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Mitchell N. Berman

University of Pennsylvania Carey Law School

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ASPIRATIONAL RIGHTS AND THE TWO-OUTPUT THESIS

Mitchell N. Berman*

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

In his 1997 *Harvard Law Review* Foreword, *Implementing the Constitution*,¹ Professor Richard Fallon challenged constitutional theorists' widespread assumption that judge-interpreted constitutional meaning was the single important output of judicial review. "Identifying the 'meaning' of the Constitution is not the Court's only function," he observed. Rather, it is part of a general mission "to *implement* the Constitution successfully." To that end, Professor Fallon argued, "the Court often must craft doctrine that is driven by the Constitution, but does not reflect the Constitution's meaning precisely."² Building on work by Professors Henry Monaghan and Larry Sager,³ Professor Fallon set forth the most complete and forceful call to deprive meaning relative to doctrine.

The ensuing decade has witnessed a steady increase in scholarly attention to the meaning/doctrine distinction. My own contribution to that burgeoning literature, *Constitutional Decision Rules*,⁴ had several goals. As intellectual history, it aimed to identify, and provide a framework for understanding, an emergent trend of constitutional scholarship oriented toward "the claimed existence of [constitutional] doctrine, conceived as a category of judicial work product . . . more comprehensive than judge-interpreted constitutional meaning."⁵ In my view, the fundamental divide within this genre separates "taxonomists" from "pragmatists." The taxonomists (represented by Professors Fallon, Sager, and Monaghan) accept what we may call the "two-output thesis": the claim "that there exists a conceptual distinction between two sorts of judicial work product each of which is integral to the function-

* Bernard J. Ward Centennial Professor in Law, The University of Texas at Austin.

¹ Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54 (1997).

² *Id.* at 57.

³ See Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

⁴ Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004). For an excellent and yet more recent exploration of the subject see Kermit Roosevelt III, *Constitutional Calculation: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649 (2005).

⁵ Berman, *supra* note 4, at 4.

ing of constitutional adjudication,”⁶ namely judge-interpreted constitutional meaning and judge-crafted tests bearing an instrumental relationship to that meaning. The pragmatists (represented by Professors Rick Hills, Daryl Levinson, David Strauss, and Evan Caminker) deny this. According to them, the distinction is illusory because the forward-looking, cost-benefit calculations thought to inform the supposed second output inform the first too. If it’s pragmatism all the way down, they argue, a distinction between judicial outputs cannot be maintained.

Allying myself with the taxonomists, I articulated and tried to defend a new carving of these two outputs. I thus proposed that judge-announced “constitutional doctrine” be understood to include statements of what courts have interpreted the Constitution to mean (“constitutional operative propositions”) as well as instructions to courts regarding how to decide whether that judicially determined constitutional meaning has been satisfied (“constitutional decision rules”). The default, generally invisible decision rule is the more-likely-than-not standard of proof. But decision rules often employ heightened (or reduced) proof standards. They can also be conclusive presumptions: for example, an instruction to conclude *A* if you conclude *B* (where *B* is an adequate proxy for the operative proposition *A*, but a fitter subject of judicial inquiry).⁷ When constitutional doctrine is carved in this way, I argued, the conceptual ineliminability of two distinct outputs becomes patent. Because courts inescapably face epistemic uncertainty when seeking to apply (judge-interpreted) constitutional meaning, judicial review requires devices that direct courts how to decide whether that meaning is met.

The two-output thesis is not, I think, controversial. I have found it readily accepted by law students and constitutional lawyers. But to be accepted is not quite to be internalized. And courts have yet to grasp fully the truth of the thesis, let alone its significance.⁸ For this reason among others, Professor Fallon’s further contributions to the field he helped create are most welcome. Moreover, given my own considerable debt to his earlier work, it should not surprise that much in *Judi-*

⁶ *Id.* at 36.

⁷ Obviously, proposition *B* could be the better object of judicial inquiry if *A* is a standard of which *B* is a more rule-like approximation. But there are other possibilities. For example, if the Court interprets some constitutional provision to refer to legislative purposes yet doubts judges’ ability to identify purposes, it might reasonably instruct courts to inquire into a predicate that correlates with the purposes that the constitutional operative proposition makes relevant.

⁸ Witness the plurality’s suggestion in *Vieth v. Jubeliver*, 124 S. Ct. 1769 (2004), that a constitutional claim is nonjusticiable unless a judicially manageable standard is “discernible in the Constitution.” *Id.* at 1786 (plurality opinion).

*cially Manageable Standards and Constitutional Meaning*⁹ I find right and illuminating. However, I am skeptical of what is likely the article's freshest and most provocative claim — namely, that some constitutional rights may be only aspirational. Ironically, if Professor Fallon's arguments in support of that claim do not succeed, their failure might be due in part to his seeming retreat from the two-output thesis he had apparently embraced a decade earlier.

I. INPUTS AND OUTPUTS

The Court's central task in *Vieth v. Jubilever*¹⁰ was to articulate judicially manageable standards for adjudicating claims of constitutionally excessive partisanship in redistricting. Yet, says Professor Fallon, the Justices' efforts on that score "reveal an important, little-noted ambiguity."¹¹ I agree. In my vocabulary, demands of administrability could be satisfied either by a judicially manageable operative proposition (to be implemented by the more-likely-than-not decision rule) or, if the operative proposition were too standard-like, by a judicially manageable decision rule that adequately fit the operative proposition. But one need not endorse my terminology to accept this basic point, which flows from the two-output thesis alone: what must be judicially manageable is either the judge-interpreted constitutional meaning or the constitutional doctrine crafted to implement it.

Here, though, is how Professor Fallon puts matters:

In one usage, references to judicially manageable standards describe an input to constitutional decisionmaking. Viewed as an input in light of which a court might be asked to resolve constitutional cases, the bare language of the Equal Protection Clause is not a judicially manageable standard in political gerrymandering disputes. In another usage, however, judicially manageable standards are not so much inputs as the outputs of constitutional adjudication. A judicially manageable standard is an output, rather than an input, in any case in which a court successfully devises a test that can thereafter be used to implement a constitutional provision that is not itself a judicially manageable standard.¹²

Notice this. I have claimed Professor Fallon as a charter member of the Two-Output Club. But here he appears as a one-output guy: The judicially manageable standard must either inhere in the plain language of a constitutional provision or be supplied by a judicially created test designed to implement that (unmanageable) language.

⁹ Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274 (2006).

¹⁰ 124 S. Ct. 1769.

¹¹ Fallon, *supra* note 9, at 1282.

¹² *Id.* at 1282–83 (emphases omitted).

Professor Fallon's present picture, it seems, recognizes only text (input) and test (output).¹³

This account is overly reductionist. Judicial implementation of an input that is not itself judicially manageable could yield a judicially manageable standard either because the Court interprets the vague language (perhaps in an originalist mode) to bear sufficiently determinate and administrable meaning or because, unable to ascertain a constitutional meaning it deems judicially manageable, the Court constructs an administrable test that approximates the meaning. But Professor Fallon's input/output distinction furnishes no resources for distinguishing between "tests" that arise by application of interpretive methods other than textualism and those that Justices self-consciously craft to implement their views of constitutional meaning. In both cases, the judicially manageable standard emerges as an "output," yet only in the latter would we comfortably say that the Court has "devis[e]d a test."¹⁴

This is more than a quibble over exposition. For reasons I and others have urged, foregrounding distinctions among types of outputs — and not merely between outputs as a class and the constitutional text as "input" — can have great value. However, the distinction is curiously lost throughout *Judicially Manageable Standards*.

Consider Professor Fallon's repeated questioning whether a gap can arise between "constitutional meaning" and judicially devised constitutional doctrine.¹⁵ If read to reference court-interpreted constitutional meaning, the question comes very close to asking whether the two-output thesis is true.¹⁶ Admittedly, thanks largely to Professor Fallon's own earlier work, some will feel hard-pressed to take that question as seriously as he asks. But absent the modification, the question seems to ask something entirely different, such as whether the

¹³ See also, e.g., *id.* at 1296 ("Upon determining that the language of a constitutional provision is not itself a judicially manageable standard at the input stage, the Supreme Court assumes a responsibility to devise a judicially manageable standard as an output of its adjudicative process."). Elsewhere, however, Professor Fallon intimates a broader conception of inputs, extending beyond bare constitutional language to encompass "inherent elements of the Constitution's meaning." *Id.* at 1277.

¹⁴ I agree, though, "that it is often difficult to identify when in constitutional analysis the search for meaning leaves off and the development of judicially manageable standards begins." *Id.* at 1316. Usually, the difficulty is even more pronounced for an opinion's readers than for its author, which is why I have cautioned that distinguishing between types of outputs will be especially challenging and contestable when "reverse-engineering" existing doctrine. See Berman, *supra* note 4, at 78–83, 108.

¹⁵ See, e.g., Fallon, *supra* note 9, at 1277 ("Can the demand for judicially manageable standards introduce a disparity between constitutional meaning and judicial rules of decision in cases that the courts decide on the merits . . .?"); *id.* at 1313–17.

¹⁶ They are not the same question because doctrine could merely specify meaning and because of other reasons that I cannot pursue here.

judiciary is the sole expositor of constitutional meaning. By leaving references to constitutional meaning unqualified, Professor Fallon can thus be read to question not the two-output thesis, but the judicial-exclusivity thesis.

To appreciate the difference, notice that Professor Fallon describes “constitutional pragmatists” as denying “that any useful distinction exists between constitutional rights (or meaning) and the doctrinal tests that courts apply.”¹⁷ But all that pragmatists, qua pragmatists, disavow is that a useful distinction can be drawn within judge-announced doctrine between rights (or meaning) and remedies (or tests).¹⁸ They are not committed to denying the utility of distinguishing between constitutional meaning and judge-crafted doctrinal tests. We need such a distinction to be able to criticize judicial doctrine as based on a misunderstanding of constitutional meaning, and pragmatists need not think such criticisms unintelligible or pointless.

Absence of the two-output thesis is also apparent when Professor Fallon explores the difference between underenforcement and nonenforcement. Fallon rightly observes that “a determination of nonjusticiability due to the absence of judicially manageable standards is simply the limiting case of a decision to underenforce constitutional norms.”¹⁹ But he adduces one reason to favor underenforcement so great as to border on nonenforcement over the formal nonenforcement provided by a holding of nonjusticiability: namely, that the former preserves “judicial options in future cases.”²⁰ Although Professor Fallon might overstate the difference — formal declarations of nonenforcement are always subject to reconsideration — I grant the point. Nonetheless, his analysis misses one salient consideration that cuts against *de facto* nonenforcement. Because dismissal for nonjusticiability is explicitly not a decision “on the merits,” formal judicial nonenforcement does not imply that the challenged action is constitutional. But if the distinction between judicial outputs is obscured, a court’s use of radi-

¹⁷ Fallon, *supra* note 9, at 1313.

¹⁸ Of course, I believe, with Professor Fallon, that the pragmatists are wrong about this. Indeed, I read Professor Levinson to have essentially conceded the point when acknowledging both that constitutional understandings have value outside courts and that those understandings can be influenced by what happens inside courts. See Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 887 n.123, 906 (1999). It follows that it is valuable for courts to be able to distinguish statements about the Constitution — statements that are intended or expected to influence extrajudicial discourse about what the Constitution means — from statements about how courts must administer judicially understood constitutional meanings. This conclusion is enough to generate some version of the two-output thesis. In short, the pragmatists err in thinking that a useful distinction between judicial outputs must depend on their arising from distinct types of processes; the outputs could, for example, be distinguished by reference to the functions they serve.

¹⁹ Fallon, *supra* note 9, at 1306.

²⁰ *Id.* at 1303 n.124; see also *id.* at 1306–09.

cally underenforcing doctrine to reject a constitutional challenge will often be misread as holding the action constitutional. If this provides reason to worry about judicial underenforcement, it therefore also provides reason to highlight the distinction between judicial outputs. In my particular take on the two-output thesis, when a court administers a constitutional operative proposition by means of an underenforcing decision rule, the possible alternative holding to “unconstitutional” is not “constitutional,” but rather “not adjudged to be constitutional,” where the latter — much like criminal law’s “not (proved) guilty” verdict — makes clear that constitutionality cannot be assumed.

To appreciate the value of such a formulation, recall Professor Fallon’s contention that “Justice Kennedy concluded that the partisan gerrymander before the Court [in *Vieth*] did not violate the Constitution.”²¹ This is a possible reading of Justice Kennedy’s concurrence but not, I think, the best one.²² After all, having bemoaned the absence of satisfactory guidance regarding what constitutes unconstitutionally excessive partisanship in redistricting, Justice Kennedy was unlikely to have concluded that the Pennsylvania legislature did not violate the Constitution. What he could have concluded, though, is that by not offering an adequately managed standard, the plaintiffs had failed to establish that the Pennsylvania redistricting violated the Constitution. In short, his conclusion is better rendered as “not proved to be unconstitutional” than as “constitutional.” Surely the difference can be meaningful to an engaged citizenry. Explicit embrace of the two-output thesis will encourage such nuance to emerge.

II. ASPIRATIONAL RIGHTS AND NONJUDICIAL UNDERENFORCEMENT

My claim thus far is that Professor Fallon’s failure to differentiate explicitly among types of judicial outputs is not mere oversight but evidence that he may not own the two-output thesis as fully as the reader of *Implementing the Constitution* might have concluded and as I had previously contended.²³ With this hypothesis in mind, I turn finally to perhaps the most novel and arresting claim in *Judicially Manageable Standards*: Fallon’s argument (what I will call the “aspirational rights thesis”) “that we should think of the Constitution as a partly aspirational document, embodying ideals that are not yet and perhaps need not ever be fully realized.”²⁴

²¹ *Id.* at 1306 n.144.

²² I discuss Justice Kennedy’s concurrence in Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781, 807–809 & n.181 (2005).

²³ Even in that previous work, however, I had noted ambiguity in Fallon’s treatment of judicial outputs. See Berman, *supra* note 4, at 36 & n.126.

²⁴ Fallon, *supra* note 9, at 1279.

Let us sharpen the thesis by situating it within a network of kindred claims. First is the “judicial underenforcement thesis”: constitutional norms need not be judicially realized in full, or, in Fallon’s terms, there is a permissible disparity between “doctrinal rights” and “background rights.”²⁵ Second is the view that officials (judicial and nonjudicial) may not be morally obligated to comply with constitutional commands (background or doctrinal). Third is the claim that the Constitution underenforces political justice and hence contemplates that ideals of political morality will remain partly aspirational as far as the Constitution is concerned.

Professor Fallon’s aspirational thesis is compatible with each of these familiar ideas. Despite some equivocation,²⁶ however, it goes beyond them all in holding (a) that nonjudicial officials may not be under (b) a constitutional obligation to respect rights that (c) do, in fact, have constitutional status. It is, as Fallon claims, “unfamiliar” and “bracing.”²⁷

To a substantial extent, Professor Fallon suggests that the aspirational thesis follows naturally from the fact of judicial underenforcement. For example, if courts can take practical considerations into account in not fully enforcing the constitutional nondelegation norm, Fallon can “see no reason why a member of Congress” should not be constitutionally entitled to do so too. Similarly, when administering a bureaucracy, “executive officials should be as entitled as courts to take considerations of ‘manageability’ into account in issuing directives — to be administered by others — that could lead to constitutional underenforcement in some cases.”²⁸

The force of these examples is uncertain. The first example — legislative “underenforcement” of the nondelegation doctrine — is unreliable as a guide to our judgments about the aspirational thesis partly because it involves nondelegation. Many readers who share Professor Fallon’s conclusion that a legislator is not constitutionally obligated to cast a quixotic vote against a bill that delegates legislative power may do so precisely because they deny the premise that, rightly understood, the Constitution does “forbid[] Congress to delegate its legislative powers.”²⁹ So change the hypothetical. Suppose a legislator believes that the Equal Protection Clause flatly forbids race-conscious legislation but that judicial doctrine permits it when the compelling interest test is met. Is she constitutionally obligated to vote against an affirmative

²⁵ See *id.* at 1322–31.

²⁶ In places, Fallon seems to reduce the aspirational thesis to the now-mundane judicial underenforcement thesis. See, e.g., *id.* at 1323–24.

²⁷ *Id.* at 1332, 1317.

²⁸ *Id.* at 1324.

²⁹ *Id.*

action program? I am disposed to answer “yes.” In any event, a negative answer requires more argument. Moreover, that legislators differ from judges on this score may not be wholly mysterious. Judges and legislators could face different obligations because, among other things, the legislative case isn’t best described as underenforcement. With respect to nondelegation and equal protection, legislators’ principal duty is not one of enforcing the Constitution, but of complying with it.

The same worry — that Professor Fallon elides a distinction between enforcement and compliance — confronts Fallon’s second example too. Consider a more concrete illustration. In *Atwater v. City of Lago Vista*,³⁰ the Court held that a police officer who has probable cause to believe an offense was committed in her presence does not violate the Fourth Amendment by effecting an arrest, even for a trivial misdemeanor.³¹ Suppose that this decision reflects the majority’s understanding that the Fourth Amendment forbids arrests that are unreasonable all things considered, along with the majority’s choice to administer this meaning with an underenforcing decision rule that employs a conclusive presumption. Now, if policymakers are constitutionally permitted to design and implement rules that result in constitutional underenforcement, it could be that no government official is constitutionally obligated to enforce the Fourth Amendment “background” right never to be subjected to an unreasonable arrest.

But it does not follow, and I think it false, that no government official is constitutionally bound to comply with this background right. Rather, I think each officer remains constitutionally obligated not to execute unreasonable arrests even though, in a sense, judicial doctrine and internal police department rules permit it. If so, then it is unclear how the constitutional right to be free from an unreasonable seizure is “aspirational,” except in a sense that pragmatists might embrace — a right is aspirational if not effectively enforced, even if it purports to be binding on its direct addressees — but that Fallon properly rejects.³²

Furthermore, our supposition that policymakers are constitutionally entitled to underenforce this right stands on shaky footing. In defending this claim, Professor Fallon appears to define underenforcement in terms of “a rule that permits any false negatives . . . at all.”³³ But that definition won’t do: every rule permits some false negatives.³⁴ So Fallon must supply a more satisfactory account of what underenforcement means in the administrative context. (Maybe that an administrative rule underenforces a right when the rule is designed to

³⁰ 532 U.S. 318 (2001).

³¹ *Id.* at 323.

³² See Fallon, *supra* note 9, at 1315–16.

³³ *Id.* at 1324.

³⁴ For further exploration, see Berman, *supra* note 4, at 133–36.

produce more false negatives than false positives?) Until then, whether policymakers are entitled to underenforce the background right is an open question.

In addition to relying on case-specific judgments, Professor Fallon identifies two putative benefits of the aspirational thesis:

First, . . . [it] helps to sustain an understanding of the Constitution that is sufficiently capacious for nearly everyone's dreams. We can agree that the Constitution embodies large aspirations and deserves our allegiance partly because it does so without our also needing to agree on what those aspirations are. Second, acknowledgment that a gap can permissibly exist between partly aspirational background rights and judicially enforceable doctrinal rights accommodates the need that nearly everyone feels for practical, sometimes pragmatic compromises in constitutional law . . .³⁵

I am skeptical that these are good arguments for the aspirational thesis. To start, it is unclear why we need the aspirational thesis to generate widespread allegiance to the Constitution. After all, the two-output thesis alone goes some considerable distance toward maintaining that possibility. If we understand that judge-announced doctrine need not be identical to judge-interpreted constitutional meaning, and if the Court need not always explicitly divide announced doctrine into (in my terms) operative-proposition and decision-rule components, then we are more likely to achieve an overlapping consensus in support of that doctrine. Application of strict scrutiny to all racial classifications, including those that favor racial minorities, is an example of doctrine that can garner support from people with widely divergent views of constitutional meaning. Those who believe that the Equal Protection Clause constitutionalizes a judgment that all racial classifications inflict very substantial harms can view the doctrine as serving a justificatory function. Others, who believe that the clause prohibits only racial classifications that issue from negative racial stereotyping, can accept the doctrine in evidentiary terms as a way to “smoke out” bad motives.

The two-output thesis highlights yet another fact that obviates the need for the aspirational thesis. I have already remarked both that what Professor Fallon frequently calls “constitutional meaning” is really judge-interpreted constitutional meaning and that the two-output thesis keeps that crucial point in sight. Simply put, widespread support for the Constitution is sustained by the understanding that the Court can get constitutional meaning wrong. We can always argue that correct constitutional meaning just isn't what the operative proposition claims. Understanding background rights as aspirational, then, is not necessary for generating broad acceptance of, or even rev-

³⁵ Fallon, *supra* note 9, at 1326–27 (footnote omitted).

erence for, the Constitution in a society marked by wide dissensus on questions of political morality — though such a belief could breed complacency about our constitutional obligations.

The second proposed benefit seems no more promising. Indeed, Professor Fallon appears to grant that we do not need the aspirational thesis to justify judicial underenforcement. That thesis is deployed to justify nonjudicial underenforcement. But I do not think that Professor Fallon is entitled merely to assume a widely felt need for pragmatic compromises in the articulation of nonjudicial actors' obligations to conform to constitutional mandates.

* * * *

In raising these objections, I hardly claim to disprove the aspirational thesis. My more modest aim has been to reveal weaknesses in the case Professor Fallon has presented and to show how those vulnerabilities emerge when we keep the two-output thesis clearly in mind. That thesis alone comes close to entailing the permissible disparity thesis.³⁶ And those theses, together, may give us what we need.

CONCLUSION

“If constitutional rights can be partly aspirational,” Professor Fallon observes, we ought to explore when courts do and should “regard it as permissible to allow gaps to develop between constitutional aspirations and implementing doctrine.”³⁷ These are important questions. But they do not depend upon the antecedent. Even if constitutional rights are not aspirational in Professor Fallon’s sense, it is still true, as he says, that “the question of how to define the grounds and limits of permissible disparity grows urgent.”³⁸ Professor Fallon rightly continues to press for “overall theories of how courts should decide constitutional cases, not just theories of constitutional meaning.”³⁹ Perhaps, though, scholars who accept the invitation will do better if armed with the two-output thesis that Professor Fallon skips past than with the aspirational rights thesis he propounds.

³⁶ The two-output thesis does not quite entail the permissible disparity thesis because, as Professor Fallon explains, the second output could simply “specify” the first. *See id.* at 1283. Still, he acknowledges that specification without any distortion will be rare. *See id.*

³⁷ *Id.* at 1327.

³⁸ *Id.* at 1331.

³⁹ *Id.*