Washington University Law Review

Volume 89 | Issue 1

2011

Toward a Reality-Based Constitutional Theory

Andrew Coan

TOWARD A REALITY-BASED CONSTITUTIONAL THEORY

ANDREW COAN[*]

TABLE OF CONTENTS

ABSTRACT

Despite the alleged triumph of legal realism and the empirical turn of closely related fields such as judicial behavior, a startling number of constitutional theorists continue to approach their work as a purely conceptual enterprise. This is particularly true of originalists, but it is true of many others as well. Indeed, much of normative constitutional theory as it is presently practiced resembles a recreational debating society more than a serious effort to improve the functioning of a massively complex modern society. If constitutional theory is to live up to its aspirations, a new reality-based approach is urgently needed. This brief Commentary makes the case for such an approach and offers practical suggestions for getting it off the ground.

∗ Assistant Professor, University of Wisconsin Law School. Thanks to Anuj Desai, Larry Kramer, Victoria Nourse, Brad Snyder, Mariah Zeisberg, and workshop participants at the University of Michigan Law School, Yale Law School, and the 2010 Wisconsin Constitutional Law Discussion Group.

INTRODUCTION

For most fields of American legal scholarship, the centrality of empirical questions to the serious study of law is old news.[1] Regrettably, one cannot say this of normative constitutional theory. Despite the alleged triumph of legal realism, despite the empirical turn of closely related fields such as judicial behavior, despite years of savage criticism of constitutional-theoretical navel-gazing, a startling number of constitutional theorists continue to approach their work as a purely conceptual enterprise. This is particularly true of originalists, but it is true of others as well. Over the past half century, a substantial fraction of normative constitutional theory has consisted of attempts to reason more or less deductively from one abstract ideal of democracy or another.

This is deeply unfortunate. The object of normative constitutional theory is—or should be—to improve the functioning of a massively complex system of governance. Any progress in that direction will require sustained attention to the real-world institutions and social conditions through and on which constitutional law operates. Contrary to the view of some critics,[2] normative theory has an important role to play in this effort. Data do not explain or—what is more important—evaluate themselves. But a far more rigorous engagement with empirical realities is necessary if normative theory is to make a useful contribution.

Originalism is a perfect example. In recent years, a diverse group of prominent constitutional theorists has attempted to revive the old argument that our commitment to a written constitution entails an originalist approach to constitutional interpretation.[3] This argument comes in various forms. Some depend on other controversial justifications for originalism. Some assume the very authority they purport to justify. But in its strongest form, the originalist argument from writtenness holds the possibility of providing an independent justification for originalism. The idea, which seems at least superficially plausible, is that only originalism can explain why we keep the written Constitution around.

---

1. *See* Lee Epstein et al., *On the Effective Communication of the Results of Empirical Studies, Part I*, 59 VAND. L. REV. 1811, 1816 (2006) ("To claim that empirical work is now a fundamental part of legal scholarship borders on the boring.").

2. *E.g.*, Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1 (1998) [hereinafter Posner, *Against Constitutional Theory*]; Richard A. Posner, *Conceptions of Legal "Theory": A Response to Ronald Dworkin*, 29 ARIZ. ST. L.J. 377 (1997).

3. *See, e.g.*, Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 636 (1999); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 50–61 (1999); Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 303 (2007).

This claim has been extremely influential in the New Originalism. Arguably, it is the most distinctive normative claim to come out of that movement. But it cannot be sustained on close examination. Indeed nothing, or virtually nothing, follows from our commitment to a written constitution. One can be committed to a written constitution in many ways and for many reasons—almost none of which entail an originalist interpretive approach. For example, one can be committed to the constitutional text as a conventionalist focal point; as a framework for common law interpretation; as a locus of popular constitutionalist discourse; or as one of many ingredients in a pluralist practice of constitutional adjudication. These approaches may or may not be superior to originalism on the merits, but each accords the written constitutional text an important role.[4]

With the conceptualist castle of writtenness demolished, originalists are left with their old standbys: popular sovereignty and constraint. But the force of these normative justifications is substantially dependent on empirical considerations that no originalist has ever attempted to investigate systematically. This is especially true of the argument from constraint but also applies to the argument from popular sovereignty.

As to popular sovereignty: What sort of constraints would original meaning place on contemporary majorities? How far would nonoriginalist decisions depart from the durable views of contemporary majorities? To what extent do any such views exist? And if they do not exist in meaningful numbers today, what is the likelihood they existed at the founding? To what extent do contemporary Americans identify themselves as members of a temporally extended American people? Is an originalist interpretive approach necessary—as a practical matter—to preserve the efficacy of future acts of popular sovereignty (either through the legislative process or constitutional amendment)?[5]

As to constraint: Can any interpretive theory meaningfully constrain the decisions of individual judges? What about the decisions of a large, diverse, and politically appointed judiciary? How does originalism compare in this respect to other plausible alternatives? How does it compare with respect to practical consequences for the economy, foreign policy, and civil rights? Of course, few nonoriginalists have purported to

4. For an extended critique of originalist arguments from writtenness, see Andrew B. Coan, *The Irrelevance of Writtenness in Constitutional Interpretation*, 158 U. PA. L. REV. 1025 (2010).

5. *See* KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 156 (1999) (defending originalism as necessary to preserve the "potential sovereignty" of present democratic majorities).

answer these questions either.[6] Indeed, their existence is barely acknowledged by either side. This indifference to the actual functioning of American government is an embarrassment for constitutional theory.[7]

The problem is hardly confined to originalism. Indeed, the most remarkable feature of originalist arguments is one they share in common with many, perhaps most, other normative constitutional arguments: they operate in blissful ignorance of the real-world institutions and social conditions through and on which constitutional law operates. Indeed, much of normative constitutional theory as it is presently practiced resembles a recreational debating society more than a serious effort to improve the functioning of a massively complex modern society. If this seems too harsh, consider: Who but an academic constitutional theorist would believe that abstractions like writtenness or binding law or popular sovereignty could shed meaningful light on how we should structure our constitutional system, without a rigorous examination of how that system functions in practice?

The answer is almost certainly no one, or at least no reasonably informed person with even a modest inkling of the complexity of American government and the society it governs. This observation is hardly new,[8] but the disconnect between normative constitutional theory and the empirical realities of constitutional practice remains sufficiently stark that it bears renewed emphasis. If constitutional theory is to live up to its aspirations, if it is to be worthy of the prodigious intellectual labors undertaken on its behalf, a new reality-based approach is urgently needed.

As already mentioned, such an approach will have to consist of more than just empirical inquiry.[9] Many of our constitutional disagreements obviously do have a large empirical dimension, but in a society as politically and ethically heterogeneous as the contemporary United States, plenty of difficult normative questions would remain even if all empirical

6. *But see* Jamal Greene et al., Essay, *Profiling Originalism*, 111 COLUM. L. REV. 356 (2011) (exploring public attitudes about originalism).

7. Portions of the preceding three paragraphs are adapted, with modifications, from Coan, *supra* note 4.

8. *See, e.g.*, Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257 (2004); Posner, *Against Constitutional Theory*, *supra* note 2; Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636, 645–47 (1999) (arguing that interpretive formalism "must be defended by empirical claims about the likely performance and activities of courts, legislatures, administrative agencies, and private parties"); *cf.* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994) (emphasizing the complexity of institutional choice and its significance for constitutional theory).

9. *See* text accompanying *supra* note 2.

disagreement were miraculously resolved.[10] Perhaps more important, normative considerations will strongly influence our response to the substantial empirical uncertainty that even our best investigative efforts will inevitably leave in their wake. Too often, however, the inevitability of empirical uncertainty has become an excuse for complacency. There are unquestionably times when we have no choice but to rely on rough assumptions, to confess ignorance, or to resort to crude heuristics from decision theory.[11] But before we resign ourselves to any of these second-best options, it is imperative that we exhaust all available empirical resources. A great many such resources are available in the literature of other disciplines, especially political science, but to date they have gone largely untapped by constitutional theorists, at least those in the legal academy.[12]

With these considerations in mind, this Commentary offers a brief but hopefully suggestive sketch of what a reality-based approach to normative constitutional theory would look like in practice. As confirmation that the problem goes beyond originalism, Part I examines the unreality of one influential argument for popular constitutionalism. Part II briefly describes three bodies of literature in political science that have very substantial implications for this sort of normative argument but have gone largely untapped by constitutional theorists. Part III offers a few practical suggestions for getting a reality-based approach off the ground.

---

10. *See* Andrew B. Coan, *Well, Should They? A Response to* If People Would Be Outraged by Their Rulings, Should Judges Care?, 60 STAN. L. REV. 213 (2007) (making this point with reference to abortion).

11. *See* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY (2006) (emphasizing the profound empirical difficulties of comparative institutional analysis and suggesting tools from decision theory as one response); Adrian Vermeule, *Interpretation, Empiricism, and the Closure Problem*, 66 U. CHI. L. REV. 698 (1999) (similar).

12. Noteworthy exceptions include Richard Pildes, *Is the Supreme Court a Majoritarian Institution?*, 2010 SUP. CT. REV. (forthcoming); BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009); SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2006); Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287 (2004). I do not include the interesting and rapidly proliferating empirical literature on judicial decision-making, *see, e.g.*, Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831 (2008), because very little progress has been made toward integrating its findings into normative constitutional theory. *But see* Eric A. Posner, *Does Political Bias in the Judiciary Matter?: Implications of Judicial Bias Studies for Legal and Constitutional Reform*, 75 U. CHI. L. REV. 853 (2008). Outside the legal academy, especially in political science, the situation is considerably brighter. For an illuminating overview, see Mark A. Graber, *The Countermajoritarian Difficulty: From Courts to Congress to Constitutional Order*, 4 ANN. REV. L. & SOC. SCI. 361 (2008).

I. THE UNREALITY OF CONTEMPORARY CONSTITUTIONAL THEORY

Larry Kramer's 2004 book *The People Themselves* is one of the richest works of American constitutional law scholarship in recent years. As an intellectual history, both its rigor and its vision are deeply impressive. As a call to arms against judicial supremacy, it both reflects and helped to effect a dramatic unsettling of the dominant paradigm in American constitutional thinking. Yet for all its virtues, and despite its apparently radical break with the recent past, the overtly normative portions of Kramer's work share two important qualities with much of contemporary constitutional theory. First, highly abstract democratic ideals do most of the heavy lifting, and second, nowhere does he grapple in a serious or sustained way with the actual empirical functioning of the American political system. The most striking example of this occurs in the book's closing chapter, where Kramer anticipates and responds to concerns that ordinary citizens are not capable of performing the demanding role his theory assigns to them. It is worth quoting at length:

> [M]ost contemporary commentators share a sensibility that takes for granted various unflattering stereotypes respecting the irrationality and manipulability of ordinary people and their susceptibility to committing acts of injustice. To those who believe in the stereotypes, such weaknesses of mind and character are inevitable "facts" that must be confronted and dealt with by those who would preserve democracy [as against judicial supremacy]. Accepting these facts, they say, is just being realistic.
>
> . . . .
>
> . . . [T]he choice one makes in this regard does not turn on evidence or logic, much as intellectuals on both sides of the question might want to believe otherwise. It turns . . . on differing sensibilities about popular government and the political trustworthiness of ordinary people.[13]

In one sense, Kramer is clearly right. The disagreements among supporters and proponents of judicial supremacy, as they have actually played out in contemporary constitutional theory, have largely been a matter of competing sensibilities. If you are an elitist snob, as Kramer sees it, you will tend to believe ordinary citizens are incapable of governing

13. LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 244, 246 (2004).

themselves without powerful judicial restraints. If you are a naïve or politically opportunistic populist, as Kramer's opponents see it, you will tend to believe popular constitutional interpretation both feasible and desirable. To put the point more dispassionately, if you instinctively trust ordinary people to make reasonably good decisions about their own social life, you are likely to side with Kramer; if not, you are likely to side with his opponents. This is a perfectly apt description of contemporary debates in constitutional theory.

What is missing from this picture is any sense that things could be otherwise—any sense that normative constitutional theory could aspire to be more than a battle of sensibility-driven intuitions. After all, the issues that divide Kramer and his opponents have a very substantial empirical dimension. How likely are ordinary citizens to have strong opinions about constitutional issues? To the extent they do have such opinions, how likely are they to be factually informed, internally coherent, and stable over time? How do judges and other political officials compare to ordinary citizens on these questions? How do they compare to each other? And how do the substantive outcomes rendered by courts and other institutions compare with the views of ordinary citizens? None of these questions can be answered with Archimedean precision and perhaps some cannot be answered at all. Even if they could all be answered, there would still be much room for disagreement between Kramer and his adversaries. Surely, however, the answers would bear in a very substantial way on the nature and scope of that disagreement.

Yet Kramer shows no more curiosity about them than does the originalist argument from writtenness. It is as if he were discussing a point of religious dogma rather than the fate of a massively complex working constitutional system with far-reaching practical consequences for hundreds of millions of people.[14] This is not meant to single out Kramer for special criticism. To the contrary, his work is among the very best contemporary constitutional theory has to offer. That work of this caliber could be so fundamentally detached from reality is a mark that something is seriously amiss. We can and should do better.[15]

---

14. It is telling, in this regard, that Kramer invokes Sanford Levinson's concept of "constitutional faith." *Id.* at 247.

15. In fairness to Kramer, the passage I criticize is drawn from the concluding chapter of a book-length work whose primary focus is historical rather than normative. This would certainly excuse Kramer for not following up every difficult empirical question raised by his argument. It cannot, however, explain his apparent failure to appreciate that such questions exist and that his argument turns crucially on the answers. Significantly, his more overtly normative work exhibits a similar blind spot. *See* Larry D. Kramer, *Popular Constitutionalism, circa 2004*, 92 CAL. L. REV. 959 (2004); Larry

II. UNTAPPED EMPIRICAL RESOURCES

The political science literature is a good place to start. Of course, the interests of political scientists are hardly identical to the interests of constitutional theorists. But for several decades, they have been carefully examining a great many of the empirical questions that constitutional theorists have been content to ignore or, more typically, make undefended assumptions about. Three bodies of the political science literature, in particular, bear directly on the issues in dispute between Kramer and his theoretical adversaries.

A. The Supreme Court and Public Opinion

The first analyzes the relationship between Supreme Court decisions and public opinion.[16] Constitutional theorists have long been dimly aware of this literature, the dominant theme of which is that the Supreme Court has never been the formidable countermajoritarian force it is commonly portrayed as. To a shocking extent, however, they have continued to write and think about the Court as either a bulwark against tyranny of the majority or an incipient antidemocratic tyrant in its own right.[17]

Kramer's writings are an excellent case in point. In both *The People Themselves* and an influential *Harvard Law Review* Foreword,[18] he savages the late Rehnquist Court for usurping Congress's democratic authority to remedy civil rights violations under the Fourteenth Amendment. This critique has a complicated and quite compelling legal basis, but its substantial rhetorical power stems chiefly from Kramer's charge that the Court has been flagrantly overriding the will of the people. This may be true—and perhaps requires little empirical demonstration—in

D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4 (2001) [hereinafter Kramer, *Foreword*]. Again, the point is not to single out Kramer for special criticism. It is to demonstrate that the unreality that characterizes constitutional theory generally extends even to the very best work in the field.

16. The classics of this literature are ROBERT DAHL, A PREFACE TO DEMOCRATIC THEORY (1956); THOMAS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT (1989); Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635 (1992) [hereinafter Caldeira & Gibson, *Etiology*]. PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY (Nathaniel Persily, Jack Citrin & Patrick J. Egan eds., 2008) and GREGORY CALDEIRA & JAMES GIBSON, CITIZENS, COURTS, AND CONFIRMATIONS: POSITIVITY THEORY AND THE JUDGMENTS OF THE AMERICAN PEOPLE (2009) are important recent contributions. *But see* Pildes, *supra* note 12 (sounding a cautionary note about simplistic application of this literature to normative questions in constitutional theory).

17. The most noteworthy exception is FRIEDMAN, *supra* note 12.

18. *See* Kramer, *Foreword*, *supra* note 15.

the case of *City of Boerne v. Flores*,[19] which overturned a three-year-old law passed virtually unanimously by both houses of Congress. But in most of the other decisions Kramer criticizes, the statutes invalidated were much older and much less politically salient than the Religious Freedom Restoration Act struck down in *Boerne*. It is far from clear that these decisions were out of step with the values of contemporary Americans at the time they were decided. After all, those same Americans had elected Republican majorities in both houses of Congress and had three times elected Republican presidents who ran on platforms of limited federal power and appointed the conservative justices Kramer criticizes.

A theoretical approach that took the political science literature seriously would be more sensitive to these facts and more circumspect, here and elsewhere, in ascribing to the Court a meaningfully antidemocratic role. It would also open up the tantalizing possibility that, in the decisions Kramer focuses on, the Court was itself engaged in a form of popular constitutionalism, curtailing federal civil-rights remedies that no longer enjoyed democratic support but could not be repealed legislatively due to the power of well-organized minority interests.

And this barely scratches the surface. To give just one more example, taking the political science literature seriously would force Kramer to grapple with the high level of institutional support the Supreme Court generally enjoys even when the public disagrees with individual decisions.[20] Perhaps this support suggests a popular constitutionalist choice in favor of judicial supremacy. Perhaps it has no implications for popular constitutionalism at all. But only if we take empirical realities seriously does the question even present itself for analysis.

B. Voter Competence

The second relevant body of literature examines levels of political knowledge and engagement among American voters.[21] In broad brush, it paints a picture of an electorate that is intractably ignorant and apathetic about the vast majority of political issues, including constitutional issues. An important subdivision of this literature examines the evolution of

19. 521 U.S. 507 (1997).

20. In the political science literature, this phenomenon is known as "diffuse support." *See, e.g.*, Caldeira & Gibson, *Etiology*, *supra* note 16, at 640.

21. Here the classics include MICHAEL X. DELLI CARPINI & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS (1996); ARTHUR LUPIA & MATTHEW D. MCCUBBINS, THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW? (1998); JOHN ZALLER, THE NATURE AND ORIGINS OF MASS OPINION (1992).

public opinion over time and its sensitivity to "framing effects"—basically, the language and the level of generality with which questions are framed. Again, the picture it paints is not edifying. To the limited extent that most ordinary Americans are aware of the political issues of the day, the opinions they express on them are frequently internally incoherent, unstable over relatively short spans of time, and extremely sensitive to the framing of questions.[22]

Here too, however, normative constitutional theorists have paid depressingly little attention, preferring to fall back on ungrounded empirical intuitions and argument by salient historical anecdote.[23] The passage from Kramer's final chapter examined earlier is typical in this respect. It acknowledges the importance of citizen competence to the normative case for popular constitutionalism, which assigns ordinary citizens a demanding responsibility over constitutional interpretation. But it complacently assumes that the issue can be resolved only by intuition, ideology, or some sort of "constitutional faith."[24] For the most part, Kramer's opponents tend to share this complacency, supporting their own empirical intuitions not with facts about the contemporary American electorate but a threadbare collection of historical cautionary tales, taken to illustrate the ignorance and intolerance of the masses. The list is familiar: Jim Crow, Japanese internment, McCarthyism, and now Guantanamo Bay.

A theoretical approach that took the political science literature seriously might go a long way toward overcoming this "stalemate of empirical intuitions."[25] If the public has no stable or even coherent opinion on most constitutional issues, or if public opinion on such issues is deeply infected by factual ignorance, even popular constitutionalists may have to concede that democratic ideals have a limited role to play in allocating institutional authority over constitutional interpretation. Conversely, if the public does have informed, stable, and coherent opinions on some or many issues, democratic arguments against aggressive judicial review may have greater force, either in specific contexts or across the board. Of course, many other sources of disagreement will persist, but a shift in this direction would have profound implications for the debate.

---

22. *See, e.g.*, James N. Druckman, *The Implications of Framing Effects for Citizen Competence*, 23 POL. BEHAV. 225 (2001); Thomas E. Nelson & Donald R. Kinder, *Issue Frames and Group-Centrism in American Public Opinion*, 58 J. POL. 1055 (1996).

23. An exception is Somin, *supra* note 12.

24. KRAMER, *supra* note 13, at 247.

25. This helpful term is Adrian Vermeule's. *See* VERMEULE, *supra* note 11, at 153.

C. Political Accountability

A third and closely related body of literature analyzes problems of legislative and executive accountability.[26] Its key findings are similarly discouraging. Well-organized interest groups frequently outmaneuver diffuse majorities. The massive complexity of American government makes it extraordinarily difficult for voters to identify candidates who share their policy views or to punish elected officials who deviate from those views—or simply perform incompetently—once in office. Widespread ignorance and apathy compound the difficulty. To put the point succinctly, there is a huge amount of agency slack between voters and public officials. Crude heuristics based on party membership, interest group endorsements, and the like ameliorate but do not come close to eliminating the problem.[27]

Constitutional theorists are familiar with some aspects of this literature, most notably theoretical arguments from public choice theory about the power of concentrated interest groups to shape legislative and administrative outcomes. But there is a vast body of empirical work on these topics that constitutionalists have done little to explore and even less to integrate into normative constitutional theory. Again, Kramer's argument for popular constitutionalism is a helpful illustration. Just as he assumes that aggressive judicial review is countermajoritarian and that ordinary citizens are sufficiently informed and engaged (or capable of becoming so) to play an important role in constitutional interpretation, he assumes that legislative and executive processes are meaningfully superior to judicial processes from a democratic perspective. Of course, this is an assumption he shares with countless other constitutional theorists, as well as most government officials and judges.

A theoretical approach that took the political science literature seriously would subject this assumption to rigorous empirical examination. The democratic argument for resolving constitutional issues through ordinary political processes turns in significant part on their presumed accountability advantage relative to courts. If that advantage is small or nonexistent, the democratic argument loses much of its force. Of course,

---

26. Here the classics include V.O. KEY JR., PUBLIC OPINION AND AMERICAN DEMOCRACY (1961) and Gerald H. Kramer, *Short-Term Fluctuations in U.S. Voting Behavior, 1896–1964*, 65 AM. POL. SCI. REV. 131 (1971).

27. *See* Jane S. Schacter, *Political Accountability, Proxy Accountability, and the Democratic Legitimacy of Legislatures*, *in* THE LEAST EXAMINED BRANCH 45–75 (Richard Bauman & Tsvi Kahana eds., 2006).

the question may not be so simple. Perhaps a substantial accountability advantage exists in some contexts but not in others, in which case a more fine-grained democratic analysis might be required.[28] Only an approach that takes empirical issues seriously can answer these questions.

III. A SYNTHETIC APPROACH

The central task of normative constitutional theory is to address practical questions of interpretive method and institutional design within the context of a massively complex working political system. This is impossible to do without understanding at a fairly fine degree of granularity how that system actually functions. It is also impossible to do without deep thinking about what goals the system ought to serve and why. Constitutional theorists have done a much better job at the second of these tasks, but as the preceding discussion has shown, their efforts have been distorted and undermined by a lack of attention to the first. A reality-based approach must find a way to synthesize the two. This will not be easy. There are many reasons constitutional theory has made little progress toward this goal thus far, and the way forward will have to be worked out over a period of years, perhaps decades. The most important thing, for now, is to understand and commit to the goal. Nevertheless, it is possible to offer a few practical suggestions for getting underway.

A. A New Empirical Awareness

It is unnecessary for all or even most constitutional theorists to become experts in empirical methods and positive political theory. These are not now and probably never will be the comparative advantage of most constitutional theorists. In order to function effectively, however, it is crucial that every constitutionalist be at least minimally aware of the developments in political behavior and related fields and think carefully about their relevance to normative constitutional theory. If some constitutional theorists develop genuine expertise in these areas or if opportunities for cross-disciplinary collaboration present themselves, so much the better. Perhaps the most important thing in the near term is to cultivate a strong disciplinary awareness that the object of normative constitutional theory is a highly complex working system whose empirical

28. *See* Edward G. Carmines & James A. Stimson, *The Two Faces of Issue Voting*, 74 AM. POL. SCI. REV. 78 (1980) (explaining that the difficulty of issue voting varies with complexity of the issue in question).

realities are a nontrivial determinant of the normatively best approach. This alone will go a long way toward reconnecting normative theory with reality.

B. The Role of Empirical Intuitions

It is impossible to completely eliminate our reliance on empirical intuitions. The empirical questions constitutionalists confront are simply too numerous to subject every one to rigorous quantitative analysis. Even if it were possible do so, many empirical questions are extremely difficult or impossible to analyze in this way. In the worst cases, we might resort to formal heuristics for decision-making under uncertainty,[29] though frequently our plausible intuitions will carry us further. In all cases, however, we should become much more conscious of the role that empirical intuitions play in our thinking about normative issues and much more explicit about the extent to which they inform our theoretical analysis. In fact, these should become central canons of a reality-based approach to constitutional theory.

The more aware and explicit we are about the empirical assumptions of our analysis, the more we will appreciate the fragility of bold normative claims without firm empirical grounding. This, in turn, should increase our sense of urgency about rigorously investigating empirical questions when possible, as well as raise the disciplinary status of efforts in this direction. Carefully distinguishing empirical and normative claims might also help facilitate a new division of labor in constitutional theory, roughly akin to the division between applied and theoretical branches of other disciplines like physics and economics. So long as we understand the interdependence of theory and application, there should be no problem with specialization in one or the other. But understanding this interdependence is crucial.

C. Exploiting Available Resources

A great many of the empirical questions of interest to constitutional theorists are of little or no interest to other disciplines or are of interest in very different ways. Consequently, constitutional theory will eventually need to develop empirical methods and capabilities of its own. This, of course, will take time and sustained commitment. In the short-term, however, there is enough relevant empirical research (and positive theory) in other disciplines to keep constitutional theorists busy for some time.

29. *See* VERMEULE, *supra* note 11, at 180.

The political science literatures discussed in this Part are vast and have potentially huge implications for every normative approach grounded in some sense on democratic ideals. There is also a large political science literature on the determinants of judicial decision-making, which may likewise have substantial unexplored implications for constitutional theory.[30] Cognitive psychology and neuroscience, too, have important lessons to teach on processes of human decision-making,[31] which could cast important light on the capacity and limits of interpretive theory as a constraint on judicial decision-making. These are all resources that a reality-based approach to constitutional theory can and should tap more or less immediately. Of course, the process cannot be one of heedless appropriation. Refinement and repurposing will inevitably be required. But this is no reason to hesitate. It is merely cause to proceed carefully, with due regard for disciplinary differences.

CONCLUSION

Critics of normative constitutional theory are legion and they have a point. For far too long, far too many American constitutional theorists have proceeded in blissful ignorance of the actual workings of our political institutions. The originalist and popular constitutionalist arguments discussed in this Commentary are two examples of this broad tendency but hardly the only ones. Happily, the tendency is not without exceptions. Indeed, there are welcome signs that these exceptions are growing in number and significance. The next step is to consolidate and build on these gains, drawing on available resources from other disciplines. The process will not be easy, but if normative constitutional theory is to justify its continued existence, it is nothing short of essential.

30. *See generally* Miles & Sunstein, *supra* note 12.

31. *See* RICHARD A. POSNER, HOW JUDGES THINK (2008) (drawing on these fields and others to analyze processes of judicial decision-making).