “cruel and unusual punishment” within the meaning of the Eighth Amendment because the text of the Constitution contemplates that capital punishment will be allowed; capital punishment was common, and its constitutionality was unquestioned, at the time the Eighth Amendment was adopted; and any other approach to the Cruel and Unusual Punishment Clause would essentially allow judges to interpret that Clause however they pleased.¹⁶

Originalist theories, however, notoriously founder on other fixed points, such as the legitimacy of *Brown*. Most people think that the Framers of the Fourteenth Amendment did not believe they were drawing into question the constitutionality of public school segregation.¹⁷ In our legal culture, a theory that disapproves the legitimacy of *Brown* is *ipso facto* unacceptable. So originalists must find some way to accommodate *Brown*.¹⁸ Textualists and originalists face an even more severe problem with, for example, *Bolling v. Sharpe*,¹⁹ the companion case to *Brown* that invalidated segregation in the schools of the District of Columbia. The District of Columbia is governed by Congress, and the Equal Protection Clause—the provision on which *Brown* relied—applies only to the states.²⁰

624, 646-71 (1943) (Frankfurter, J., dissenting). The *locus classicus* of this theory, cited by Frankfurter, is James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

15. See, e.g., Scalia, *supra* note 10, at 863.

16. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 213-14, 219-20 (1990); Scalia, *supra* note 10, at 863.

17. For a summary of the evidence, see STONE ET AL., *supra* note 13, at 525.

18. One possible way is to argue that, contrary to the conventional view, the original understanding of the Fourteenth Amendment really did condemn segregation. See, e.g., Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995). This view, however, has not gained widespread acceptance.

19. 347 U.S. 497 (1954).

20. See U.S. CONST. amend. XIV. The Court in *Bolling* relied on the Due Process Clause of the

So far as I am aware, no originalist defense of these decisions, and no textualist account of *Bolling*, has ever gained general acceptance.

Other constitutional theories can account for these fixed points but face problems of their own. For example, *Brown* and *Bolling* are much easier to reconcile with a theory that emphasizes the importance of precedent, rather than text, and that sees American constitutional law as primarily a common law system.²¹ Both *Brown* and *Bolling* can be seen as the outgrowth of the kind of development characteristic of the common law, in which an innovation in doctrine is permissible if it is the product of an evolutionary trend and is supported by good arguments of policy or fairness.²² The common law approach can be used to support other views in controversial areas, as well. For example, whatever the original understanding was of the scope of Congress's power under the Commerce and Necessary and Proper Clauses, we now have decades of precedents giving Congress quite broad power. In these circumstances, according to the common law approach, the original understandings are of much less importance. A common law approach to the Constitution, however, has its own difficulties. In particular, it must find some way to account for the fact that in our system the text unquestionably counts for something; American constitutional law does not consist entirely of precedents.²³

Another theory discussed by Fallon—Bruce Ackerman's theory that the Constitution is effectively amended by "the People" in moments of heightened political awareness²⁴—has a similar characteristic. Ackerman's theory draws on propositions that are universally accepted within our legal culture, and then tries to extend those points of agreement to more controversial cases. In Ackerman's case, the points of agreement include the most basic one, the legitimacy of the Constitution itself, and one nearly as basic—the legitimacy of the post-Civil War constitutional amendments.

Neither the original Constitution nor the Civil War Amendments were adopted in accordance with the procedures specified at that time for making such changes in the law. Southern states were effectively coerced into accepting the Civil War Amendments, and the original Constitution was not adopted according to the procedures specified in the Articles of Confederation. Anyone who accepts the legitimacy of the Constitution and

Fifth Amendment, but it was adopted at a time when not just segregation but slavery was widespread. And the omission of the federal government from the Equal Protection Clause could hardly have been inadvertent; the Equal Protection Clause was drafted in the wake of the Civil War, when an accidental confusion of the states and the national government was especially unlikely.

21. For a defense of such a view, see David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

22. See *id.* at 902-03 & n.61.

23. For an effort to reconcile the common law approach to the Constitution with the importance of the text, see *id.* at 906-24.

24. See BRUCE ACKERMAN, 1 *WE THE PEOPLE: FOUNDATIONS passim* (1991); BRUCE ACKERMAN, 2 *WE THE PEOPLE: TRANSFORMATIONS passim* (1998).

the Civil War Amendments, Ackerman says—and essentially everyone does—must accept that Article V of the Constitution, which specifies how the Constitution is to be amended, is not exclusive and that the Constitution can be amended in other ways. This enables Ackerman to argue that the New Deal worked such an amendment; more generally, it enables him to draw controversial conclusions about the way these various irregular amendments should be read together, and about the circumstances in which the Constitution might be amended in this way again.

B. Is Constitutional Theory Descriptive or Prescriptive?

This understanding of constitutional theory—that it is an effort to justify certain controversial conclusions by drawing on the bases of agreement that exist in the legal culture—explains why constitutional theory is, as Fallon says, both descriptive and prescriptive. Obviously, constitutional theory is to some degree prescriptive. It is designed not just to explain current practices but to say something useful about controversial issues. But at the same time, a constitutional theory must track existing practices to a significant degree—it must be descriptive in that sense—because otherwise it will not have any ground from which to launch the effort to resolve controversial issues.

For example, strictly as a prescriptive matter, some might say that we should pay no attention to the text of the 1789 Constitution. The argument would be that the 1789 Constitution was drafted long ago, by people living in circumstances utterly different from our own, in a society that was by today's lights undemocratic and inegalitarian in many ways, and so on.²⁵ But any constitutional theory that reached such a conclusion would fail completely, because—simply as a descriptive matter—it is a fixed point for essentially all members of our legal culture that the Constitution counts for something. A theory that completely rejected the significance of the text could not gain widespread acceptance in the legal culture and therefore could not provide a basis for resolving questions about which there is disagreement.

This account of constitutional theory also explains why Fallon is right about the somewhat paradoxical role that moral arguments—using the term in the broad sense, to include arguments of fairness and policy—play in constitutional theory. Fallon suggests that moral arguments are crucial to constitutional theories but are at the same time unsettling. They are crucial because, he says, we cannot judge a constitutional theory without taking into account the degree to which it satisfies moral criteria. It must satisfy them abstractly, in the sense that a good constitutional theory must

25. For these and similar criticisms of the drafters of the Constitution (although not necessarily the conclusion that the text is irrelevant), see Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381 (1997).

adequately promote the rule of law, political democracy, and individual rights.²⁶ And a constitutional theory can also be judged, Fallon says, by the degree to which it produces morally good results in particular cases.²⁷ Anybody would be “naive and misguided to choose a constitutional theory without regard to whether it would be likely, on balance, to yield ‘good’ results.”²⁸

At the same time, the use of moral criteria to assess constitutional theories is, as Fallon says, controversial. In fact, if a constitutional theory produces results that are *too* good, morally speaking, that is a reason to be suspicious: “[A] theory, once chosen, ought to bind any principled adherent to at least some results that she would otherwise reject.”²⁹ All of these claims about constitutional theory seem at least plausible, and some seem clearly correct; yet how can one account for them? In particular, how is one to account for the apparently paradoxical notion that a constitutional theory can produce results that are so good that they call into question the *bona fides* of the theory’s adherents?³⁰

To some extent the answer to these questions follows straightforwardly from the definition of constitutional theory that I have given. Our legal culture is characterized not just by widespread agreement on certain legal judgments—the legitimacy of the Constitution, the correctness of *Brown*, and so on—but by widespread agreement on certain moral principles as well. The criteria that Fallon identifies—the rule of law, political democracy, and individual rights—are, at some level of abstraction, solid points of agreement within our legal culture (and indeed within society at large). Of course people disagree about how the rule of law is best understood, what political democracy means in practice, and how far we should go in protecting various individual rights. But there is widespread agreement that these are very important criteria for judging any political arrangement. A constitutional theory could not, therefore, serve its purpose—gathering together points of agreement in order to try to resolve controversial issues—if it slighted these criteria.

But what about the suspicion that there is something unprincipled about a constitutional theory if it does not “bind [an] . . . adherent to at least some results that she would otherwise reject?”³¹ Perhaps this widely

26. See Fallon, *supra* note 1, at 539.

27. See *id.*

28. *Id.*

29. *Id.*

30. That view is, of course, not held by Professor Fallon alone. See, for example, Henry P. Monaghan, *Our Perfect Constitution*, for an attack on theories that seek to make the Constitution conform to “current conceptions of political morality.” 56 N.Y.U. L. REV. 353, 358 (1981) (emphasis omitted). The same notion is in some ways the premise of the entire discussion of constitutional “stupidities” and “tragedies” in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES (William N. Eskridge & Sanford Levinson eds., 1998).

31. Fallon, *supra* note 1, at 539.

held intuition can be understood in the following way. While there is a great deal of agreement within our society, and our legal culture, on certain moral matters, there is also a great deal of disagreement. One reason we have legal systems—indeed, government generally—is so that society can decide how to act with respect to issues on which there is great moral disagreement. Citizens might disagree about the morality of, say, affirmative action; but if the legislature duly adopts an affirmative action measure and the courts uphold it, everyone agrees that the measure is to be carried out until it is repealed or otherwise lawfully undone.

One thing we do, then, when we accept a legal system, is in effect to say to our fellow citizens that we are not going to insist on having everything our way. More precisely, we are saying that we recognize that there is intense disagreement about certain moral matters; that if society is to function, some of those matters must be authoritatively resolved, and everyone must live with the resolution; and that we understand that the institutions we establish to resolve those disagreements might sometimes reach the result we do not favor. In any large and heterogeneous society—that is, a society that must confront many different issues, and in which there are many different views—nearly everyone will lose occasionally.

A constitutional theory prescribes something about the results a legal system should reach in controversial cases. If that theory always produces the results in controversial cases that the theory's adherents would have favored anyway, we are entitled to suspect that the theory has been rigged. That is, we might suspect that the theory does not represent a serious effort to gather together widely shared bases of agreement and use them to resolve controversial issues, but instead slights views that do not support the outcomes desired by the proponent of the theory.

II

IS CONSTITUTIONAL THEORY PAROCHIAL?

This account of constitutional theory might seem objectionable in at least two ways. First, it might seem odd to appeal to the bare fact that agreement exists as a basis for reaching conclusions about how the Constitution should be interpreted. How do we even know when agreement exists? And even if it exists today, what if it frays or dissolves? Second, and related, it might seem parochial, or elitist—not to mention hopelessly vague—to say that the point of a constitutional theory is to justify certain controversial conclusions to the legal culture. Just who or what is this “legal culture,” and why do they, or why does it, enjoy such privileged treatment?

These objections can be answered in many ways. The principal reason for appealing to existing bases of agreement is that—as the passage from Rawls suggests—it is not clear what else we could appeal to. At one time

people might have relied on appeals to religious sources to justify political decisions. But in a liberal society, religious appeals of that kind are off-limits. Whatever the proper role of religion in public life, ultimate questions about the bases of the authority of the state cannot be answered in religious terms.

Today, perhaps the most common substitute for an appeal to religious authority is an appeal to the will of the People. Fallon carefully considers this kind of appeal and decisively disposes of it.³² As he explains, this view is a vestige of an old form of positivism that held that law is, by definition, the command of a sovereign; in the modern formulations, the People simply substitute for the sovereign. But as latter-day positivists themselves have shown, the legal system of a large society simply cannot be analyzed successfully as the product of the commands of a sovereign.³³ The leading positivist account today instead describes law as the product of a form of social agreement.³⁴ It would, perhaps, be reassuring to be able to ground legal principles on something other than widespread agreement in society. The problem is that it is not clear what else there is.

What of the criticism that references to agreement within “the legal culture” are either vague or elitist or both? It is certainly true that the boundaries of the legal culture are not clearly defined. And limiting the search for agreement to the legal culture does seem to privilege an elite priesthood of lawyers over the population at large. But these arguments lose much of their force, I believe, if we compare constitutional theory to other theoretical enterprises.

One useful example is the rules of English grammar. The rules of grammar are constructed in essentially the same way that I have described for constitutional theory. There is widespread agreement that certain ways of speaking constitute correct grammar; those bases of agreement are then assembled and used to generate rules to govern areas where usage is not uniform. (It may be that there is widespread agreement because grammatical practices reflect innate properties of the human brain, but that is beside the point; we cannot examine those properties directly. We generate the rules from linguistic practices.) For example, we can infer that there is wide agreement among speakers of English that the object of a preposition takes the objective case. We then use that rule to conclude that the phrase “between you and I” is incorrect. We would reach that conclusion even if (as seems entirely possible) more native English speakers use that phrase instead of saying “between you and me.”

Similarly, we base constitutional theories on the judgments and intuitions that people in general have about legal institutions and legal issues,

32. See *id.* at 545-48.

33. See H.L.A. HART, *THE CONCEPT OF LAW* 18-78 (2d ed. 1994).

34. See *id.* at 79-123.

but we do not have to accept every view that people unreflectively express about the Constitution. The fact that many people (even a majority) might disagree with a particular Supreme Court decision—on school prayer or criminal suspects' rights, for example—does not necessarily mean that that decision is wrong. The widespread disagreement with the decision may be analogous to a common grammatical error. The decision may still be correct if it follows from broader principles about constitutional interpretation that themselves are widely accepted—such as principles about the role of precedent, or about the values that certain constitutional provisions are supposed to protect.

Of course, the rules of grammar are usually much more definite than the principles that govern constitutional interpretation. But the parallel still holds: one can say that constitutional interpretation is based on views accepted generally in the legal culture while still rejecting a majority's views about a particular issue, just as one can say that grammatical rules are inferred from the practices of a linguistic culture while rejecting, as ungrammatical, certain sentences that most people routinely utter and believe to be correct.

The analogy to grammar may also help address the criticism that constitutional theory is elitist in nature. In inferring rules of grammar, we do not treat the utterances of all English speakers equally. At the very least, native speakers are privileged. Beyond that, the rules of grammar that we infer from linguistic practices may condemn, as ungrammatical, some common ways of speaking. People may not immediately understand why those utterances are ungrammatical, at least not without a great deal of explanation. But that does not mean that rules of grammar are based on something other than a convergence in the practice of native speakers; what else could they be based on?

Parallel things might be said about constitutional theory. It requires some specialized knowledge to understand, for example, why one often cannot answer controversial constitutional questions simply by reading the text of the Constitution. Thus people who have not spent a lot of time thinking about freedom of speech may not understand why simply asserting that "Congress shall make no law . . . abridging the freedom of speech"³⁵ is often not an adequate way to resolve an issue about whether particular speech can be prohibited. But this by itself does not make constitutional law any more elitist—or any less based on the convergent practice of people in the culture generally—than grammar is.

Another comparison is to theories of what constitutes scientific or mathematical truth. If we were to try to construct such a theory we would not look at what people generally believe to be truths of science or mathematics; among the population at large, there are probably many widely

35. U.S. CONST. amend. I.

held beliefs about science and mathematics that are unquestionably false. If we were to try to construct a theory of what constitutes truth in science or mathematics, we would look to the practices of the relevant professional communities, the communities of scientists and mathematicians. We would do this even though, as is true of the legal culture, the boundaries of those professional communities are unclear, and even though this approach might be thought to be elitist or parochial.

Of course, some scientific matters are so complex, or so obviously esoteric, that no one but experts would claim to have views about them. (The same may be true of some legal matters.) But on many questions of science and mathematics, non-specialists have clear intuitions, and sometimes strong views, that we would be confident in labeling wrong. This is true, for example, of some widely held views about statistics and probability, and of some claims about drugs or foods that promise miraculous results. Although the analogy is certainly not perfect, the relationship between majority views and so-called elite views in law does not seem to be that different from the relationship one finds in these other areas.

In the end, though, what is involved is not elitism but simply a division of labor. It would be impossible for all members of society collectively to participate in every enterprise. Legal issues are, in essence, delegated to a certain subcommunity. Of course the norms and actions of that subcommunity cannot drift too far from views more broadly held in society. And the boundaries of the legal subcommunity can vary, not only over time but from issue to issue. Some legal matters command the attention of a large percentage of the population; others are for specialists alone. However large the legal subcommunity, and whatever the influences on it, constitutional theory is one way of trying to understand its norms, and—more importantly—to justify conclusions about controversial issues when the dictates of those norms are unclear.

CONCLUSION

The analogy between constitutional theory and other forms of theory may, finally, help address the question with which I began. Is constitutional theory, as Fallon says, an implicit presupposition of every lawyer or judge—or citizen—who makes a constitutional argument? Or is it an academic project of little use in the real world of legal controversy and dispute resolution?

Perhaps it is both. It is surely the former, and it will often be the latter too. Every scientific or mathematical argument presupposes an account of scientific or mathematical truth. But countless scientists—to say nothing of ordinary people resolving everyday scientific and mathematical questions in the course of ordinary life—carry out their tasks successfully without ever explicitly resorting to more abstract theories. Often they may not even

be aware that they are implicitly relying on such theories. Similarly, people could not communicate nearly as effectively as they do in English and other languages were it not for highly developed grammatical and syntactical rules. But billions of people communicate every day with little explicit knowledge of those rules. In law, as in science and mathematics and grammar, only certain kinds of questions raise the foundational issues that require resort to abstract theories.

But those questions do arise, and we have to resort to more abstract theories to resolve them. Even when those questions do not arise, there is value in understanding what we are doing, even if we can go on doing it without a full understanding. For these reasons alone, it is worthwhile to think about constitutional theory.