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Rights as Trumps

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RIGHTS AS TRUMPS

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I. INTRODUCTION

Professor Fallon's article, *Individual Rights and the Powers of Government*,[1] says much about many things.[2] At its core, however, the paper concerns how rights work. Professor Fallon posits two contrasting conceptions of rights. Some people, he says, claim that "rights are trumps";[3] in other words, rights serve as "independent checks on government power, not capable of being put into a balance in which they might be outweighed."[4] Professor Fallon vigorously challenges this depiction of rights. In his words, "[w]e have no way of thinking about constitutional rights independent of

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[1] Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343 (1993).

[2] In addition, what is said is very valuable. As I put it at the time I spoke about the paper:

> I wish to begin by . . . offering praise for [Professor Fallon's] truly remarkable paper. To begin with, the paper is extremely ambitious—so ambitious that it is impossible to comment on more than a few features of it, which is all I shall do. The paper was also very useful and illuminating to me. The issue it addresses is one that has always troubled me at a very unsophisticated level, and the paper for me cast much light. Also, to his particular credit, Professor Fallon is not satisfied to talk only of abstractions. Having expounded a theory, he rolls up his sleeves and explores a number of the theory's real-world implications.

Dan T. Coenen, Remarks at the Sibley Lecture, University of Georgia School of Law (Oct. 29, 1992) (audio tape on file with University of Georgia School of Law Library). I then added the following disclaimer:

> Having said all these nice things about your paper, Professor Fallon, I need to add that they come from a quite untrustworthy source. In the interest of full disclosure, I must tell you that I do not work at all in the field of jurisprudence and have only the most passing familiarity with the theoretical scholarship on which your paper builds. My last law review article concerned priority disputes over accounts receivable under Article Nine of the U.C.C. And so I feel a bit like Admiral Stockdale, asking myself why I am here.

Id. All these comments were, and remain, true.

[3] Fallon, *supra* note 1, at 345.

[4] *Id.* at 371.

what powers it would be prudent or desirable for government to have."[5] It follows that "rights are conceptually interconnected with, and occasionally even subordinate to, governmental powers."[6]

In this essay, I question Professor Fallon's strong rejection of the notion that "rights are trumps" by making four points. First, rights are trumps in the simple, but important, sense that they preclude the exercise of powers granted to government by the constitutional text. Second, rights sometimes operate as trumps on governmental powers in the very pure sense that they cut off all consideration of governmental interests. Third, even when the Court considers government interests in dealing with rights, it often does so on such a restricted basis that the description of rights as "trumps" remains accurate. Finally, even accepting the proposition that the fixing of rights inescapably involves a broad-based balancing of government and individual interests, there is a need to state principles for striking the balance at a very high level of generality. In my view, given our long, wise, and textually compelled constitutional heritage of individual liberty and equality, there is much to be said, both descriptively and normatively, for a constitutional vocabulary that proclaims that, at least sometimes, rights are trumps.

II. RIGHTS AS TRUMPS

A. INDIVIDUAL RIGHTS AS PREEMPTORS OF GOVERNMENTAL POWERS

On its face, the Constitution does two things. First, it grants powers to the branches of the federal government.[7] Second, it establishes rights that limit government's ability to act pursuant to its granted powers.[8] Given this constitutional architecture, it seems indisputable to say that individual rights "trump" government powers. Professor Fallon, however, ably explains why the relationship of rights and powers is more complicated than first

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[5] *Id.* at 344.

[6] *Id.*

[7] *See* U.S. CONST. art. I, § 8 (granting specific powers to Congress); U.S. CONST. art. II, §§ 1-2 (granting specific powers to executive); U.S. CONST. art. III, §§ 1-2 (granting specific powers to judiciary).

[8] *See* U.S. CONST. amend. I-IX (guaranteeing enumerated rights of individuals).

meets the eye. In particular, he shows that the Supreme Court often considers the strength of the interests that support the government's exercise of its powers in deciding whether a right is infringed.

Recognition of this complexity, however, does not justify overlooking the basic constitutional plan. Rights do trump governmental powers, and they do so even if government interests are considered in defining the scope of the right.[9] There is, moreover, practical significance in recognizing that the Constitution conceives of rights as preemptors of the exercise of granted governmental powers. At the least, the Constitution's rights-as-trumps structure—regardless of the precise role government interests play in shaping rights—bespeaks a political culture in which claims of right must be taken seriously.

B. RIGHTS AS TRUMPS IN THE PURE SENSE

The preceding discussion suggests that all rights serve as trumps in the simple sense that they preempt otherwise valid exercises of governmental powers. It is no less important to see that some

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[9] Many decisions in which the Court has struck down government action pursuant to a rights-protective provision of the Constitution are illustrative of this principle. For example, in Sable Communications of California, Inc. v. FCC, 492 U.S. 115 (1989), there was no doubt that Congress had the *power*, under the Article I, Section 8 Commerce Clause, to prohibit certain dial-a-porn messages. *Id.* at 124-25. Congress' effort to do so was struck down, however, because it violated the free-speech *right* established by the First Amendment. *Id.* at 126. Moreover, the act was struck down as violative of the right notwithstanding the government's claim that its *interest* in protecting children justified the legislation. *Id.* at 128-29.

One might read Professor Fallon's paper to suggest that the distinction between government powers and government interests is no longer real because government powers (and, in particular, the federal government's powers) in effect have become limitless. That assertion, however, is not true even with respect to the broad powers of the national Congress. *See* New York v. United States, 112 S. Ct. 2408, 2435 (1992) ("The Federal Government may not compel the States to enact or administer a federal regulatory program."). And the claim certainly is not true as to the powers of the executive and judicial branches, which face significant internal limits on the exercise of their powers, wholly apart from any person's claim of right. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 588-89 (1952) (holding that President exceeded constitutional authority by taking possession of private businesses to settle labor disputes); Warth v. Seldin, 422 U.S. 490 (1975) (requiring plaintiff to establish "case or controversy" under Article III of Constitution before Court may decide case).

rights go further and act as trumps in the even stronger sense that they preempt all consideration of governmental interests.

In many cases, as Professor Fallon demonstrates, an assessment of government interests is part of the judicial calculus as to whether rights have been infringed. In many other cases, however, rights shut off all consideration of government interests and thus operate as "trumps" in a very pure sense. The Seventh Amendment, for example, establishes the "right of trial by jury" in "[s]uits at common law, where the value in controversy shall exceed twenty dollars."[10] As Charles Alan Wright has observed: "The Seventh Amendment creates a *historical* test for trial by jury"[11]—namely, whether the plaintiff's claim is one that past courts would have considered "legal," rather than "equitable," in nature. In other words, application of the jury trial right—for reasons we might describe as formal reasons or reasons of positive law—blocks resort to competing interests in efficiency, accuracy, or the like.

There are other rights that act as trumps in essentially the same way. The right not to testify against oneself, for example, absolutely bars the government from calling a criminal defendant to testify at the defendant's own trial, even in the face of the most powerful needs to identify and punish criminal wrongdoing.[12] In a similar vein, although Professor Fallon cites Fifth Amendment takings law as indicative of the pervasiveness of balancing,[13] there is a strain of Fifth Amendment law that automatically requires compensation in cases that involve physical invasions of property.[14] In such cases, as the Court has put it, there is "a taking *without regard to the public interests* that [the government's action] may serve."[15] Moreover, and importantly, the physical-invasion rule is not merely the result of some categorical balancing of competing interests. Rather, the rule flows largely from textual and historical justifica-

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[10] U.S. CONST. amend. VII.

[11] CHARLES A. WRIGHT, THE LAW OF FEDERAL COURTS § 92, at 609-610 (4th ed. 1983) (emphasis added).

[12] WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 24.4, at 1031 (2d ed. 1992).

[13] Fallon, *supra* note 1, at 363.

[14] *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982) (stating that "permanent physical occupation of property is a taking").

[15] *Id.* at 426 (emphasis added).

tions that have little to do with whether governmental interests are "outweighed."[16]

A broader point is that Professor Fallon's paper says little about the role of formal reasons in developing constitutional rules, even though such reasons interact in complex ways with the sort of interest-balancing Professor Fallon sees as pervasive.[17] One way in which this interaction occurs is that considerations of positive law sometimes cut off all resort to arguments based on government interests. In such cases, rights are trumps.

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[16] As these examples suggest, one difficulty with Professor Fallon's position is that it builds on a characterization of rights at a conveniently high level of generality. For example, most of us would concede that "freedom of speech or of the press" leaves off at some point based on countervailing public interests. Thus, the state may deem libel actionable and perjury a crime. In other words, the more broadly a right is characterized, the more difficult it becomes to say that it is "not subject to being put in a balance." But why need we characterize our rights so broadly? For example, we could say that there is a right to some significant forum for engaging in pure political speech. Or (to draw upon another amendment) we could say that individuals have a right that bars government from intentionally putting them in severe and prolonged physical pain. Once we describe the right this way, it becomes hard to say that it can be put in a balance.

There is, it merits emphasis, more going on here than mere word play. The underlying point is that the texture of some rights is sufficiently strong that they act in a very real sense as trumps.

Another force that may drive Professor Fallon away from "rights are trumps" rhetoric is his fixation on the work of the Supreme Court. The Supreme Court handles hard cases, in which claims of right are often sticky and countervailing claims of public need are often strong. There are easy cases too, however, and those cases may be easy precisely because of the strong freestanding nature of the right. There is little litigation, for example, about the government's power to bury prisoners alive, to extract confessions by physical torture, or to ban newspapers. Moreover, the mere fact that the rights that prohibit such governmental actions are well-established does not render those rights unimportant. Indeed, the unquestioned acceptance of such rights in our society resonates with the view that they are not capable of being put in a balance in which they might be outweighed.

[17] *See generally* P.S. ATIYAH & R.S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW (Oxford 1987). For example, just as an appeal to government interests may be precluded by the formal underpinnings of a claimed right, resort to a right may be cut off by appeals to such formal concerns as historical practice or historical purpose. *See* Browning-Ferris Indus. of Vermont v. Kelco Disposal, Inc., 492 U.S. 257, 260 (1989) (holding that "history and purpose of the Eighth Amendment" indicate "that its Excessive Fines Clause does not apply to awards of punitive damages in cases between private parties"); Marsh v. Chambers, 463 U.S. 783, 794-95 (1983) (finding no violation of First Amendment religious freedoms by centuries-old practice of opening legislative session with prayer by chaplain).

C. "RIGHTS AS TRUMPS" DESPITE TALK OF GOVERNMENTAL INTERESTS

Professor Fallon emphasizes that, even in cases involving very strong claims of right, the Court often considers countervailing government interests said to justify government action. Contrary to Professor Fallon's suggestion, however, the Court's treatment of these cases may be seen as consistent with, rather than contradictory of, the claim that rights are trumps. To see why, we must think about the Court's reasons for talking about governmental interests in assessing claims of right. This subject is complicated, but at least in cases involving strong rights (like the right to engage in pure political speech or the right of minorities to be free of racial or religious discrimination), it seems fair to say that the Court talks about countervailing government interests for one basic purpose: to provide what might be described as an emergency escape valve from the operation of the right. It is for this reason that—to quote the old saw—"scrutiny that [is] 'strict' in theory" typically is "fatal in fact."[18] In other words, the Court employs the tool of exacting scrutiny, rather than the tool of automatic invalidation, solely because of the practical wisdom that one should never say never.

To my ear, this "emergency escape valve" conception of governmental interests in strong-rights cases fits comfortably into a rhetoric that describes rights as trumps. There may be rare cases, to continue the metaphor, in which the trump is overtrumped. This reality, however, does not diminish the *essential* character of the right as a strong, recognizable, and freestanding limit on governmental powers.[19]

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[18] Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

[19] There is another sense in which rights may be viewed as trumps in cases that involve express consideration of countervailing government interests. The Supreme Court, for example, has "rejected administrative ease and convenience as sufficiently important objectives to justify gender-based classifications." Craig v. Boren, 429 U.S. 190, 198 (1976). In other words, the right to be free of such discrimination shuts out all consideration of an entire—and extremely significant—category of interests said to justify the government's actions. When rights operate in such a fashion, it seems fair to say that they serve as "independent constraints on the powers of government." Fallon, *supra* note 1, at 344.

D. "RIGHTS AS TRUMPS" AS A META-BALANCING PRINCIPLE

All that precedes casts doubt on the need to conceive of rights solely in terms of judicial balancing of individual and governmental interests. Even if we accept a world view in which rights inevitably are only the result of balancing, however, it remains necessary to state balancing rules at a very high level of generality. In other words, judicial choices about whether governmental or individual interests should prevail in any given case will depend on verbal formulas that provide a structure in which these competing interests are assessed. It thus is critical in a society committed to individual liberty and equality that verbal formulas at a high level of generality communicate an emphatic commitment to the rights of the individual.

In fact, such verbal formulas are pervasive in our law. Thus, the invocation of rights often triggers the "strictest scrutiny";[20] Americans enjoy "preferred" freedoms;[21] and the "freedom to differ is not limited to things that do not matter much" because "[t]hat would be a mere shadow of freedom."[22] For me, the depiction of rights as trumps fits easily into this rhetorical tradition by communicating at least each of the following propositions: (1) there is a core set of human rights that can never be balanced away; (2) many rights are properly "balanced" against government interests only in the very narrow "emergency escape valve" sense; and (3) individual rights are never *merely* to be "put in a balance" but instead must always be viewed as possessing a special dignity because reflective of the special dignity of each individual human being.

The danger of failing to think about rights as trumps is suggested to me by the Court's peyote decision, *Employment Division, Department of Human Resources v. Smith*.[23] In practical effect, the issue in the case was whether the government could send Alfred Smith to jail for consuming peyote as part of a religious sacrament of the Native American Church. Writing for the Court,

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[20] Rogers v. Lodge, 458 U.S. 613, 617 n.5 (1982).
[21] Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943).
[22] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).
[23] 494 U.S. 872 (1990).

Justice Scalia rejected Mr. Smith's free exercise claim on the ground that "an individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[24] In adopting this rule, the Court relied on such considerations as (1) the practical difficulties courts would face if required to consider religion-based claims of exemption from all laws imposing general criminal prohibitions;[25] (2) the government's need to counter "socially harmful conduct";[26] and (3) the risk that taking a different approach would amount to "courting anarchy."[27] What is striking about the Court's analysis of Mr. Smith's free exercise claim is that the Court focuses on most everything except Mr. Smith himself.

To my way of thinking, a recognition that at least some rights are "trumps" carries the virtue of making it hard to talk about *Employment Division v. Smith* without talking about Mr. Smith, and thus advancing the core constitutional norm of recognizing his individual worth. This is so because the very acknowledgement that there are rights that trump all attempted exercises of governmental power forces us to inquire what those rights are—that is, to focus on the contours of the individual's zone of freedom into which the hand of government cannot reach at all. Moreover, once a court undertakes to explore those boundaries in a case like Mr. Smith's, it becomes difficult, if not impossible, to ignore considerations that, to me, deserve a prominent role in the case: the centrality of religious belief and practice to Mr. Smith's personal fulfillment; the extraordinary burden placed on Mr. Smith by criminalizing his participation in his own religion's central religious ceremony; and the absence of alternative means for Mr. Smith to participate in religious sacraments.[28]

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[24] *Id.* at 878-79.

[25] *Id.* at 885.

[26] *Id.*

[27] *Id.* at 888.

[28] *See id.* at 919-21 (Blackmun, J., dissenting). In making these comments, I do not mean to fault Professor Fallon for incorrectly analyzing the *Smith* case in his paper. In fact, he does not analyze the case at all, and I have discussed *Smith* only to illustrate how the retention of a rights-are-trumps rhetoric could matter in one concrete case. I also do not mean to suggest that Professor Fallon is unconcerned about individual liberty or equality. In fact, he takes pains in his paper to highlight the risk of "abuses of governmental power," Fallon, *supra* note 1, at 360, to emphasize "that, in the absence of judicial oversight, political

Perhaps analysis of Mr. Smith's case proceeds the same way even if the Court's opinion starts with the words "rights are trumps." To me, however, that result seems doubtful. And that is the point. In a balancing world, balancing rules matter greatly in how balances are struck. Moreover, there is no obvious reason to reject—particularly in a time when so-called "definitional" or "categorical" balancing enjoys broad currency[29]—a strong meta-balancing rule that endorses some zone of freedom that cannot be balanced away.

III. CONCLUSION

Much of what we do as legal analysts involves trying to find words to capture legal realities. It is important to recognize, as we go about this business, that there exists a causal link between the words we use to describe reality and the perceptions of reality that those around us come to embrace. Perceptions of reality, in turn, shape reality, for persons who thus have developed perceptions often strive to think and act in accord with what is "normal" and "accepted" and "right." This tendency is particularly strong in a legal system that self-consciously espouses a commitment to following the teachings of the past.

This is not to say that we should misstate what is real to achieve what we believe is right. To the contrary, a commitment to intellectual honesty is the highest duty of academics and a particular duty of those academics who work with the matters of morality that inevitably are bound up with the law. What is important to see is that we must be very careful in choosing and abandoning rhetorical traditions, lest we disserve both the cause of accurately depicting legal realities and the cause of justice. Professor Fallon ably demonstrates that it is an oversimplification to say "rights are trumps" and then to say nothing more. It is also, however, an oversimplification *not* to say that "rights are trumps," for in important senses they are.

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decision makers will undervalue the interests that rights are supposed to protect," *id.* at 377, and to suggest a preference for "a broad judicial role," *id.* at 374. These same concerns underlie my basic point here: We should think hard before retreating too much from a constitutional rhetoric that recognizes rights as trumps.

[29] *See, e.g.*, GERALD GUNTHER, CONSTITUTIONAL LAW 1082 (12th ed. 1991) (describing *New York Times* line of cases as reflecting "balancing, albeit not ad hoc balancing").

In the end, my point may boil down to being that Professor Fallon's description of those rights that emanate from the American Constitution is inaccurate because it is too descriptively sterile. It does not capture our Revolutionary heritage, the pitched battle of antifederalists for a Bill of Rights, the Jeffersonians' assault on the Alien and Sedition Acts, and the passionate egalitarianism of the abolitionists and reconstruction-era Republicans. Nor, in my view, does Professor Fallon's depiction of rights fairly capture the spirit of *Brown v. Board of Education*,[30] *Gideon v. Wainwright*,[31] *New York Times Co. v. Sullivan*,[32] *Roe v. Wade*,[33] and *Texas v. Johnson*.[34]

There are ironies in these remarks. The first is that, while I criticize the rhetorical accuracy of Professor Fallon's article, I view the paper as reflecting the highest level of intellectual honesty. Professor Fallon is trying hard to find words that fairly describe what the Supreme Court does. I do not criticize, but praise, that effort and the spirit of fair-minded inquiry that Professor Fallon has brought to his endeavor. I question only whether his effort, in the end, has been wholly successful.

The second irony is that, while I have made a case against abandonment of a "rights are trumps" rhetoric, I must admit that I am, in many ways, sympathetic to judicial balancing.[35] Is this inconsistent? I think not. Somehow we must communicate, descriptively and normatively, the special role rights play both inside and outside the judicial balancing process. Recognizing that in important ways rights are trumps properly serves this critical purpose.

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[30] 347 U.S. 483 (1954).
[31] 372 U.S. 335 (1963).
[32] 376 U.S. 254 (1964).
[33] 410 U.S. 113 (1973).
[34] 491 U.S. 397 (1989).
[35] *See generally* Dan T. Coenen, *Justice Blackmun, Federalism and Separation of Powers*, 97 DICK. L. REV. (forthcoming July 1993).