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A QUEST FOR LAW IN A LAWLESS SUPREME COURT

Lino A. Graglia*

RICHARD FALLON, *LAW AND LEGITIMACY IN THE SUPREME COURT* (HARVARD UNIVERSITY PRESS 2018). PP. 240. HARDCOVER \$41.00.

The purpose of Professor Fallon’s book is to show that the Supreme Court is bound by law despite its expansive policymaking role. As he states in the book’s Preface: “[W]e need to recognize that political views will have an inescapable role” in the Court’s constitutional decisions.¹ The task, therefore, is to

develop conceptions of law in the Supreme Court, and legitimacy in judicial decision-making that accommodate this realization. . . . But our conceptions of law and legitimacy in the Supreme Court cannot be so flaccid that they would permit the Justices, with five votes, to do anything they might be able to get away with.²

To say, as he does, that his book is “ambitious”³ is an understatement, as it attempts to do, in an impressive display of lawyerly skill, what cannot be done: deny that the Supreme Court is a lawless political institution.

The source of the problem Professor Fallon faces begins with the even more fundamental problem that contemporary constitutional law is a matter of delusion and pretense. The pretense is that the very old and very brief Constitution, written by a small group of men in an incomparably different environment, provides meaningful answers to contemporary social problems. The result is that the Court’s rulings of unconstitutionality are necessarily policy judgments. Constitutional law is the product of “judicial review,” the power of courts—largely invented by the courts—to invalidate policy choices made by legislators and other officials of government on the ground that they are prohibited by the Constitution.⁴ It happens, however, that the Constitution prohibits very few policy choices and even fewer that American legislators might otherwise seek to adopt. The result is that if judicial review was in practice what it is in theory, it would be a matter of very limited importance, giving the Supreme Court a very limited policymaking role.

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1. RICHARD FALLON, *LAW AND LEGITIMACY IN THE SUPREME COURT* xii (2018).

2. *Id.*

3. *Id.* at ix.

4. *Id.* at 1.

The Constitution was adopted in 1789 to establish a national government, primarily for purposes of defense, finance, and commerce, not to create or protect individual rights.⁵ The only substantive right created was a prohibition of debtor-relief laws.⁶ The first Ten Amendments, known as the Bill of Rights, and adopted two years later, meant to apply to only the federal government, and primarily concerned with criminal procedure, adds two more substantive rights. The Second Amendment added a qualified right of the people to “bear Arms”⁷ and the Fifth prohibits confiscation of property.⁸ Nothing better illustrates the limited role of the Constitution than the fact that, as a practical matter, it largely comes down to a single constitutional provision, the second sentence of the Fourteenth Amendment.⁹ Most constitutional cases involve state, not federal, law and nearly all of them purport to turn on one or two clauses of the Fourteenth Amendment: one prohibiting the states from “depriv[ing] any person of life, liberty, or property, without due process of law” and the other from “deny[ing] to any person . . . the equal protection of the laws.”¹⁰ The Court’s expansive policymaking role rests to a large extent on a kind of judicial *coup d’état* whereby the Court converted these clauses to grants of power to invalidate any deprivation of liberty or any discrimination, i.e., any law it considers “unreasonabl[e].”¹¹ After the application of either of these revised clauses to a case, the Constitution drops out of the picture, leaving the Court with a pure policy judgment. Professor Fallon’s task, like that of all nonoriginalist proponents of the “living Constitution,”¹² is to deny or obscure this reality and give the Court’s ruling of unconstitutionality “legitimacy”¹³ by showing that the Justices are in some way limited by the Constitution.

Professor Fallon’s book can be seen as a response to a well-known statement by Justice William J. Brennan that Fallon quotes in his preface: “With five votes, you can do anything.”¹⁴ “Brennan was wrong,” Fallon says, as “there are some things—indeed, many things—that the Justices cannot do, even with five votes.”¹⁵ Later in the book, he quotes the also well-known statement of Charles Evans Hughes, later a Chief Justice of the United

5. See THE FEDERALIST NO. 84, at 512 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“[B]ills of rights are, in their origin, stipulations between kings and their subjects . . . [T]hey have no application to constitutions, professedly founded upon the power of the people and executed by their immediate representatives and servants.”).

6. U.S. CONST. art. I, § 10 (“No State shall . . . pass any . . . Law impairing the Obligation of Contracts.”). The history of the provisions demonstrates why constitutional restrictions on policy choices should not be favored. Human life and society are too various to admit of absolute principles. See *Home Building & Loan Ass’n v. Blaisdell*, 290 U.S. 398 (1934) (finding it necessary to virtually read this section out of the Constitution to allow Minnesota to provide some relief to indebted farmers during the Great Depression).

7. U.S. CONST. amend. II (“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”).

8. U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

9. U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

10. *Id.*

11. See Lino A. Graglia, *Creative Constitutional Interpretation as Justification for Rule by the Supreme Court*, 51 ARIZ. ST. L.J. 109, 116–17 (2019).

12. *Id.* at 110.

13. FALLON, *supra* note 1, at x.

14. *Id.*

15. *Id.*

States Supreme Court, to the same effect, “the Constitution is what the judges say it is.”¹⁶ This would be true, Fallon admits, “[i]f there is no way to enforce the Constitution against the Justices, and if they are thus practically unconstrained.”¹⁷ The Justices are, however, he argues, subject to practical restraints both “external,” “imposed by others,” and “normative,” “standards to which officials ought to conform.”¹⁸ They are constrained by the Constitution itself, by for example, its separation of powers, which means that just as the President cannot “sentence people to jail for having committed tax fraud,” the Court “cannot set interest rates or establish national defense policies.”¹⁹

“Asking whether the Constitution constrains Justices of the Supreme Court,” Fallon argues, “is like asking whether the rules of baseball constrain the umpire from giving one team four strikes per batter or four outs per inning.”²⁰ Doing that would be to “step[] outside the role of an umpire in a baseball game as defined by broadly shared understandings of the rules that make baseball baseball.”²¹ Similarly, the Court could not, for example, “order[] the army to invade Iran.”²² The rules of baseball, however, are clear, specific, and enforceable; the rules of constitutional lawmaking by the Supreme Court, if any, are uncertain and unsanctioned, and, unlike the umpire, the Court decides the case. The Court’s creation of a constitutional right to have an abortion, for example, seems a clear case of it successfully stepping out of the judicial role and into the legislative role, even if it can’t order the invasion of Iran.

Turning to external restraints, Professor Fallon points out that each Justice is “constrained individually by the need to secure the agreement of at least four colleagues in order to render legally efficacious judgments,”²³ which seems more to affirm than to dispute Justice Brennan’s statement. Another potential external constraint, Fallon argues, is that the “Constitution empowers Congress and the president to impose sanctions on the Supreme Court and its Justices if they deviate from what Congress and the president take to be the Constitution’s dictates.”²⁴ He does not, however, specify the source or the nature of these sanctions or give any example of their being used. The only sanctions for judicial misbehavior provided for in the Constitution are impeachment and removal from office for “high Crimes and Misdemeanors,”²⁵ and abuse of judicial power is not considered a crime. Only one Justice was ever impeached, and he was not convicted, causing President Jefferson to denounce impeachment as “not even a scare-crow.”²⁶

A potentially significant constraint on the Court mentioned by Fallon is the power of Congress to limit by statute the Court’s appellate jurisdiction, but for various reasons, including that the Court gets to pass on the validity of the statute, it has rarely been used.

16. *Id.* at 105.

17. *Id.*

18. FALLON, *supra* note 1, at 105.

19. *Id.* at 107.

20. *Id.*

21. *Id.*

22. *Id.* at 108.

23. FALLON, *supra* note 1, at 109.

24. *Id.* at 110.

25. U.S. CONST. art. II, § 4.

26. KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 12 (Robert C. Clark et al. eds., 15th ed. 2004).

Fallon finds it useful to mention that the Justices “are also subject to the criminal law, including its prohibitions against bribery and extortion.”²⁷ As another external constraint, Fallon notes that President Franklin Roosevelt proposed “packing” the Court by adding some friendly Justices, but the proposal was almost uniformly denounced as improper and was defeated after a “switch” by the Court made it unnecessary.²⁸

“Perhaps the most practically important constraint on the Justices,” Professor Fallon states, is “the prospect that some decisions they might imaginably render would be treated as nullities or otherwise prove inefficacious.”²⁹ Fallon gives as examples the Marshall Court’s refusal to invalidate a statute that removed sixteen Federalist judges, appointed for life, as the Constitution provides, from office by abolishing their offices, and its refusal to issue an order to the Jefferson administration when faced with “a credible threat of defiance” in *Marbury v. Madison*.³⁰ These decisions, Fallon is correct, might well have been influenced by prudence given the weak and vulnerable position of the Court in its earliest days, but that is not its position today. He mentions as further examples of nullification President Lincoln’s refusal during the early days of the Civil War to obey an order by Chief Justice Taney to free an alleged Confederate collaborator, and the Court’s decision to allow military trials and summary executions of alleged Nazi saboteurs after President Roosevelt “made it known” that he would not obey a contrary decision.³¹ Finally, he argues that the Court did not order immediate desegregation in *Brown v. Board of Education* because “it knew that a mandate of immediate desegregation might have proved inefficacious.”³² Exercise of caution in a truly revolutionary decision would not be surprising, but the Court was faced not only with possible defiance by southern school districts but more importantly with the fact that the districts could and would effectively and legally avoid desegregation by simply closing the public schools.

Turning to the alleged “Politically Constructed Bounds of Judicial Power,” Professor Fallon argues that Congress permits the Court to have the last word on social policy issues only if its decisions “remain within the bounds of political and practical tolerability.”³³ It is no doubt true but almost tautological that “decisions that provoke sufficiently broad and enduring public outrage will not survive.”³⁴ In place of examples of these supposed constraints, Fallon resorts to the canard, favored by defenders of judicial power, that the Court “has never strayed very far for very long from mainstream public opinion.”³⁵ In fact, there is little that Congress or the people can do about unwanted constitutional decisions as is illustrated by the fact that none of the often-detested revolutionary decisions of the Warren and Burger Courts have ever been overturned.

Finally, Professor Fallon argues that the Justices are subject to “[n]ormative constraints.” The Justices, he thinks, “understand themselves as subject to legal obligations

27. FALLON, *supra* note 1, at 110.

28. *Id.* at 111.

29. *Id.*

30. *Id.* at 113.

31. *Id.*

32. FALLON, *supra* note 1, at 110.

33. *Id.* at 114–15.

34. *Id.* at 116.

35. *Id.* at 11; see generally Justin Driver, *Constitutional Outliers*, 81 U. CHI. L. REV. 929 (2014).

as well as political constraints” and they take them “seriously.”³⁶ He does not tell us, however, what they are or how they constrain. He rejects the view of “norm skeptical” political scientists that suggest the “Justices consistently vote to decide cases in ways that directly reflect their ideological values,” because the skeptics wrongly assume that ideology “must always dominate all other considerations.”³⁷ The fact that the Justices disagree on ideological grounds does not mean, he says, that they “do not feel normatively constrained by the Constitution and applicable interpretive norms.”³⁸ It does show, however, that their decisions are ideologically based.

Professor Fallon next turns to the favorite topic of constitutional scholars, theories of constitutional interpretation. Although the Justices are, he argues, “meaningfully bound by law,” the “relevant legal authorities are often indeterminate,” presenting the Justices with the problem of how to “settle constitutional issues correctly.”³⁹ As far as constitutional law is concerned, however, the relevant legal authorities—the Constitution—are very few, and mostly determinate. To the extent that they are indeterminate—probably because the Court has made them so—they should not present the Court with a constitutional problem. If a legislatively enacted policy choice is not clearly prohibited by the Constitution, the only conclusion consistent with the theory of judicial review is that it is not unconstitutional—“clearly” because in a democracy, the legislative choice should prevail in cases of doubt. Further, constitutional issues are almost always policy issues that do not have a single “correct” answer. A policy issue arises because interests recognized as legitimate come into conflict, which can be resolved only by making a policy choice, a trade-off, not by empirical investigation or logical analysis. Marches and street demonstrations, for example, may be valuable means of political expressions, but it is also important that the streets can be sometimes used as streets. The only question to be decided by a Supreme Court Justice faced with a challenge of a regulation of street demonstrations is the extent to which he or she is willing to override the legislative choice.

Constitutional interpretation should not be a mysterious subject. The Constitution should presumably be interpreted like any other written document to receive the author’s message assuming that it is written in a known language with words used in their conventional sense. It has a fixed meaning dependent upon the intent of the author or, in the case of the Constitution, the understanding of the ratifiers. This view is known in constitutional interpretation theory as “originalism.” The alternative, non-originalist, view is the theory of the “living Constitution,” according to which the meaning of constitutional provisions can and do change over time. “[L]iving Constitution” is, however, simply a misleading metaphor; short of constitutional amendment, the words of the Constitution do not change; it is only the Justices who apply them that do the “living.”⁴⁰ By giving the words new meaning, they effectively rewrite the Constitution. The purpose and effect of the metaphor is to make judicial performance of the legislative function appear to be

36. FALLON, *supra* note 1, at 120.

37. *Id.* at 121–22.

38. *Id.* at 123.

39. *Id.* at 125.

40. *Id.* at 23, 134.

performance of the judicial function. Arguing that the Constitution need not necessarily mean what it was intended or understood to mean presents living constitutionalists with the problem of what, then, it does mean, of what is its alternative source of meaning. The apparent conclusion that it can then mean anything the so-called interpreter wants it to mean must be denied by proponents of the living Constitution because that would make the Constitution even more obviously irrelevant.

Professor Fallon begins his discussion of theories of constitutional interpretation with a statement that is essentially the originalist position, that “courts should invalidate statutes only in cases of plain unconstitutionality, reflecting ‘a clear mistake,’” which “emphasizes the legal and moral significance of decision-making by democratically accountable lawmakers.”⁴¹ He rejects this position, however, in favor of a number of living Constitution theories that he finds more acceptable. He endorses, for example, Professor David Strauss’ theory that the Supreme Court should decide constitutional cases as a common law court, free to make changes in the law. The difficulty with this is, of course, that common law, but not constitutional decisions, are legislatively revisable by ordinary statute. Professor Strauss objects to originalism, incredibly, on the ground that it “would unfairly privilege the views of people who lived long ago over the judgments of those living today,”⁴² which is true but is not an objection to originalism but to constitutionalism. It is a good reason to disfavor adopting constitutional restrictions, but not to create new ones or ignore the ones we have. Fallon also praises Professor Philip Bobbitt’s suggestion that the Court decide constitutional cases on the basis of a number of “modalities,” including textual, historical and structural. When these modalities come into conflict, as they surely must, Bobbitt recommends deciding on the basis of “conscience.”⁴³ That these so-called alternative methods of interpretation are in practical effect prescriptions for unconstrained judicial policymaking seems too clear for dispute.

Proponents of “interpretive methodologies” should seek an approach, Professor Fallon argues, that “would advance, establish, or ensure judicial legitimacy.”⁴⁴ “According to the standard model,” he states, “Justices . . . would ideally adopt a constitutional theory before ascending to the bench,” and then “apply that theory consistently to decide the cases,” which would “preclude unprincipled, outcome-driven adjudication in which the Justices experience no real methodological discipline and vote for . . . ideologically congenial” results.⁴⁵ Fallon rejects this approach, however, as too rigid. He also rejects the view of some political scientists that “debunk debates about interpretive methodology as an academic pretension” of no practical effect, but he finds that the “leading” theories also have “limitations.”⁴⁶ He recommends “Reflective Equilibrium Theory”⁴⁷ as a better approach which he borrows from moral philosopher John Rawls. Rawls argued that moral reasoning involves two-way traffic between our provisional judgments about particular cases and our over-arching moral principles. The

41. FALLON, *supra* note 1, at 134.

42. *Id.* at 135.

43. *Id.*

44. *Id.* at 125–26.

45. *Id.* at 126.

46. FALLON, *supra* note 1, at 136.

47. *Id.* at 148.

Supreme Court, Fallon argues, should decide constitutional cases by similarly attempting to “bring our case-specific judgments into alignment with our principles, and vice versa, [in] a quest for ‘reflective equilibrium,’” which should aid Justices in achieving “principled consistency” in constitutional decision-making.⁴⁸ The widespread adoption of this theory, he says, “would undoubtedly require significant revisions in our existing constitutional practice” in that it leads to what he calls the “startlingly counterintuitive conclusion” that “commitments to interpretive methodologies are and ought to be revisable, though subject to the demands and discipline of good faith.”⁴⁹ This theory is better than the other theories, he argues, because it “captures the appropriate relationship between theory and case-by-case practice in the quest for moral and legal legitimacy in constitutional adjudication.”⁵⁰

In his final chapter, Professor Fallon concludes, none too clearly, that “the conjunction of democracy in constitutional interpretation with sharp ideological division in politics has produced, or at least threatens to generate, serious grounds for forward-looking worry about the legitimacy of constitutional adjudication by the Supreme Court, at least in the sociological and ultimately in the moral sense.”⁵¹ In response to this worry, Fallon offers two suggestions. First, under the heading “The Case for Greater ‘Judicial Restraint,’” he argues that because “Congress and the state legislatures have claims to moral and political legitimacy that arise from their democratic accountability,” courts should be “reluctan[t] to reject as unconstitutional legislation that Congress or the state legislatures have presumably adjudged to be constitutionally valid.”⁵² He believes that in “a substantial fraction of the cases in which the Justices invalidate[d] legislation,” their intervention was unwarranted and that the Justices could achieve “a more appropriately restrained approach” by adopting his Reflective Equilibrium Theory of constitutional interpretation.⁵³

Professor Fallon’s second suggestion for lessening the worry about the Supreme Court legitimacy is the adoption of “Changing Norms of the Judicial Nomination and Confirmation.”⁵⁴ He believes that because the Court “has come to play an increasingly prominent and ideologically inflected role in our constitutional scheme,” the nomination and confirmation of Justices have come to be viewed as “matters of high political and sometimes partisan consequence,” leading to “scheming, posturing, and gamesmanship.”⁵⁵ He recommends that presidents and senators “agree on and abide by principles of moderation,” defined as “legal and political centrism.”⁵⁶ While he claims to reject the “rule of clear mistake,” he repeats that the Court should not “frustrate the operation of the political process by invalidating legislation adopted by institutions with

48. *Id.* at 143.

49. *Id.* at 147–48.

50. *Id.* at 154.

51. FALLON, *supra* note 1, at 157–58.

52. *Id.* at 159.

53. *Id.* at 164.

54. *Id.* at 165.

55. *Id.*

56. FALLON, *supra* note 1, at 165.

greater political legitimacy.”⁵⁷

Professor Fallon ends the book with a section headed “An Appraisal of the Moral Legitimacy of Supreme Court Decision Making” and concludes that “the Justices exert more authority to limit democratic decision making than they should” because of their “refusal to give greater deference” to democratic institutions.⁵⁸ He rejects the conclusion of the “Cynical Realists,” including former Judge Richard Posner, that “methodological argumentation in the Supreme Court is merely a sham,”⁵⁹ preferring to explain the Court’s decision-making on the basis of the Fainthearted Commitments Hypothesis which “holds that the Justices generally apply consistent decision-making premises from one case to the next, but that they tend to deviate when necessary to reach what they regard as morally and practically desirable outcomes in high-stakes cases.”⁶⁰ By “[e]schewing too many, too rigid, advance commitments,” the Reflective Equilibrium Hypothesis allows the Justices to reach “ideologically congenial results in a substantial fraction of, but not all, cases.”⁶¹ This apparently would be enough to show that the Court is subject to some constraint and therefore not a lawless political institution. Its adoption by the Justices, Fallon concludes, “could do a great deal to enhance the moral legitimacy of constitutional adjudication in the Supreme Court.”⁶²

It is difficult to imagine a “methodological” conclusion less likely to have any practical effect. The Cynical Realists are surely correct that methodology is much less important in Supreme Court constitutional decision-making than Professor Fallon assumes. His Reflective Equilibrium Theory is, virtually by definition, much too vague and uncertain to be useful. More important, the basic problem with Fallon’s approach, as with all living Constitution theories of “interpretation,” is that it assumes, contrary to the theory of judicial review and without historical support or argument, that the Court ought to invalidate as unconstitutional policy choices made in the ordinary political process on moral as well as legal grounds, effectively rewriting the Constitution by adding prohibitions of disfavored policies. The only way that the Court can enhance the legitimacy, moral or otherwise, of its constitutional adjudication is by confining itself to invalidating as unconstitutional only those legislative policy choices that the Constitution actually prohibits.

57. *Id.* at 160, 165.

58. *Id.* at 167.

59. *Id.* at 169, 171.

60. *Id.* at 170.

61. FALLON, *supra* note 1, at 170.

62. *Id.* at 174.