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### Aspiration and Underenforcement

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## ASPIRATION AND UNDERENFORCEMENT

*Kermit Roosevelt III\**

Replying to Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274 (2006).

Professor Fallon's article<sup>1</sup> is a valuable contribution to the emerging body of literature that applies what could be called the decision rules model to the study of constitutional law. The model distinguishes between the meaning of the Constitution — its actual grants of rights and powers — and the doctrine that courts create to decide whether rights have been violated or powers exceeded. In the terms used by Professor Mitchell Berman, which are becoming conventional, the model separates the Constitution's operative propositions from judicial decision rules.<sup>2</sup>

The distinction between decision rules and operative propositions is a powerful analytic tool. Although it can be traced back to the nineteenth century, Professor Fallon deserves credit as one of the earliest modern scholars to present it as a general account of constitutional decisionmaking.<sup>3</sup> I and others have used it to examine and critique particular areas of doctrine.<sup>4</sup> In this article, Professor Fallon takes a dif-

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<sup>1</sup> Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274 (2006).

<sup>2</sup> See Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 9 (2004).

<sup>3</sup> In 1893, Professor James Bradley Thayer marked the distinctive nature of judicial decision rules with the observation that a legislator who had voted against a law as unconstitutional might, if placed on the bench, "there find it his duty, although he has in no degree changed his opinion, to declare it constitutional." James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893). Professor Fallon developed the idea in Richard H. Fallon, Jr., *The Supreme Court, 1906 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54 (1997); see also RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION (2001). Earlier, though less comprehensive, statements of the idea may be found. See Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975) (arguing that legislators may be obliged to vote against laws they feel are unconstitutional even if a court would not strike them down); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978) (arguing that while courts may underenforce some constitutional rules, nonjudicial actors should consider themselves bound to the full extent).

<sup>4</sup> See Berman, *supra* note 2 (criminal procedure and Section Five enforcement power); Mitchell N. Berman, Guillen and Gullibility: *Piercing the Surface of Commerce Clause Doctrine*, 89 IOWA L. REV. 1487 (2004) (Commerce Clause); Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781 (2005) (voting rights); Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649 (2005) [hereinafter Roosevelt, *Constitutional Calcification*] (criminal procedure, Commerce Clause, Section Five, equal

ferent taxonomic tack, focusing on one of the factors that go into the shaping of particular decision rules. That factor is the need for judicially manageable standards. Though it is most prominent in the political question doctrine, the demand for such standards exists elsewhere.<sup>5</sup> By focusing on the pervasiveness of this particular factor, Professor Fallon offers a deeper insight into the role it plays in the construction of decision rules. And, in what I find to be the article's most interesting and original move, he suggests that it may also play a role in nonjudicial constitutional enforcement, one that might lead us to a different understanding of the nature of constitutional rights.

As should be evident already, this is a project for which I have a great deal of sympathy, and much of the article strikes me as both valuable and fairly clearly correct. I believe Professor Fallon is correct, in particular, to reject what he calls the pragmatist position, which "postulates a tautological relationship between constitutional doctrine and constitutional meaning."<sup>6</sup> Professor Daryl Levinson's *Rights Essentialism and Remedial Equilibration*<sup>7</sup> is probably the most comprehensive statement of the "pragmatist" position. To the extent that it rejects a supposed dichotomy between rights and remedies, however, it is not in fact a challenge to the decision rules model. Decision rules straddle the right-remedy divide that Professor Levinson attacks. They are rules that courts apply to determine whether rights have been violated. They are not statements about the actual contours of rights; that is the whole point of the distinction. But neither are they entirely rules about when remedies will be awarded; remedial analysis may follow the conclusion that a right has been violated and may grant or withhold a remedy accordingly.

It is certainly true, as Professor Levinson argues, that remedial considerations exert an important influence over the shape of constitutional decision rules. The consequences and feasibility of awarding a particular remedy will affect a court's assessment of enforcement costs and costs of error.<sup>8</sup> But that is not the same thing as saying, as Professor Levinson does, that such considerations exert an influence over the shape of constitutional operative propositions or rights.<sup>9</sup> The interrelation of remedies and decision rules is, in short, entirely consistent with

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protection, free exercise); Kermit Roosevelt III, *Forget the Fundamentals: Fixing Substantive Due Process*, 8 U. PA. J. CONST. L. (forthcoming Aug. 2006) (substantive due process).

<sup>5</sup> In my taxonomy of factors, the need for judicially manageable standards is subsumed under the headings "Enforcement Costs" and "Guidance for Other Governmental Actors." See Roosevelt, *Constitutional Calcification*, *supra* note 4, at 1665–66.

<sup>6</sup> Fallon, *supra* note 1, at 1313.

<sup>7</sup> Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999).

<sup>8</sup> See Roosevelt, *Constitutional Calcification*, *supra* note 4, at 1661, 1665.

<sup>9</sup> See Levinson, *supra* note 7, at 890.

the decision rules model. To point out that interrelation is simply to focus attention on one of the factors that goes into the creation of decision rules — it is essentially the same thing that Professor Fallon's article does.

From that perspective, Professor Levinson's article is a contribution, and an excellent one, to the body of decision rules scholarship. Professor Levinson, however, does not seem to see it that way; he suggests to the contrary that his analysis undermines the idea that constitutional rights can be over- or underenforced. He argues that examination reveals that *all* constitutional rights are over- or underenforced, which makes it "both pointless and indeterminate" to speculate about the shape of rights themselves.<sup>10</sup>

As any pragmatist would concede, the test of that assertion must be practical; it must be whether the decision rules model is a useful way of understanding and critiquing constitutional decisions. Demonstrating the model's utility was one of the main aims of my *Constitutional Calcification*, and my claim there was that an unthinking equation of decision rules and operative propositions leads to a number of mistakes.

To reprise one example, consider the question of equal protection analysis of racial classifications. Suppose that everyone agrees that racial classifications that disadvantage minorities should receive strict scrutiny under the Equal Protection Clause. If we deny the distinction between decision rules and operative propositions, this prescription must be a statement about the meaning of the Equal Protection Clause. And if that is so, there is substantial appeal to the argument that in fact proved decisive in extending strict scrutiny to racial classifications that seem to benefit minorities: equal protection must protect everyone equally, so if some racial classifications receive strict scrutiny, all of them should.<sup>11</sup>

Attending to the distinction between decision rules and operative propositions reveals that this argument is not necessarily sound. One might endorse strict scrutiny for racial discrimination against minorities as a decision rule for two quite different reasons. First, one might believe that the meaning of the Equal Protection Clause is a general prohibition of racial classifications: the Clause deems them so offensive that they can be allowed only to achieve some extraordinarily important government interest. On this view, the strict scrutiny decision

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<sup>10</sup> *Id.* at 925.

<sup>11</sup> This argument was endorsed by Justice Powell. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 289–90 (1978) (opinion of Powell, J.) ("The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color."). The argument also does most of the work in Justice O'Connor's majority opinion in *Adarand Constructors v. Peña*, 515 U.S. 200, 224 (1995), which itself cites *Bakke*.

rule serves to ensure that the harm from the use of a racial classification is balanced by an important state interest. Second, one might believe that the meaning of the Clause is a prohibition of discrimination that arises from a lack of equal concern and respect for the burdened group. On this view, a strict scrutiny decision rule for racial discrimination against minorities makes sense because such classifications are extremely likely to be of that sort. Strict scrutiny on this view smokes out impermissible legislative motivations.<sup>12</sup>

The pragmatist claim is that since it is decision rules that decide cases, speculating about meaning is idle. But which view one takes of constitutional meaning will have very significant consequences for the appropriate treatment of affirmative action. If the meaning of the Equal Protection Clause is that racial classifications are bad, then all racial classifications should presumably receive equivalent scrutiny, and the decision rules for classifications burdening and benefiting minorities will be symmetrical. But if the meaning is that discrimination arising from a lack of equal concern and respect is prohibited, heightened scrutiny can sensibly be allocated to cases in which discrimination is most likely to proceed from a failure to give equal weight to the interests of the disadvantaged individuals — something that can be said much more easily of discrimination against racial minorities than of discrimination in their favor.

Distinguishing between decision rules and operative propositions here gives a perspicuous view of the grounds of disagreement with respect to affirmative action: it suggests that the agreement about the appropriate decision rule for discrimination against racial minorities masks a disagreement about the underlying operative proposition. It also rebuts the argument that strict scrutiny for affirmative action follows inexorably from the proposition that equal protection must protect everyone equally. While a symmetry requirement makes a good deal of sense at the level of operative proposition, whether decision rules should be symmetrical depends on our view of the relevant operative proposition.<sup>13</sup>

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<sup>12</sup> See generally Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 438–39 (1997) (describing smoking-out and balancing understandings of strict scrutiny).

<sup>13</sup> For other examples of this sort of analysis, see Roosevelt, *Constitutional Calcification*, *supra* note 4, at 1693–1700, 1707–13, which discusses Commerce Clause and Section Five enforcement power. Professor Levinson's response, Professor Fallon suggests, is that this analysis is useful only if operative propositions can be reverse-engineered from decision rules and further that such reverse-engineering is impossible because courts do not in fact decide cases by first identifying operative propositions and then crafting decision rules. See Fallon, *supra* note 1, at 1316 & n.185; Levinson, *supra* note 7, at 873 (claiming that the decision rules model "bears little resemblance to the actual judicial practice of rights-construction"). It is certainly true that in many cases judges simply apply or refine existing decision rules. But when it considers a new decision rule, the Court frequently addresses the distinction quite self-consciously. Professor Fallon's article shows it doing so in *Vieth v. Jubelirer*, 124 S. Ct. 1769 (2004). Other examples include the plurality opin-

So I find the decision rules model quite useful, and Professor Fallon's extended analysis of the pervasive effect of the need for judicially manageable standards is likewise a valuable contribution. I have some reservations, however, about his extension of what he calls the "permissible disparity thesis" to nonjudicial actors and the implications he draws from that extension.

The permissible disparity thesis holds that "a gap frequently exists between constitutional meaning and judicially enforced doctrine."<sup>14</sup> In this form, it follows more or less immediately from the decision rules model. Professor Fallon's novel suggestion is that permissible disparity may exist also with respect to the obligations of nonjudicial actors, and that consequently the "best rationalizing explanation" of the gap may take a particular normative cast: some "background rights" may be "partly aspirational, embodying ideals that do not command complete and immediate enforcement."<sup>15</sup>

I confess to viewing the prospect of nonjudicial underenforcement and aspirational rights with something less than complete equanimity. One source of the discomfort is the fact that many of the reasons that can be offered for judicial underenforcement do not justify its practice by nonjudicial actors.

Perhaps the most prominent reason for judicial underenforcement is the belief that some other actor is simply better at determining constitutional requirements in particular circumstances. Suppose, for instance, that the commerce power authorizes Congress to regulate activities that substantially affect interstate commerce, an understanding that follows fairly plausibly from reading the Commerce Clause in conjunction with the Necessary and Proper Clause.<sup>16</sup> The question of whether a given activity substantially affects interstate commerce is one that Congress is likely better at answering than courts, and deferential review of the congressional conclusion is therefore likely to produce fewer errors than nondeferential review. Likewise, legislatures are probably generally better at weighing costs and benefits, and a court that thinks that the meaning of some constitutional provisions (for instance, the Equal Protection and Due Process Clauses) requires

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ion in *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973), and *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985), both of which articulated criteria for heightened equal protection scrutiny; *Smith v. Robbins*, 528 U.S. 259, 265 (2000), which defined procedures that adequately safeguard the right to appellate counsel; and even *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938), which offered a general theory of when nondeferential decision rules are justified.

<sup>14</sup> Fallon, *supra* note 1, at 1317.

<sup>15</sup> *Id.* at 1324–25.

<sup>16</sup> See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937); Roosevelt, *Constitutional Calcification*, *supra* note 4, at 1674.

that the benefits of a law exceed its costs will likely minimize errors by generally deferring to legislative assessments.

Nonjudicial underenforcement, however, does not take the form of deferring to another actor's assessment of constitutional requirements in the hope of thereby minimizing constitutional violations. Instead, this sort of "underenforcement" amounts to a knowing violation of the Constitution — for example, passing a law despite believing that the regulated activity does not substantially affect interstate commerce. The goal of minimizing total constitutional violations will seldom be a justification.

A related reason for judicial underenforcement, or for the creation of a decision rule whose shape varies substantially from that of the underlying operative proposition, is that the operative proposition turns on a fact that the judiciary is simply incompetent to ascertain. That government acts cannot be based on personal hostility to those affected is a plausible operative proposition, but it is not one that courts can readily enforce. Likewise, a requirement that officials weigh the interests of affected parties equally, or not try to silence speakers because they disagree with the message, turns on subjective mental states. When operative propositions relate to mental states, courts frequently underenforce them or employ objective tests as substitutes.<sup>17</sup> But here again the rationale offers no support for nonjudicial underenforcement, since compliance in such cases is perfectly within the nonjudicial actor's ability.

Judicial underenforcement might also be based on an assessment that full enforcement will do more harm than good because it will be unacceptably costly in terms of other constitutional values. Nondeferential review of due process challenges to economic regulation, or discrimination with respect to nonsuspect classes, for instance, might be thought to trench too deeply on the ability of the representative branches to make policy choices, thereby raising separation of powers concerns.<sup>18</sup> This too is a rationale that nonjudicial actors generally cannot invoke.

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<sup>17</sup> See, e.g., Berman, *supra* note 2, at 67.

<sup>18</sup> This sort of observation inspires the pragmatist response that if the construction of decision rules is constrained by considerations of constitutional principle, then decision rules are of equal stature with operative propositions, a point Professor Rick Hills has made to me in conversation. I agree that in some cases the Constitution severely limits judicial choice of decision rules. The refusal to enforce constitutional provisions in the face of "a textually demonstrable constitutional commitment of the issue to a coordinate political department" is a clear example. *Baker v. Carr*, 369 U.S. 186, 217 (1962). But the question of whether sex-based classifications should receive heightened scrutiny, for instance, strikes me as one that is simply not resolved by the meaning of the Constitution. The answer will depend on how a judge weighs the factors that go into the creation of decision rules, and Professor Fallon is right to suggest that how a judge would balance the factors is perhaps the most important judicial qualification, one to which we should be far more attentive than we are. See Fallon, *supra* note 1, at 1321–22.

Why then might a nonjudicial actor be justified in underenforcing a constitutional operative proposition? Professor Fallon's answer is that just as manageability concerns may lead courts to underenforce, nonjudicial actors can give weight to practical costs.<sup>19</sup> To some extent, this claim is undeniable. An executive official promulgating guidelines for subordinates might very well choose bright-line rules that do not precisely fit the operative propositions. Such an official is in much the same position as a court articulating decision rules, and similar considerations would apply. Indeed, one might expect such an official to instruct subordinates to follow whatever decision rules the courts have created.

But what if a nonjudicial actor's assessment of practical costs leads her to a rule other than the one courts have created? In such circumstances, we might hope that courts will give respectful consideration to the nonjudicial suggestion, but we should expect judicial doctrine to prevail.<sup>20</sup> A fair amount of judicial doctrine, in fact, could be understood as articulating what sorts of practical considerations may justify nonjudicial underenforcement. For example, by holding that administrative convenience is merely a legitimate (and not a compelling) state interest, the Court has effectively ruled that it is not a practical consideration sufficient to justify nonjudicial "underenforcement" of equal protection through sex-based discrimination.<sup>21</sup>

Professor Fallon agrees with this, I believe, which is why he considers nonjudicial underenforcement to be relevant primarily in circumstances in which the judiciary also underenforces to at least the same degree.<sup>22</sup> But rather than view this as a narrow range of cases, he suggests that it might also apply to and explain constitutional change in areas such as equal protection where constitutional provisions "reflect moral ideals."<sup>23</sup> *Brown v. Board of Education*,<sup>24</sup> he suggests, can be understood as a fuller enforcement of an idea of equality that was merely aspirational at the time of the Fourteenth Amendment's ratification.<sup>25</sup>

This is one explanation of constitutional change, but it is not the only one, and it is perhaps unduly teleological. The idea that realization of the "full conceptual meaning" of some constitutional provisions

<sup>19</sup> See Fallon, *supra* note 1, at 1324.

<sup>20</sup> *Dickerson v. United States*, 530 U.S. 428 (2000), and *Smith v. Robbins*, 528 U.S. 259 (2000), are two examples of the Supreme Court's consideration of decision rules developed by nonjudicial actors. See generally Roosevelt, *Constitutional Calcification*, *supra* note 4, at 1668–72.

<sup>21</sup> See *Frontiero v. Richardson*, 411 U.S. 677 (1973).

<sup>22</sup> See Fallon, *supra* note 1, at 1324 (describing the role of officials "charged with implementing judicially underenforced constitutional guarantees").

<sup>23</sup> *Id.* at 1326.

<sup>24</sup> 347 U.S. 483 (1954).

<sup>25</sup> Fallon, *supra* note 1, at 1325–26.



is an ongoing venture suggests that constitutional interpretation is to a significant degree a philosophical task. But the idea that ratifiers adopting abstract constitutional provisions intend thereby to authorize philosopher-judges to instruct them on the full conceptual meaning of their words is neither particularly likely nor, to me, particularly attractive.

One might instead say that the applications of an unchanging operative proposition such as a ban on unjustified discrimination are inevitably and properly informed by societal views about what is justified or natural and what is invidious.<sup>26</sup> “Progress” on such issues occurs not when society is ready to embrace the full meaning of its pre-existing commitments but when social attitudes shift — when differential treatment of blacks, or women, or gays, stops seeming natural and starts seeming invidious.<sup>27</sup> The work in such cases is done not by philosophers or legal theorists but by social movements and norm entrepreneurs.<sup>28</sup>

Consider Professor Fallon’s modern example of a Court that believes both that the full conceptual meaning of the Constitution includes a background right to gay marriage and that announcing such a right would trigger a backlash likely to include a constitutional amendment banning gay marriage. In such a case, he suggests, the Court “should decline to adopt a rule of decision enforcing the background right.”<sup>29</sup>

This conclusion is not obvious to me. It is not clear what value justifies concealing from the American people their constitutional commitments nor why a judge may legitimately prefer the unamended Constitution to the hypothetical amended one. I would say that the prospect of such a backlash is not so much a practical factor to be considered as it is evidence that the background right does not exist. If a national supermajority thinks a particular form of discrimination is justified, I would take that as good evidence that the Equal Protection Clause does not forbid it.<sup>30</sup>

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<sup>26</sup> See generally KERMIT ROOSEVELT III, *THE MYTH OF JUDICIAL ACTIVISM: MAKING SENSE OF SUPREME COURT DECISIONS* 47–58 (forthcoming 2006).

<sup>27</sup> See, e.g., Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995).

<sup>28</sup> See, e.g., Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 929–30 (1996) (describing norm entrepreneurs); Jack M. Balkin, *How Social Movements Change (Or Fail To Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27 (2005); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002).

<sup>29</sup> Fallon, *supra* note 1, at 1329.

<sup>30</sup> That is, I take the meaning of the Equal Protection Clause to be something like a ban on unjustified discrimination, but I believe that analysis of justification cannot be performed in a philosophically pure way but must (and should) be conducted with reference to current national societal understandings.

That national sentiment could of course change, and we could find evidence of that change in a series of state legislative acts or judicial decisions recognizing a state-law right to gay marriage. Such a pattern could lead a federal court to conclude that marriage discrimination is no longer justified. This was the progress from *Bowers v. Hardwick*<sup>31</sup> to *Lawrence v. Texas*:<sup>32</sup> evolution of societal attitudes, reflected in objective indicia, changed the outcome of constitutional cases. This process is quite distinct from the judicial explication of the full conceptual meaning of equality. We might hope that social attitudes will bend toward justice, but their progress will be determined less by what we do as judges or scholars than by what we do as citizens.

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<sup>31</sup> 478 U.S. 186 (1986).

<sup>32</sup> 539 U.S. 558 (2003).