1-1-1992

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CONCEPTUAL INTERDEPENDENCE AND COMPARATIVE COMPETENCE

Eric Rakowski*

Professor Fallon argues that individual rights against the government are not conceptually independent limits on public power within our constitutional order. He further maintains that, because weighing the competing interests that ground assertions of personal or state prerogative is a ubiquitous feature of American constitutional law, governmental institutions should be delegated primary responsibility for discharging this task, and judges should be appointed largely on the basis of their competence in balancing opposed interests.

The first of these claims is, I shall argue, unhelpful. Conceptual interdependence, as Fallon appears most frequently to understand this relation, denotes an analytical connection between paired concepts, a relation that their definitions render unfailingly true. Saying that rights and powers are conceptually interdependent is like saying that the volume of air in a bottle depends upon the volume of wine it contains, and vice versa. Understood in this way, Fallon's conceptual interdependence thesis is trivial. At best, noting the interrelation enables him, to the extent that his empirical claim about the public's unawareness of this truth is correct, to expose a flaw in many people's unstudied view of how constitutional rights and state power may collide. But it remains obscure why we should be concerned about what abstract statements people are inclined to make about rights prior to reflection. Surely it is their considered beliefs that count.

As I show below, however, several passages suggest that Fallon wishes to make a falsifiable claim about American constitutional practice. He might be contending that judges routinely delimit the scope of individual rights and governmental powers based on their own assessment of the interests at stake, rather than blindly enforce the judgment of others, such as the Constitution's authors.

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or popular morality. If this reading of Fallon’s paper is accurate, saying that individual rights and the government’s powers depend conceptually on one another is merely an infelicitous way of noting that originalism has never been the working jurisprudential theory of most American judges, and certainly not of the Supreme Court. This assertion, if indeed it forms the core of Fallon’s conceptual interdependence thesis, is plainly true. But for that reason it likewise seems too familiar to contribute much to our understanding of what the courts have done or to prompt advice about what they should do.

The second of Professor Fallon’s claims I consider below is more difficult to assess. Judges, he says, might be less competent than other governmental actors in finding the right balance between rival interests in certain classes of cases. Indeed, in some areas the Supreme Court has attempted to ossify this insight in doctrine. Nevertheless, in many instances judges must themselves evaluate adverse interests, without deference to earlier decision makers. Hence, they should be chosen, Fallon recommends, with an eye to their proven competence in gauging personal and public claims.

How we allocate decision-making authority is of course crucially important, as a matter of political theory and within the constraints of our constitutional structure. Virtually everything Fallon says about this issue is, by my lights, insightful and sound. What worries me is the rhetoric of competence and the suggestion that excellence in judging shadows experience, that it naturally trails lawmakers’ or executive officials’ first-hand acquaintance with the benefits and costs of defining entitlements or permissions more or less broadly.

Assessing people’s warring claims is not a task at which public servants can be credited with expertise, according to some untested measure of technical proficiency. What matters most (if by no means exclusively) in assigning authority or choosing decision makers is judges’ or other officials’ values. The crucial determinants in selecting men and women for the bench and bounding their authority are the convictions that specific individuals or groups of people espouse or are apt to hold with regard to the legitimacy of various governmental actions and with respect to the proper constitutional relation between individual freedom and collective preference. Intelligence and legal craft matter too, but
they cannot eclipse the significance of moral commitments. Possibly Fallon would agree with this claim. Given some ambiguity in his article, however, the point might benefit from added emphasis.

I. FALLON'S CONCEPTUAL INTERDEPENDENCE THESIS

Professor Fallon's "basic thesis" is that, within our constitutional culture, personal rights to thwart the exercise of governmental power are not "conceptually independent" of the power they constrain.¹ I fully agree with this claim. Mapping the boundaries of individuals' constitutional rights against the state ineluctably entails fencing government's powers simultaneously.² And the only sensible way to mark this border, as Fallon says, is to consider citizens' myriad interests—in leading comfortable and meaningful lives, in personal autonomy, in depressing the risk of tyranny—and to assess their relative importance when conflicts loom.

Where I think we disagree is over the significance of this thesis. Fallon's text seems open to two plausible readings, neither of which, in my view, notably advances our understanding of the roles our courts have played in defining rights and powers or helps us decide whether those roles are appropriate.

A. CONCEPTUAL INTERDEPENDENCE AS STIPULATED DEFINITION

Professor Fallon's conceptual interdependence thesis is, I think, most naturally read as a tautology. It is analytically true that individual constitutional rights limiting the reach of governmental powers form the obverses of those powers. This interpretation is supported by Fallon's statement that his thesis "is analytical, not

² This is not to say, of course, that rights always have hard edges, permitting an exact description of their domain, or that a constitution should aspire to that precision. There are evident advantages to stating rights amorphously, so that they may be turned to unforeseen purposes and their content may evolve as circumstances and moral insight change. My simple point, which seems to be Falls's as well, is that wherever a right against the government is found to end in a given case, governmental power begins.
normative,” and that “[w]e have no way of thinking about constitutional rights independent of what powers it would be prudent or desirable for government to have.” It is further confirmed by his repeated references to the relation as “conceptual,” which implies that it cannot be shown up as false by an obdurate reality. In addition, this reading finds confirmation in Fallon’s invocation of Hohfeld’s definitional pairings of individual rights or privileges with corresponding duties or the absence of rights on the part of government, ties which are incontestably analytical relations.

If the conceptual interdependence thesis is tautological, however, why offer it? One possible answer is that its being tautological does not preclude its being eye-opening. After all, analytical truths are sometimes recondite, arresting, and profoundly influential. This is frequently true of logical or mathematical demonstrations—think of Gödel’s theorem—and might hold here as well.

Professor Fallon believes that many people (it is not entirely clear which individuals or groups he has in mind) misapprehend the logical interconnection of constitutional rights and powers. A “familiar understanding” of governmental powers subordinates them to individual rights. “[W]e often assume” that rights are conceptually independent moats holding back governmental powers. This assumption is “easy” to make, and it encourages us to read the writings of Ronald Dworkin and other liberal thinkers.

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3 Fallon, supra note 1, at 382.
4 Id. at 344. Numerous other quotations buttress the conclusion that Fallon regards rights and powers as definitionally linked, both born, as a constitutional matter, from an explanatory prior conception of people’s interests. Fallon says, for example, that it is “impossible to understand either government powers or individual rights other than in terms of the interests they are designed to promote.” Id. at 347-48 (emphasis added). Or again: “Each is specified in terms of the other, and the balance is struck by reference to underlying interests.” Id. at 361. The conceptual interdependence thesis appears true by virtue of the meanings we attach to its primary terms.
5 E.g., id. at 347.
6 See id. at 344 n.4. The purely analytical character of Hohfeld’s analysis is brought out clearly in Judith J. Thomson, The Realm of Rights 39-60 (1990); J.W. Harris, Legal Philosophies 76-86 (1980).
7 Fallon, supra note 1, at 343.
8 Id.
"acontextually" in defense of this mistaken view. At least part of Professor Fallon’s aim is apparently to help us look upon constitutional claims to rights or collective authority better aware of what sacrifices recognizing those claims would entail.

In my opinion, however, little profit, whether of insight or conduct, is likely to accrue from noting the analytical relation between rights and powers. It is too transparent. Anybody pondering whether a court should declare a constitutional right to shout racially demeaning remarks, or to kill animals cruelly as part of a religious ritual, or to own firearms, cannot help but ask whether some governmental entity should be empowered to outlaw that conduct. Perhaps someone confronted by the abstract question of what constitutional rights are, without any reference to context, might neglect to mention governmental powers. But reference to any concrete factual situation would surely repair this deficit. Moreover, even if Fallon’s phenomenological claim were true, so that most of us need a more forceful reminder of the indivisible link between rights and powers when reflecting on constitutional issues to attend to this conceptual relation properly, it is worth asking exactly what benefits we can expect to reap when we become more acutely aware of the interconnection. Professor Fallon’s discussion is chary of examples of errors that courts or other decision makers have made because they ignored the conceptual interdependence thesis, as well as of specific predictions about the advantages of acknowledging this analytical truth. These omissions, if they do not call into question the utility of Fallon’s thesis, might indicate that interpreting his claim as tautological mischaracterizes it, notwithstanding the passages quoted above.

B. CONCEPTUAL INTERDEPENDENCE AS NONORIGINALISM

Although the bulk of Professor Fallon’s references to conceptual interdependence support construing it as an analytical relation,

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9 *Id.* at 368. Fallon does not charge Dworkin with this error. Dworkin would, however, object to Fallon’s use of the verb “balancing” to describe an appropriate approach to judging the merits of competing claims. *Id.* at 346. In Dworkin’s view, balancing is proper when a judge must weigh opposed assertions of *right*, but not when a claim of individual right conflicts with a more diffuse public welfare interest that lacks the importance necessary for ascriptions of rights. See RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 197-200 (1977).
parts of his discussion point in a different direction. He says, for example, that "in American constitutional law, rights typically do not operate . . . as conceptually independent constraints on the powers of government," which seems to imply that sometimes they do operate in this way. He contends that Ronald Dworkin's theory of rights "is, in its main lines at least, compatible with my thesis," suggesting that incompatibility is possible—which is scarcely conceivable with respect to a bare definition—and that it might well obtain. More important, Fallon asserts on two occasions that "post-New Deal constitutional theory has departed from older strands of liberal thought that would have viewed rights as conceptually independent limits on governmental power." In fact, he writes:

Constitutional rights would often be conceptually independent of considerations supporting broader or narrower governmental powers in some natural law theories and historically-based understandings of constitutional guarantees, and possibly in theories based on Kantian conceptions of personhood or autonomy. Indeed, constitutional rights would much more often be conceptually independent of government powers in virtually any theory that did not call for a balancing of the interests supporting a claim of right against the interests supporting recognition of a power of government to promote some competing good.

At least in some moments, Fallon therefore appears firmly of the view that conceptual interdependence is a contingent relation between rights and powers, one that has acquired prominence in American constitutional law only recently and that formerly earned more jeers than applause. I frankly do not know how to reconcile these quotations with Fallon's assertions about the impossibility of

10 Fallon, supra note 1, at 344 (emphasis added).
11 Id. at 345.
12 Id. at 368; see also id. at 346.
13 Id. at 345-46 (footnotes omitted).
conceiving constitutional rights apart from powers or his labeling his thesis "analytical," unless by the latter he means it describes present practice by analyzing or dissecting the regnant jurisprudential orthodoxy. But it is worth considering the view expressed in these quotations without regard to seemingly inconsistent passages.

Three aspects of Fallon's exposition and defense of this view puzzle me. The first is his list of champions of the rival conceptual independence thesis. As advocates of "historically based understandings of constitutional guarantees," Fallon lists Antonin Scalia and Henry Monaghan. Neither of these writers challenges the definitional claim that, for constitutional purposes, individual rights against the state necessarily circumscribe state power and that the reach of legitimate state power perforce marks the perimeter of individual rights. Their target is the contention that current Supreme Court Justices' views about where the line should be drawn ought to govern, rather than the view of some earlier decision maker, such as the Reconstruction Congress. These citations suggest that, for Fallon, conceptual independence is synonymous with, or at least encompasses, originalism and that Fallon's main thesis, although never phrased in this way, is that the Supreme Court has rejected this and related approaches to constitutional interpretation.

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14 Id. at 346 n.9 (citing Antonin Scalia, Originalism: The Lesser Evil, 57 U. Cin. L. Rev. 849 (1989); Henry Monaghan, Our Perfect Constitution, 56 N.Y.U. L. Rev. 353 (1981)).

15 By "originalism" I mean the view that a law or constitutional provision should be read by a court as commanding or forbidding what its enactors or some larger group of people would have deemed it to command or forbid at the time it was enacted, typically without allowing for any widespread changes in values or perceptions between that time and the time of adjudicative interpretation and regardless of judges' opinions about the correctness of those earlier views. See, e.g., Paul Brest, The Misconceived Quest for the Original Understanding, 60 B.U. L. Rev. 204, 204 (1980) (defining two species of originalism: "strict textualism" and "strict intentionalism").

16 Further support for this conclusion resides in Fallon's claim that his thesis entails that "the outer boundaries of judicial authority, and especially the power and responsibility of the Supreme Court, are necessarily broad." Fallon, supra note 1, at 372. His thesis has this conclusion, Fallon says, because the Court has, quite properly, defined constitutional rights by referring explicitly to the interests they sustain; the originalist complaint that Fallon's view "wrongly invites judges to substitute their personal values for those of the Constitution" is therefore, he says, misguided. Id. Fallon's contention that prophylactic rules, such as the rule excluding from evidence statements made by criminal defendants not given Miranda warnings, are proper and illustrate his point, see id. at 373-74, lend additional plausibility.
The remaining examples have presumably been chosen to illustrate possible positions other than originalism that insist on the conceptual independence of rights and powers as a matter of American constitutional law. I make this inference because if Fallon intended to oppose his understanding of contemporary constitutional dogma to originalism only, he would have said so directly. But if this is Fallon's aim in selecting these examples, the class of positions he means to deny is shadowy.

The two representatives of "natural law theories" he names are Robert Nozick and Richard Epstein. Nozick does not, however, purport to offer a theory of constitutional rights, which is what the present interpretation of Fallon's thesis addresses; instead, he sets forth a theory of distributive justice and collective authority he believes that all states ought to honor, without arguing that the theory is implicit in our Constitution. Thus, the relevance of Nozick's argument is obscure. The example is also odd because Nozick's account of rights is self-consciously an exposition of people's rights not to be coerced by others, whether those others act individually or as a body, such as a state. Nozick does not conceive of rights except as limitations on governmental and other powers, nor does he view the division of state and individual authority as immutable, because people are free to relinquish some or all of their rights in building a state they like.

The same points hold true of other moral philosophical accounts of individuals' rights against the state, such as those offered by Hobbes or Locke or Gauthier or Rawls, to which Fallon refers. All these writers consider explicitly the party-wall nature of rights and powers in demarcating the frontiers of personal liberty and collective coercion. Suitably defined people deciding upon the limits to sovereign authority in some hypothetical choice situation ineluctably juggle the gains and losses to human freedom from delegating to government a greater or lesser bundle of the claims and permissions they as individuals are thought naturally to

to this reading.

17 Fallon refers to the argument contained in Robert Nozick, Anarchy, State, and Utopia (1974).

Moreover, these varied philosophical resolutions of the question where governmental powers end speak not at all—certainly not directly—to the question of how the Constitution should be read in late twentieth century America.

As for Epstein, his theory of the Just Compensation Clause in *Takings* is, for the most part, straightforwardly originalist: which rights some constitutional provision confers depends upon its authors' intentions as expressed in canonical language. Locke’s (corrected) views have constitutional stature only because the framers shared them and sought to fix them in constitutional parchment. The conceptual independency claim appears to be

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19 Like Nozick, these writers attempt to set forth those rights people have against one another, and only *a fortiori* against state authority. Some further contend that individuals may not alienate any natural rights they choose in delegating power to governments. Hobbes, for example, thought that a person could not surrender his right of self-defense when he joined a state. See *Hobbes*, supra note 18, at 199, 268-69; *De Cive: The English Version* ch. 2, § 18, at 58-59 (H. Warrender ed., 1983) (1651). And Locke argued from our natural duty to preserve ourselves to the impossibility of our legitimately conferring absolute and arbitrary power on a sovereign authority. See *Locke*, supra note 18, *Second Treatise* § 135, at 402-03. These points, however, in no way call into question the thesis that whatever rights people do have against one another or the state are intelligible solely by reference to the corresponding power of persons and entities they check.


21 Although Locke misunderstood the implications of some of his premises, Epstein says, the "critical point" is not what Locke thought, but what the framers thought he proved, because they wrote the Constitution. Id. at 12. Their intentions, as expressed in the Constitution's text, settle its meaning. Judges lack a license to update, that is, alter, its meaning to cope with new challenges. "[T]he idea that constitutions must evolve to meet changing circumstances is an invitation to destroy the rule of law." Id. at 24.

At least this seems to be Epstein's view, because it is the only one that could justify his extended examination of Locke's arguments and the importance he attaches to their being "dominant" when the Constitution was written and ratified. Id. at 16. Nevertheless, in fairness to Professor Fallon, if he wishes to use Epstein's book to exemplify some other position, I freely acknowledge that Epstein's ruminations about constitutional interpretation in *Takings* are cryptic. Only five pages after averring that historical meanings must guide constitutional interpretation at the risk of forfeiting the rule of law, he notes that "[h]istorical arguments have played virtually no role in the actual interpretation" of the Eminent Domain Clause by the Supreme Court, and he says that "[t]he question of what the specific clauses meant and how they applied in particular situations was left to future generations." Id. at 29. It is hard to square these assertions with the historically based understanding of the Clause Epstein favors. Likewise, it is difficult to see why "[t]he dominant loyalty is to the text as written and not to the framers' view of the consequences it entailed," id. at 28, when the main reason why textual language is legally controlling is that it is "the best evidence of textual intention." Id. at 27 (emphasis added).
little more than an alias for an inflexible theory of constitutional interpretation by reference to past non-judicial decisions.

Nor is it clear what point Fallon hopes to make by mentioning "Kantian conceptions of personhood or autonomy" and by qualifying the reference by saying that they are only "possibly" illustrations of his thesis. Apart from Bruce Ackerman's book *Social Justice in the Liberal State*, which is an explicitly normative work that does not purport to say how the Constitution or any other legislation should be read, the writings Fallon cites all offer readings of the First Amendment's Free Speech Clause that are sensitive to the interdependence of rights and powers in defending one view of the balance between them. David Strauss, for instance, in the article Fallon cites, states that his favored principle for delimiting freedom of speech "can be overridden if the consequences of following it are too severe," thereby demonstrating an awareness of the interdependence of personal rights and state power that Fallon appears to think he "possibly" ignores.

Finally, at the risk of unduly prolonging this inquiry, Fallon concludes his catalogue by saying that "constitutional rights would much more often be conceptually independent of government powers in virtually any theory that did not call for a balancing of the interests supporting a claim of right against the interests supporting recognition of a power of government to promote some competing good." This sentence seems to me only to thicken the fog. The words "much more often" and "virtually" indicate that the distinction between conceptual interdependence and conceptual independence is not coincident with the distinction between interpretive theories that counsel interest-balancing by judges and those that forbid it. The rest of Fallon's article, however, is devoted to the ways that American courts have traded off constitutionally

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22 Fallon, *supra* note 1, at 346.
23 *Bruce A. Ackerman, Social Justice in the Liberal State* (1980).
24 See Fallon, *supra* note 1, at 346 n.11.
26 Fallon, *supra* note 1, at 346.
significant interests since the 1930s and the implications of pervasive interest-balancing for the allocation of decision-making authority. If the ubiquity of interest balancing by judges in setting the contours of constitutional liberties for at least the past fifty years is not what the conceptual interdependence thesis, treated as a descriptive claim, is intended to affirm, then Fallon's point escapes me. But his language indicates that this is not his point, because conceptual interdependence has no necessary connection to interpretive methods that balance state and personal interests. The import of Fallon's thesis is therefore uncertain.

So much for the first puzzling aspect of Fallon's exposition. His examples leave unclear the precise meaning of his claim. The second feature I find enigmatic is the absence of any discussion of rival descriptive accounts of constitutional judging over the last few decades. Careful attention to opposing views would silhouette Fallon's own contentions, lending them the definition their abstract formulation lacks. But challengers go unmentioned following this brief list of alleged partisans of conceptual independence. One is tempted to infer either that Professor Fallon's conceptual interdependence thesis is not descriptive, or that he is unsure who contests it, or that the claim is patently true, which in turn suggests, even if it does not guarantee, that its significance is slight. I do not know what to make of his opponents' invisibility.

The third reason for my perplexity is the omission of any discussion of what Fallon suggests was a sharp, significant transition in the late 1930s from judges' use of interpretive methodologies that repudiated the conceptual interdependence thesis to their adoption of theories of adjudication that embraced it. If there was a noteworthy change of this kind, then one would expect a proponent of the descriptive claim we are now considering to address the reasons for the switch and the desirability of one or the other method. Fallon's paper, however, leaves the matter untouched. This might indicate that his conceptual interdependence thesis is not an assertion about history, but rather a definitional relation. As we saw, however, there are problems with that alternative reading too.

For these reasons, I am uncertain just what Professor Fallon's basic thesis is and what significance or originality he thinks it may rightly claim. Regarded as a tautology, it seems self-evident,
unlikely by its announcement to improve the practice or understanding of adjudication or legislation. Regarded as a potentially falsifiable descriptive claim, its imprecise formulation makes its significance hard to divine. If the claim is that judges, at least recently, have not looked exclusively to the meanings that a constitutional provision’s authors attached to it, then it seems so mundane as not to merit repeating. If the claim is rather that judges have increasingly weighed competing interests in a less categorical fashion, preferring in ever larger numbers to examine the joust of interests on a case-by-case basis instead of formulating stiff rules based on generalizations about the force of interests on each side of a dispute, then it is by no means clear what Fallon believes he has added to earlier assertions of this kind. Changes in the way the Supreme Court and lower courts have taken account of opposing personal and state interests are undeniably important, and spotting trends is a significant service to those concerned about the future of individual liberties. But that investigation is only valuable if conducted in a detailed, painstaking manner. Only then can we decide whether those developments are salutary and what blend of rules and individualized balancing tests would best promote human flourishing while respecting personal liberties. Professor Fallon’s sweeping conceptual interdependence thesis does not, on any of the readings I think it might support, help us spy a forest we never noticed before. Nor does it tell us whether to saw or plant.

23 See, e.g., Aleinikoff, supra note 27; Horwitz, supra note 27. This possible reading also seems inconsistent with Fallon’s claim that categorical approaches to defining rights equally illustrate his conceptual interdependence thesis, inasmuch as the intimate connection between rights and powers informs the categorical formulation of either. See Fallon, supra note 1, at 361-64. The questions of how capaciously rights should be defined and of how open those definitions should be to refinement or rejection by later courts is of considerable importance. But it can only be answered helpfully by examining different doctrinal areas with care. The conceptual interdependence thesis does not itself clear any headway.

II. THE COMPARATIVE COMPETENCE DIFFICULTY

Several issues are endemic to designing governmental structures. Among the most prominent are determining what liberties and coercive powers individuals or groups possess when those structures are initially set in place, deciding how those forms of authority over resources or people may change over time, and choosing individuals or institutions to rule on where the balance of right lies at any moment. In the United States, the Constitution establishes the framework for the initial distribution of authority and for the evolution of decision-making power. Within that frame, federal and state legislatures decide which individuals or groups (including the government as the representative of shifting collections of people with respect to different issues) possess various rights or powers. The courts ultimately ascertain (if asked to do so by an aggrieved party) whether the legislature's decisions honor the frame's limits; if the Constitution's bounds have been overstepped, the courts may rectify the transgression to the extent that wrongs can still be undone.

That judges have the last word does not entail that they should have the first word or that when they review challenged decisions by other governmental actors, they should engage in a fresh weighing of competing interests. In some cases, structural considerations might stay their hand. Suits raising concerns about the separation of powers offer familiar examples in America's constitutional scheme. In certain other cases, however, courts have a different reason for deference. According to Professor Fallon, whom I take to be endorsing as well as explaining recent Supreme Court doctrine, judges are not always the most competent people at appraising the relative force of competing interests.

Courts can make a plausible claim of special sensitivity to the interests underlying constitutional rights. But surely they have no comparable, general expertise in assessing the weight of the interests that underlie assertions of government power. Indeed, courts often will be much less well situated than legislative and especially executive officials to appreciate government's practical needs.
... How do judges and Justices know, better than officials who may be far more expert in the matrix of practical constraints in which government must function, how the competing interests underlying claims of individual rights and claims of governmental power ought to be balanced?\(^{30}\)

The Supreme Court's answer to these questions, Fallon says, is that judges do not know better than non-judicial government officers and that judges recognize their shortcomings: "Confronted with the awkward obligation of defining rights by reweighing interests that have already been weighed by officials who often may have plausible claims of relevant expertise, the Supreme Court has developed [certain] distinctions to define areas of judicial deference to legislative and administrative officials."\(^{31}\) Of course, judges must guard against granting undue deference to officials whose own interests are affected by the decisions they take; courts must always scrutinize official judgment. But creating "doctrinal enclaves in which the 'professional' judgment of executive officials presumptively defines constitutional entitlements" is a sensible response to what Fallon terms the "comparative competence difficulty."\(^{32}\)

I do not wish to take issue with Professor Fallon's description of the Supreme Court's doctrinal innovations, nor with his assertion that the Justices' views about the comparative competence of assorted officials to assess vying interests spurred the division of labor he recounts. What I would like to question is the reasoning he sketches and his apparent belief that it sustains something like the categories of deference the Court has embraced.

Let me first step back. Professor Fallon argues that people's interests, diverse as they are, comprise the currency mediating individual rights and governmental powers, as a matter both of

\(^{30}\) Fallon, supra note 1, at 376.

\(^{31}\) Id. at 377.

\(^{32}\) Id.
This observation helpfully focuses attention on the provisional or contingent character of government—on the justification of state authority, on the needs and desires that knit people in communities, and on the human foundations of existing governments, most especially our own. It is these foundations that give post-Enlightenment states at least a potentially valuable plasticity in accommodating citizens’ preferences and welfare in respecting their autonomy and equality as our understanding of those concepts evolves, a plasticity that governments derivative of putatively divine commands or some natural order might be thought to lack. Fallon’s attempt to categorize people’s interests is a necessary first step in ascertaining both where, for constitutional purposes, powers and permissions intersect, and, for legislative purposes, when the state should exercise whatever powers the Constitution grants it.

Perhaps the most prominent contemporary defender of the view that rights—all rights, not merely constitutional rights against the use of governmental power—are grounded in interests is Joseph Raz. See, e.g., JOSEPH RAZ, THE MORALITY OF FREEDOM 166, 180-83 (1986); see also Jeremy Waldron, Rights in Conflict, 99 ETHICS 503 (1989) (discussing some implications of Raz’s view). See generally UTILITY AND RIGHTS (R.G. Frey ed., 1984). Fallon does not discuss recent philosophical debates about the proper characterization of individual and group rights.

In endorsing Fallon’s inquiry into the breadth and force of people’s morally salient interests, I do not mean to approve in any particular his account of constitutionally relevant concerns. I am inclined to doubt, for example, that “[i]nterests in well-being have an important ‘objective’ component,” Fallon, supra note 1, at 353 (citation omitted), although Fallon’s meaning is not pellucid. I would further deny that sometimes “it may be a better state of affairs for everyone to have equal benefits than for a few to have a larger share,” id. at 354-55 (citation omitted), as would Rawls and other partisans of the principle that Pareto improvements are always morally permissible. See, e.g., RAWLS, supra note 18, at 143-44, 532-41. In addition, it seems to me, although perhaps not to Fallon, see Fallon, supra note 1, at 355, that what he terms “systemic” interests in forestalling abuses of governmental power can be recharacterized without loss in terms of the individual interests he lists, should one have a penchant here for reductionism.

To say that individual rights and governmental powers should for constitutional purposes be defined to best serve people’s varied interests is not to say—and I do not read Fallon as saying—that the United States is committed to some type of collectivist or utilitarian notion of the public good, which necessarily subordinates the interests of some people to those of others if the latter are heavier in the aggregate, even if the interests of members of the larger group are, taken singly, of lesser magnitude. Nor do I read Fallon as suggesting that we should model our laws on this conception of the public welfare. If one believes that people possess certain rights against one another apart from whatever legal rights positive law confers, one can, as contractarian theorists generally do, imagine them agreeing to live together under a central authority to advance their manifold interests.
In his article, Fallon does not advance beyond this initial step. He ventures no opinions as to the relative priority of the interests he identifies when they pull in contrary directions, nor does he say how the number of people on each side of a dispute should shape policy or constitutional principle when interests clash. He is silent, to take a few examples, concerning the relevance of what Ronald Dworkin calls "external" preferences to the balance of interests, the significance of alleged harms stemming from offense rather than physical injury to the definition of constitutional rights, and the capacity, if it exists, of numerous small wrongs to swamp a more serious setback to the interests of a less numerous group of people. These are, of course, difficult questions of morality and justice, and one might reasonably doubt whether much can be said in the abstract about the melee of interests that would help settle the many controversies with which courts and legislatures currently wrestle. I certainly do not wish to fault Fallon for putting to one side issues he would need many more pages to address satisfactorily. What I shall suggest is that, in the absence of the careful analysis of the nature and strength of people's interests and of mediating principles of right that he eschews, claims about the comparative competence of judges, legislative assemblies, and executive officers to decide which interests should prevail lack

without imagining them agreeing to waive all of their pre-political rights to better their lot. To the extent that the contracting parties are thought not to surrender all their natural liberties, one of their interests, in Fallon's terms, would have to be the preservation of the rights they retained. Asserting that rights and powers can be conceived in terms of interests for constitutional purposes therefore does not entail that references to rights are eliminable as a matter of constitutional analysis or political discourse. Cf. Jeremy Waldron, The Substance of Equality, 89 Mich. L. Rev. 1350, 1358-64 (1991) (book review) (arguing that appeals to equality cannot all be translated, without loss, into appeals to other, more precisely defined, moral values). Fallon's discussion of the interests underpinning constitutional rights could be strengthened, in my estimation, by noting explicitly that principles of right and justice constrain and often resolve conflicts between people's competing interests and frequently do so without much if any regard for the urgency of people's rival needs.

36 External preferences are desires with respect to the assignment of resources or opportunities to people other than oneself, such as a mother's wish that her child be granted some preference or a Nazi's desire that Jews take a back seat to Aryans in the allocation of public goods. See Dworkin, supra note 9, at 234-38; Ronald Dworkin, A Matter of Principle 360-69 (1985).

37 An excellent treatment of this question may be found in Joel Feinberg, The Moral Limits of the Criminal Law: Volume Two, Offense to Others (1985).
The problem emerges from a common understanding of constitutional adjudication. What rights or powers the Constitution confers depends upon the correct answers to at least two questions. First, what is the best way to read the document's baggy clauses? This is, needless to say, a large question, and one that is inescapably interpretive. It cannot be settled by reference to history or precedent; instead, we must seek an answer by constructing the normatively most defensible theory of the representative democracy we have. Professor Fallon has elsewhere offered an impressive theory of precisely this kind. I do not want to discuss the details of his or other theories here. But I would like to draw attention to one important aspect of the theories I find compelling. If one agrees with Fallon or with numerous other nonoriginalist writers that reading the rights-protecting and power-conferring clauses of the Constitution is not wholly or even substantially a task of historical excavation, of uncovering the hopes, expectations, or intentions of people who played some part in writing or ratifying the Constitution or its amendments, but that it compels resort to various moral judgments, then one needs to confront a second question. One must face the problem Professor Fallon understandably leaves unexplored in his essay: who should prevail when people's interests diverge? Answering this question requires reliance on what, in a pluralistic society, will almost inevitably prove a controversial account of morality and justice.

The weakness in glib judgments about comparative competence of the sort Professor Fallon at least appears to attribute to the Court is that they overlook these interpretive and moral issues. We can hardly make reliable judgments about which people in particular or, more generally, which institutions are most likely to

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39 Ronald Dworkin addresses a similar criticism to those (he names Hart and Sacks) who tried to avoid facing difficult moral questions by urging judges to decide cases with the aim of best advancing the goals of the legal process: the same moral questions inevitably re-emerge in identifying the goals that our legal system ought to serve. See DWORKIN, supra note 9, at 6-7.
answer these questions correctly until we ourselves know some or all of the answers. Or, in the absence of that knowledge, we cannot do so unless we have a fair idea of which convictions, qualities of mind, institutional incentives, and modes of reasoning will most probably conduce to the proper result. In his article, however, Professor Fallon leaves these matters unattended. He offers no thoughts on the moral ordering of rival interests. Nor does he explore procedural devices for removing or reducing the evaluative problem at the lawmaking stage, such as arguments, along the lines of John Ely's, that seek a moral justification for pluralistic legislation rendering it immune to objections based on the results of that legislation. Instead, he asserts, or reports as the Supreme Court's established belief, that "[c]ourts can make a plausible claim of special sensitivity to the interests underlying constitutional rights," but that they "often will be much less well situated than legislative and especially executive officials to appreciate government's practical needs." From these undefended claims about sensitivity Fallon then skips to conclusions about comparative institutional competence and the optimal allocation of decision-making authority. The slide is too easy.

I do not mean to deny that familiarity with and sensitivity to adverse interests may improve the tailoring of constitutional rules. Nevertheless, it is less than plain how passing acquaintance with the hardships of governing could, as Fallon intimates, support vesting presumptive decision-making authority in non-judicial officers. If every right fronts a power and every power backs a right, the comparative advantages of courts and other branches in calculating costs and benefits on one or the other side of the ledger seem apt to offset one another. Even if first-hand familiarity with the difficulties of implementing state policies is a boon, moreover, it would be a mistake to exaggerate its significance. After all, these difficulties could be expressed in briefs and oral argument to a court, leaving judges to assess their gravity.

What cannot be left out of account are a great many factors—above all, ideological identifications or tendencies—that dwarf in importance personal acquaintance with the difficulties of public

40 JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).
41 Fallon, supra note 1, at 376.
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administration. Allow me to list, without pretending to be comprehensive, some notable considerations:

— the zeal of many elected or appointed officials to retain their jobs, to rise to higher positions, or to enhance their prospects for employment in the private sector when they quit office;
— the dangers that hug judges' insularity and protected tenure, in particular the risk of their becoming unable or unwilling to understand or sympathize with the perspectives of people very different from themselves;
— the prevalent desire of executive officers to aggrandize their power and autonomy;
— citizens' wish to make their chosen representatives more responsible by giving them non-reviewable discretion in legislating, joined to their concomitant fear of lending them final authority;
— the attraction to many people of more majoritarian, participatory decision making;
— any systematic differences that judges and lawmakers manifest in conceiving of our government as pluralist or republican;
— the tendency of personal favor to warp even well-intended judgment; and
— prominent if not universal differences between the typical educations and professional experiences that judges and other officials receive, the traditions that mold their conduct, and the audiences for whom they foremost write and act.

In short, what Professor Fallon's argument needs—or, if he is merely reporting what he takes to be the Supreme Court's reasoning, what the Justices need—is a fuller review of the aspects of situation and character that Bickel and Thayer and Hart and Sacks and Bork and Michelman (to name but a handful) have examined so thoughtfully if his claims about comparative competence are to
persuade.  

It is a difficult to say which departments of government should be entrusted, across the rainbow of cases, with announcing where the barricades protecting human freedom from state power should be placed. In our constitutional scheme, the proper response, to the extent that it is not foreclosed by precedent, is bound to involve some shared responsibility, with courts offering executive officials and lawmakers a latitude which, in the course of litigation and in light of experience, they allow to be stretched only so far. Professor Fallon is right to note that "an ongoing encounter with the comparative competence difficulty . . . is a defining feature of the Supreme Court's role." It would, however, be erroneous to think that competence in weighing contending interests is a corollary of close contact.

It would, I think, be an even greater error to conceive of this sort of competence as a skill, like sewing seams or tossing a football. The word "competence," particularly alongside Fallon's references to "expertise," suggests an ability we can measure by reference to some ideal we all share and apply in like fashion. This is not, however, what we seek in judges, partly because we cannot find it. Striking a balance between opposed interests, whether case-by-case or in formulating a constitutional rule, is fundamentally an exercise of normative judgment, which we applaud or decry insofar as the moral principles animating that choice are principles we affirm, rank, and render determinate in the same way as the person whose judgment we are evaluating. To say, therefore, that we should allocate to institutions the power to make decisions that are, in significant part at least, moral in nature, based on their competence in choosing, and to recommend that Supreme Court Justices be selected partly to advance that same end, risks misdescribing the stakes and thus the criteria that should guide institutional design and judicial nominations. The question in both cases is not chiefly technical facility, although legal skills are also requisite, but moral commitment and the way people tend to classify factual situations

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42 A vast literature on comparative institutional competence has grown up over the last forty years. For a clear discussion of the virtues and limitations of judicial decision making, with abundant references to other writers, see DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY 22-67 (1977).

43 Fallon, supra note 1, at 376.
in terms of broader principles, together with the importance and eliminability of familiar incentives and pressures, of the sort just mentioned, that induce public servants to revise or betray their beliefs.

For this reason, I entertain reservations about Professor Fallon's assertion that "at least some considerable number of Supreme Court Justices should be men and women whose judgment has matured and manifest itself in dealing with problems of interest balancing in a variety of practical contexts." Not that I think worldly experience necessarily baneful, although I wonder whether the populist instincts politicians develop are those best calculated to vindicate the liberties of derided minorities. It may be that personal experience with the frustrations of governing would more likely corrupt than enoble judgment. Nor do my worries have an empirical mooring. I cannot claim to have concluded, following diligent study, that former politicians elevated to the Supreme Court have performed less creditably than former academics or prosecutors or corporate counsel or lower court judges. And I certainly cannot quarrel with Fallon's assertion that "we need judges, and especially Justices of the Supreme Court, who possess

44 Id. at 383.

45 Let me note, however, that Fallon's suggestion that the opposite is true—that when we had a Court brimming with what he calls "people of national reputation and broad experience," id., constitutional interests were balanced most deftly—is also not supported by any historical analysis. Fallon cites Sanford Levinson, Contempt of Court: The Most Important "Contemporary Challenge to Judging," 49 WASH. & LEE L. REV. 339, 342 (1992), in which Levinson points out that every Justice serving on the Court that decided Brown in 1954 had either held national or statewide elective office, served as Attorney General or Solicitor General, or had some experience working in the executive branch at the federal level. What Levinson does not do, however, is attempt to show in detail that this Court was in some way superior to Courts composed of less exalted public figures. Are we to believe that all nine men then serving were stellar judges? Certainly Minton, Burton, and Reed, to name only three members of the Brown Court, do not generally occupy prominent places in Supreme Court hagiography. In contrast, John Harlan, who joined the Court shortly after Brown, lacked acquaintance with public service; yet it would be ludicrous to suggest that his opinions were myopic or that his handling of competing claims was clumsy. Moreover, it requires further, quite difficult argument to demonstrate that those Justices who had political experience and whose record was especially fine were better judges because they had formerly held public office. It would be fascinating and perhaps even useful to study the Supreme Court's history sedulously, to determine whether politicians who were raised to the bench made better, or at any rate systematically different, Justices than academics or judges or practicing attorneys. But it is reckless to claim that political experience is a bonus without doing the research.
practical wisdom," even if that virtue seems to me vacuous unless it denotes, unhelpfully, a proclivity to make practical decisions of which we approve.

What disturbs me is the suggestion that a political career is a particularly useful prelude to judging, a signal qualification for service on the High Court—as though the interest balancing that politicians and judges do is indistinguishable and facility springs naturally from immersion in public life. To repeat, choosing among competing interests is not primarily a display of skills we can all appreciate and rate along a common scale. It is, rather, a manifestation of a judge’s views about interpretation and, on the leading theories of constitutional construction, an expression of his or her moral commitments. It does, of course, reflect more than theoretical knowledge and philosophical allegiances; as Fallon says, good judging “demands an aptitude for sizing up situations and assessing which principles ought to control under particular circumstances.”

People who have labored long under the glare of public scrutiny might amass records that would make their future conduct as Justices more predictable by evincing their values and the manner in which they habitually apply them. For that reason, they might form an attractive pool for judicial nominations. But they should be chosen, if they are, not because they as politicians or public servants have some unique or especially valuable experience or insight or acquired knack, but only because we know from their records more certainly (if we do) what we are getting.

I am unsure to what extent Professor Fallon parts company with

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46 Fallon, supra note 1, at 383 (citing Lawrence B. Solum, The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection, 61 S. CAL. L. REV. 1735 (1988)). Like all accounts of practical wisdom with which I am familiar, Solum’s is ethereal. Of course we value discrimination in fitting means to ends, intelligence in diagramming practical problems, and integrity in pursuing morally laudable goals. But generalizations of this kind, at this lofty level of abstraction, assist little in choosing real people to decide actual cases.

47 Fallon, supra note 1, at 383.

48 Professor Fallon’s call for appointing “some considerable number” of Supreme Court Justices from the ranks of professional politicians and executive officers—not all the Justices, but some—might also exaggerate the amount of dialogue among the Court’s members. In recent years, serious intellectual exchanges among the Justices in conference or informally have, notoriously, been meager. I am not sure why appointing politicians to the Court should improve matters, especially by comparison, say, with argumentative academics. Fallon’s reasoning does not, moreover, carry over to lower court appointments, where dialogue is impossible (trial courts) or ordinarily perfunctory (most appellate matters).
this view. He stresses the importance of substantive values as well as practical experience and practical wisdom. And elsewhere he recommends choosing Justices "not just for technical lawyering but for statecraft and even an element of moral stewardship." I too would like Justices to be amply endowed with all manner of virtues. What I do want to stress, however, whether or not Fallon disagrees, is that the debate over judicial nominations, and especially over appointments to the Supreme Court, is, and I think should remain, not a discussion about competence as the concept is typically understood, although legal proficiency is essential, but chiefly a discussion about interpretive and moral convictions. To transform that debate into the idiom of competence or to vaunt political work as a valuable prerequisite seems to me likely to disserve the interests Professor Fallon and I both believe an independent judiciary is needed to protect.

49 See Fallon, supra note 1, at 383.