

THE PRAGMATIST'S VIEW OF CONSTITUTIONAL IMPLEMENTATION AND CONSTITUTIONAL MEANING

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

Professor Fallon's article, *Judicially Manageable Standards and Constitutional Meaning*,¹ is an important and powerful defense and exploration of what I have had the presumption to call "antipragmatist" constitutional theory. As I define this family of views, antipragmatist scholars maintain that constitutional law can be usefully divided into two domains: the domain of "constitutional meaning" and the domain of "implementing doctrine." Although the approaches of these scholars differ in important respects, the essence of their argument can be boiled down to two fundamental propositions about what judges do: first, judges devise implementing doctrines to carry out constitutional meaning, and second, they design implementing doctrines with practical and institutional considerations in mind that are not a part of the inquiry into constitutional meaning.

The first step of examining constitutional meaning is primarily a matter of "interpretation" broadly understood, relying on text, history, abstract moral theory — anything, really, just so long as constitutional meaning does not rest on the messy instrumental questions of how time-consuming, financially costly, or politically controversial the proposed constitutional principle is likely to be. If successful, the inquiry into meaning results in the judicial recognition of some relatively abstract constitutionally protected principle that might be incapable of being directly enforced against anyone. At the second stage, courts come up with implementing rules — what Professor Mitchell Berman calls "decision rules"² — that guide courts in their enforcement of the relevant value or principle in a cost-effective, institutionally sensitive manner. Such implementing doctrines are designed with an eye toward instrumental considerations, such as the judicial need to provide clear guidance to future litigants, the need to resolve cases in a timely manner, and the costs of the Supreme Court's monitoring of lower federal courts.

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

² See Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004).

I suggest that this claim is, in important ways, seductively misleading. But the concept of a gap between meaning and implementation is, nevertheless, extraordinarily helpful because it highlights not only a subtle ambiguity in the nature of constitutional doctrine, but also a deeply felt desire of scholars and judges to achieve noninstrumental certainty in the law. I suggest that we would all be wise to resist the call to hunt for the Snark of “pure,” noninstrumental constitutional value because I believe that no such thing exists. But to be deaf to the call would be to ignore an important psychological need of judges and scholars.

Professor Fallon’s exploration of the concept of “judicially manageable standards” is an effort to understand this alleged disparity between constitutional meaning and constitutional implementation. His starting point is Justice Scalia’s statement for a plurality in *Vieth v. Jubelirer*³ conceding that severe partisan gerrymandering violates the Fourteenth Amendment’s protection of democracy but denying that any judicial remedy is available for such a constitutional violation.⁴

According to Professor Fallon, this decision is revealing, for it indicates that a gap exists between ideal constitutional meaning — “democratic principles” — and judicial doctrine. This “potential distinction between constitutional norms and the judicial tests through which constitutional norms are enforced”⁵ seems to be in tension with many of the commitments that originalists like Justice Scalia insist on in other contexts. Even Justice Scalia is prepared, it seems, to accept an ad hoc, mushy, all-things-considered doctrine like “judicial manageability” to determine whether a proposed judicial doctrine is too ad hoc, mushy, and all-things-considered. Thus, the concept of judicial manageability is itself not judicially manageable.⁶ Moreover, Justice Scalia’s plurality opinion in *Vieth* suggests that the degree of judicial manageability needed to permit judicial adoption of a doctrine varies with the constitutional need for judicial enforcement; if a constitutional command derived from text and history is clear — say, the ban on racial discrimination — then Justice Scalia is prepared to accept a mushier judicial doctrine to enforce it. Thus, the size of the gap between meaning and implementation might vary with doctrinal context; the Court might be willing to enforce some constitutional principles directly, without reducing them to manageable implementing doctrines.

These considerations lead Professor Fallon to offer a series of fascinating observations about the nature of the permissible disparity between meaning and doctrine in Part IV of the article. Although all of

³ 124 S. Ct. 1769 (2004).

⁴ *Id.* at 1785 (plurality opinion).

⁵ Fallon, *supra* note 1, at 1281.

⁶ *See id.* at 1294.

these observations are worthy of comment, I focus on Professor Fallon's foundational claim: that a gap exists between "pure" constitutional meaning and implementing doctrine.

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My objection to the concept of such a gap is that, pragmatically speaking, the meaning of a constitutional provision *is* its implementation. To talk of some "pure" constitutional principle independent of how some institution — the courts, the Congress, the President, the mob, law professors, and so forth — implements that value is to talk in empty, metaphysical abstractions.

Consider, for instance, the constitutional meaning of Article I, Section 2, which the Court held in *Wesberry v. Sanders*⁷ requires that electoral districts provide "equal representation for equal numbers of people."⁸ Did *Wesberry* announce a principle of constitutional meaning, or did it announce an implementing doctrine that carries out the principle of political equality? On one hand, *Wesberry* is an unconvincing candidate for pure constitutional meaning given its recent vintage and perplexingly narrow focus. Presumably, the concept of political equality existed before *Wesberry* announced the idea that Article I required equipopulous districts. This concept could be implemented in numerous ways — for instance, by providing public subsidies to poor candidates for office or by adopting a system of proportional representation to insure that sizeable constituencies are not submerged by single-member, plurality districts. Why focus on equipopulous districts as the touchstone of political equality? *Wesberry* can be seen as selecting a particular method of implementing the ideal of equality based on the simplicity and administrability of that method: "one person, one vote" is a much easier way for courts to enforce political equality than, say, a ban on excessive partisan gerrymandering.

On the other hand, "one person, one vote" is also a ringing slogan of political justice. Its simplicity makes it not only judicially manageable, but memorable. Moreover, its demands seem so minimal that any resistance to such demands suggests a lack of serious commitment to democratic equality. Seen in this light, equipopulous districts are not just a convenient way of carrying out a more general principle but rather a democratic principle in their own right. Indeed, *Wesberry* itself termed "equal representation for equal numbers of people" as "the fundamental goal for the House of Representatives."⁹

⁷ 376 U.S. 1 (1964).

⁸ *Id.* at 18.

⁹ *Id.*

Professor Fallon acknowledges 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.”¹⁰ But this concession underestimates the depth of the problem; the very characteristics that make a rule judicially manageable also tend to make a rule into an axiomatic principle of justice. “One person, one vote” and “trial by jury of one’s peers” are both popular rallying cries of American constitutionalism precisely because they are simple to understand and relatively easy to implement. Those traits are also why these principles have found their way into judicial doctrine (in *Reynolds v. Sims*¹¹ and *Duncan v. Louisiana*,¹² respectively). Each of these slogans could be regarded as a specific method of implementing a more general constitutional commitment — say, fair representation of interested persons in politics and criminal procedure. But it would be extremely odd to say that these bright-line rules are somehow mere implementing doctrines that over- or underenforce the more abstract constitutional meaning of “fair representation.” One could reach such a conclusion only by indulging an academic’s bias in favor of abstraction altogether alien to the Constitution itself, which largely consists of a bundle of extremely specific and therefore easy-to-understand slogans about quartering soldiers, bearing arms, protecting speech and debate in the legislature, and so forth.

Part of what it means for a rule to be a fundamental principle is that the rule is simple enough to sink into public consciousness as an axiom of government. As *McCulloch v. Maryland*¹³ noted, the Constitution is unlike most law in that it should be “understood by the public.”¹⁴ “Popular manageability,” therefore, is a touchstone of constitutional meaning. But popular manageability and judicial manageability are so similar that they are almost indistinguishable.

Take, for instance, the requirement adopted in *In re Winship*¹⁵ that the government prove guilt in criminal trials beyond a reasonable doubt. One could characterize this standard of proof as a judicial effort to implement the more basic constitutional principle that an excessive number of innocent persons not be convicted. Indeed, *Winship* offered some support for this view, observing that the beyond-a-reasonable-doubt standard “is a prime instrument for reducing the risk of convictions resting on factual error” because it “provides concrete substance for the presumption of innocence — that bedrock ‘axiomatic

¹⁰ Fallon, *supra* note 1, at 1316.

¹¹ 377 U.S. 533 (1964).

¹² 391 U.S. 145 (1968).

¹³ 17 U.S. (4 Wheat.) 316 (1819).

¹⁴ *Id.* at 407.

¹⁵ 397 U.S. 358 (1970).

and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'"¹⁶ But *Winship* also recognized that the beyond-a-reasonable-doubt standard is itself a fundamental principle "basic in our law."¹⁷ It is not mere implementation, but meaning itself.

The truth is that the *Winship* presumption, like virtually all doctrinal rules, is both meaning and implementation simultaneously. It is a bright-line rule that can be rationalized as a specific effort to enforce a more general commitment to "fairness." But the presumption is also a basic datum from which we infer our more general commitments to abstract propositions about procedural fairness. As Rawls puts it, "[w]e start . . . by looking to the public culture itself as the shared fund of implicitly recognized basic ideas and principles."¹⁸ Put another way, we start from specific intuitions derived from historical experience and then infer general principles of justice from those intuitions, not vice versa.

Courts, in short, frequently define more general commitments in terms of specific paradigmatic rules. Those specific rules do not "implement" the commitment but constitute it as paradigmatic cases in which the commitment has been met or violated. There is a temptation to say that the specific rule "overenforces" or "underenforces" some more general constitutional concept. Professor David Strauss expresses this view by arguing that the task of the specific prophylactic rule is "to minimize the sum of error costs and administrative costs."¹⁹ Likewise, Professor Fallon argues that implementing rules should be evaluated by assessing how frequently they result in overenforcement (false positives) or underenforcement (false negatives) of some underlying constitutional principle.²⁰

But the very problem of vague constitutional phrases — say, "involuntary" confessions or "unequal representation" — is that the concept referenced by the phrase is too vague or indeterminate to operationalize independent of the various doctrines that enforce it. In contrast to what Professor Fallon's social science analogy implies,²¹ the Court simply has no clear concept of what constitutes an "error" absent reference to the very doctrines that are allegedly being assessed for their accuracy in enforcing constitutional meaning. Thus, it is meaningless to speak of "false positives" and "false negatives" as if the

¹⁶ *Id.* at 363 (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)).

¹⁷ *Id.* at 362 (quoting *Leland v. Oregon*, 343 U.S. 790, 803 (1952) (Frankfurter, J., dissenting)).

¹⁸ JOHN RAWLS, *POLITICAL LIBERALISM* 8 (1993).

¹⁹ David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 193 & n.12 (1988).

²⁰ Fallon, *supra* note 1, at 1315–16.

²¹ *Id.* at 1315–16 & n.184.

underlying concept could be defined with any accuracy apart from the specific rules or practices that give it life.

Take, for instance, the problem of determining whether a confession is “voluntary” within the meaning of the Fifth Amendment’s rule against compelled self-incrimination. As the Court observed in *Bram v. United States*,²² “the facts by which compulsion might manifest itself, whether physical or moral, would be necessarily ever different,” defined by subjective states of the suspect’s “hope or fear” that “necessarily rest upon the state of facts which existed in the particular case, and, therefore, furnish no certain criterion.”²³ *Bram* confidently asserted that “however great may be the divergence between the facts decided in previous cases and those presented in any given case, no doubt or obscurity can arise as to the rule itself, since it is found in the text of the Constitution.”²⁴ But this pious hope rests on the premise that terms like “compelled” in the Fifth Amendment are somehow self-defining. The premise is certainly false; different judges can legitimately reach different conclusions about the voluntariness of the same confession based on their implicit trust of the police, the urgency of preventing crime, their own sense of the proper resilience of the human mind, etc. Thus, we cannot know whether *Miranda v. Arizona*²⁵ overenforces the Fifth Amendment since we do not know which confessions count as involuntary absent *Miranda*’s clarification of the standard of voluntariness.

In other words, by providing a simple paradigm of “involuntary” confessions, *Miranda* does not simply provide a prophylactic rule to implement the “voluntariness” standard. Instead, *Miranda* provides a paradigm case of what it means to be an involuntary confession — that is, a confession produced by interrogations unaccompanied by *Miranda*’s required warnings. This does not mean that those warnings are necessary for a confession to be voluntary: *Miranda* acknowledged that there may be “other procedures which are at least as effective” in preventing compelled confessions.²⁶ But the Court’s assessment of whether an alternative procedure is “at least as effective” cannot possibly be a comparison of how many false negatives the alternative procedure generates compared to *Miranda* because the whole point of *Miranda* is that the Court did not have a clear concept of the “hopes or fears” that constituted compulsion. Instead, the alternative procedure has to be sufficiently similar to the *Miranda* warnings that

²² 168 U.S. 532 (1897).

²³ *Id.* at 548.

²⁴ *Id.* at 549.

²⁵ 384 U.S. 436 (1966).

²⁶ *Id.* at 467.

it will generate the same intuition that the vague constitutional concern has been satisfied.

The same goes for virtually all of the so-called “prophylactic” rules that are described as implementing more general constitutional norms. Those rules invariably help constitute the constitutional norms that they allegedly implement. For instance, we do not have any clear, noncontroversial concept of political equality apart from the “one person, one vote” standard. How, therefore, could one possibly determine whether such a doctrine “overenforces” political equality by forbidding practices that do not diminish political equality? Likewise, we cannot determine whether the “beyond-a-reasonable-doubt” standard “overenforces” the norm against conviction of actually innocent defendants because we do not have any minimally reliable way of determining actual innocence except through use of our traditional criminal procedures, which include the *Winship* presumption. Thus, the doctrine partially defines the norm by way of illustration.

The assumption of a gap between constitutional meaning and constitutional doctrine, in sum, assumes that the former is well-defined absent the latter. I call this an antipragmatist assumption because it implicitly adopts the view that extraordinarily general terms like “voluntariness,” “political equality,” and “innocence” have meaning outside of some thick and specific set of social practices. The alternative pragmatist assumption takes as its starting point Oliver Wendell Holmes’s observation that a word is “the skin of a living thought.”²⁷ The flesh beneath the skin is, at least in part, judicially devised doctrine, including all of those doctrines that are allegedly under- or overenforcing abstract constitutional values. Those values are not the muscle but the hide; they do not determine the shape of doctrine but rather are shaped by the doctrine.

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Professor Fallon maintains that “pragmatism denies the possibility of rights or constitutional meaning apart from what the courts will enforce.”²⁸ But this charge confuses pragmatism with judicial supremacy. Pragmatism maintains that there is no constitutional meaning apart from the actions that the relevant institution takes to enforce the Constitution. But the pragmatist need not be a judicial supremacist, because the relevant institution need not be the judiciary. For instance, suppose that the Committee on Elections in the House of Representatives adopted the view that a candidate for the House could not be an inhabitant of a state within the meaning of Article I unless she

²⁷ *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

²⁸ Fallon, *supra* note 1, at 1315.

was legally domiciled within the state at the time of the election according to the relevant state's definition of "domicile." Suppose, also, that every other institution in the United States were prepared to follow this ruling. Then the pragmatist would be inclined to say that this ruling defined the meaning of the term "Inhabitant" in Article I, Section 2, Clause 2. In this case, the prophecies of what the Committee on Elections would do in fact, and nothing more pretentious, are what I mean by the law.

Pragmatism does not exclude departmentalism; it might be that different federal departments have different constitutional duties. Nothing in the view that social practices constitute the law suggests that "the meaning of provisions establishing official duties always ceases where judicial superintendence leaves off."²⁹ It might be that even if the Court refuses to entertain some constitutional claim, another institution will entertain a roughly similar claim. For instance, the Court might refuse to issue an injunction forbidding one private party from discriminating against another on account of race. This judicial refusal does not, on the pragmatist account, preclude Congress from enacting a statute that forbids such discrimination. The relevant constitutional meaning, in such a case, will be defined by those doctrines that determine when the Court will defer to Congress's decision. Such a view does not require any acknowledgment of some extra-institutional, freestanding "constitutional meaning" independent of what the Court and Congress do in fact.

Professor Fallon is, therefore, incorrect to urge that pragmatists cannot explain the political question doctrine.³⁰ That doctrine, like a myriad of other institutional norms such as standing, ripeness, mootness, jury trial, and rules against ex parte contacts, is simply a constitutional limit on Article III power that does not apply to Congress. Likewise, judges have powers that the political branches lack, such as the power of applying a preexisting legal standard to a specific individual in a specific case. Such institutional rules are themselves aspects of constitutional meaning, not simply doctrines of implementation. When the *Vieth* plurality refused to adopt an interpretation of the Constitution because it was not judicially manageable, it did not declare that there was some realm of meaning that mere practical considerations prevented the Court from implementing. Instead, the plurality declared that constitutional norms about the proper judicial role prevented the Court from carrying out a proposed constitutional rule regarding the proper role of partisan politics in electoral districting. To the pragmatist, *Vieth* does not show any gap between meaning and

²⁹ *Id.*

³⁰ *See id.* at 1314–16.

implementation; instead, it shows a gap between the constitutional capacities of Article III courts and Article I Congress. The cash value of such a difference in constitutional roles is given by Congress's capacity to make rules that the Court will enforce rather than enjoin.

Put another way, the Court did not "underenforce" the Equal Protection Clause in *Vieth*. Instead, it enforced one constitutional norm (about the proper judicial role) instead of another (about the proper scope of partisan politics). To the pragmatist, the institutional rules that define the different roles of Article III courts, the President, and Congress are matters not merely of implementation but of constitutional meaning. Whenever such constitutional limits on judicial means prevent the Court from taking actions that another branch might take, the Court is interpreting the Constitution just as surely as if it were to reach a decision on the merits of the substantive dispute.

The same can be said for judicial adherence to *stare decisis*, which is another restriction on the judicial role from which Congress is free. *Stare decisis*, like the political question doctrine, is a constitutional doctrine about proper judicial etiquette; it is a defensible extrapolation from Article III's requirement that judges exercise only the "judicial Power of the United States."³¹ This command requires that judges act like judges, which suggests that they show some sort of loyalty to precedent. When judges follow *stare decisis* instead of their own views of the Constitution absent *stare decisis*, they do not open up a gap between constitutional meaning and implementation. Instead, they enforce an Article III constitutional value to limit the power that would otherwise exist to enforce the Constitution. The Constitution specifies both means and ends, and if a judge adheres to judicial means, she is not "underenforcing" constitutional ends in the name of some extra-constitutional principle of implementation. Instead, she is fully enforcing a constitutional rule about the proper judicial role — a role that precludes the judge from exercising nonjudicial power, even in the name of constitutional values that would otherwise apply to a nonjudicial actor.

In the true pragmatist spirit, one might respond that the distinction between Professor Fallon's position and my own might have doubtful practical significance. After all, Professor Fallon agrees that implementation of the law has critical importance for constitutional doctrine. Our only difference is that he would distinguish between pure constitutional meaning and implementation, whereas I maintain that implementation is inextricably a part of constitutional meaning. In the end, what is the difference between our views?

³¹ U.S. CONST. art. III, § 1.

Perhaps there is no difference. I would urge, however, that instrumental concerns should not be downgraded to mere matters of implementation as if they could be quarantined in a subconstitutional category and thus avoid infecting the rest of the doctrine with their contingency. The costs of implementing constitutional doctrine typically concern matters of full-blown constitutional importance, such as adhering to precedent, using only judicially manageable rules in actual cases and controversies, maximally respecting the role of nonjudicial actors, and the like. These considerations have constitutional weight; when judges take them into account, they are not diluting the “real” Constitution but rather enforcing equally aspirational constitutional goals. Likewise, any reliance on text or history will properly be influenced by instrumental reasoning, if only because ordinary interpretation requires one to share most of the values and goals of the writer whose words one strives to interpret.³² Thus, when Chief Justice Marshall broadly interpreted the Necessary and Proper Clause of Article I, Section 8 in *McCulloch*, he properly mixed instrumental and interpretive considerations, declaring that “it is the interest of the nation to facilitate [the enumerated powers’] execution” and “can never be their interest, and *cannot be presumed to have been their intention*, to clog and embarrass [these powers’] execution by withholding the most appropriate means.”³³

McCulloch’s statement indicates that our view of what seems like excessively costly implementation is built into our interpretation of constitutional meaning from the very start: we do not, for instance, lightly attribute to the Framers a view that Article I clogs and embarrasses the federal government with gratuitous impediments. Likewise, textual interpretation tells us what counts as excessively costly implementation. A doctrine is judicially unmanageable in part because it calls on judges to act in a nonjudicial manner, making general policy decisions that seem to fall outside the “judicial Power” specified by Article III. In respecting these limits on judicial means, we do not temper our aspirations with middle-aged realism about the costs of implementation. Rather, we honor our aspirations regarding fundamental constitutional values, which include values about means as well as ends.

³² See DONALD DAVIDSON, *On the Very Idea of a Conceptual Scheme*, in INQUIRIES INTO TRUTH AND INTERPRETATION 183, 196–97 (1984).

³³ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 408 (1819) (emphasis added).