Published on e-First 7 September 2018

Book Review

LAW AND LEGITIMACY IN THE SUPREME COURT*

by Richard H Fallon Jr

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> Brennan was wrong: there are some things – indeed, many things – that the Justices cannot do, even with five votes.[1]

1 In his article, "With Justice Kennedy Gone, It's Trump's Court Now" published in *TIME* on 28 June 2018,[2] Massimo Calabresi wrote:

> Over the years, Kennedy had been a critical vote on everything from gay rights to free speech and even the 2000 presidential election. His replacement with a reliable conservative could shift the country's top court to the right, likely making abortion less available, affirmative-action programs more limited and executive power more expansive.

This situation creates the context that leads to the kind of questions Richard H Fallon asks and attempts to answer in his book, *Law and Legitimacy in the Supreme Court*.[3] Specifically, he wonders if it were at all plausible to inquire into the simple question whether the "Justices take their purely normative obligations seriously". "Do we have reason to believe that they strive to obey the Constitution and other surrounding legal norms out of a felt obligation to obey the law?", he asks, "Or, alternatively, could we more accurately view them as strategic political actors who care only about what they can get away with inside the politically constructed outer boundaries of their practical authority?"[4] It was the fear of the latter that Ronald Dworkin believed that it was necessary to answer the former in the affirmative, and to that end, Dworkin devoted his life's work to formulating the meta-norms that might compel a judge to obeisance. Thus, in his book, *Justice in Robes*,[5] he launched a spirited defence of such norms, and an equally powerful

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* Belknap Press, 2018.

1 Richard H Fallon Jr, *Law and Legitimacy in the Supreme Court* (Belknap Press, 2018) at p x.

2 Massimo Calabresi, "With Justice Kennedy Gone, It's Trump's Court Now" *Time* (28 June 2018).

3 Richard H Fallon Jr, *Law and Legitimacy in the Supreme Court* (Belknap Press, 2018).

4 Richard H Fallon Jr, *Law and Legitimacy in the Supreme Court* (Belknap Press, 2018) at p 120.

5 Ronald Dworkin, *Justice in Robes* (Belknap Press, 2006).

attack against legal pragmatism. In that book, he aimed his sharp intellectual whip against the established pragmatists of the day. He wrote of Richard Posner: "Posner's lectures are characteristically entertaining, hasty, picaresque, and punchy. They are packed with a great variety of relevant and irrelevant excursions, references and insults. The arguments he offers for his main claims are so spectacularly unsuccessful".[6] It was probably lost on Dworkin that his scathing comment might be turned against him in the exact form by his pragmatist opponents. That is why Fallon's measured and scholarly approach is calming for its language if not its content, which can be scary if we contemplate what might happen should judges think of themselves as authoritarians.

2 Fallon is fully alive to the threat of pragmatism, yet he understands that pragmatism (though he prefers to describe pragmatists in the older terminology of "legal realists") has its service and indeed, "if we are all Realists", he thought, "most of us are not Cynical Realists".[7] Fallon thus accepts that legal problems that present themselves in real life often require a practical, if not ideal, solution, but he believes (like Dworkin) that there are norms that tie judges to their oath, which they must not betray. The thrust of Fallon's book is directed at answering the question, "What is the nature of the judicial responsibility that the Justices must not betray?"

3 Fallon reminds us of the power of judicial authority – that it confers rights, creates responsibilities and disabilities on the citizens of the land and proceeds to examine the legitimacy and illegitimacy of Supreme Court decisions. He draws on the abnormality of the decisions in *Roe v Wade*[8] and *Bush v Gore*[9] as examples of how in spite of public fears, the decisions had not diminished the legitimacy of the court. He assumes that the Constitution has a minimally moral status, that is, it has some moral foundation to dispel the natural tradition which claims that unjust laws are not laws. The premise of Fallon's theme is that, "If the Constitution is minimally legitimate, then that promise [to enforce the Constitution] has moral significance. When ruling on disputed cases, the Justices purport to speak in the name of the law. Having promised to support and obey the Constitution, the Justices have an obligation not to speak falsely".[10] Fallon thus opens the discussion as to what it means "not to speak falsely" and the view from its mirror

6 Ronald Dworkin, *Justice in Robes* (Belknap Press, 2006) at p 75.
7 Richard H Fallon Jr, *Law and Legitimacy in the Supreme Court* (Belknap Press, 2018) at p 2.
8 410 US 113 (1973).
9 531 US 98 (2000).
10 Richard H Fallon Jr, *Law and Legitimacy in the Supreme Court* (Belknap Press, 2018) at p 36.

image – "judging in good faith", a subject closely examined by Steven J Burton in *Judging in Good Faith*.[11] This idea of judging in good faith amalgamates three things, according to Burton, namely, the motivation for speech, the rhetoric which carries it, and the consequences of it.[12]

4 Fallon delves into the deeper aspects of that idea, first by explaining what it means to claim a constitutional meaning, and then contrasting that with the apposite linguistic meaning. "[if] there were only one sense of meaning in ordinary language use", he says, "and if the Supreme Court frequently deviates from it, then we would need to confront questions of judicial legitimacy".[13] The fact of multiple and opposing claims to meaning lodges itself like a fishbone stuck in one's throat, with little being done to remove it, but Fallon seems to regard this as a minor inconvenience. Linguistic indeterminacy and flexibility frame the issue upon which judges debate the law.

5 Fallon rushes from that cursory acknowledgement to the laws and norms that matter, but he first explicates the fact that history has a role in the development of those laws through what he calls T1 and T2 meanings. T1, in his nomenclature, is the meaning of the Constitution at the time it was written and ratified. T2 is the meaning acquired, endorsed, or given subsequently, by judges. One important point he makes is that some aspects of the Constitution are known from the start as being vague or ambiguous, but the early framers were content to allow the settlement of their meanings to subsequent executive conduct, and its endorsement by the Supreme Court to stand. This is known as the "liquidation through practice" principle of dealing with early ambiguities. That is different from the notion of acceptance through "historical tradition". The acceptance of an adult to refuse unwanted medical care is an example of the meaning extended to the Due Process Clause by way of historical tradition, which, in turn, opens to the third means of elucidating constitutional meaning in the context of history – judicial precedent.

6 From ch 4 onwards, Fallon marches on briskly and enthusiastically as he approaches the major theme of his thesis. He begins with the rhetorical question, "[Do judges] endeavour to comply with, and seek to hold each other to norms of proper conduct that define their and others' legal duties?" As if there were any doubt that this was a rhetorical question, Fallon asserts that available evidence warrants

11 Steven J Burton, *Judging in Good Faith* (Cambridge University Press, 1992).
12 Steven J Burton, *Judging in Good Faith* (Cambridge University Press, 1992) at p 24.
13 Richard H Fallon Jr, *Law and Legitimacy in the Supreme Court* (Belknap Press, 2018) at p 58.

an affirmative answer.[14] If there is "no reason to doubt that the Justices are as law bound and as agreed about what the law requires as the rest of us", how do we ascertain what that law might be whenever the Justices disagree among themselves? That is the hard question – it is as hard as the cases that the Supreme Court chooses to hear each year from the myriad applications for an audience before it. So, how do we identify the factors and norms that the Justices employ in laying down their opinions? One can, of course, answer this question with a list or two on the canons of construction or rules of interpretation, but Fallon hopes to simplify the answers for us by distilling them all in three signages. First, judges must acknowledge the paramount authority of the Constitution in all cases. Secondly, they must regard the Constitution as legitimate and binding authority (this differs from the first in that it concerns specifically to the binding effect of judicial precedents bearing upon Constitutional interpretation). Thirdly, one of the important reasons for not overruling precedent is the need for and the desirability of maintaining stability in the law. As an example, Fallon says that the Justices in 2000 might well not have decided *Miranda v Arizona*[15] ("*Miranda*") case in the same way were they to hear it anew, yet the decision in *Miranda* was affirmed in *Dickerson v United States*[16] for the sake of stability in the law. Fourthly, in addition to maintaining stability, the Justices ought to look towards providing clear guidance to future cases. The point of note is that the decision must not only be a clear precedent, but a clear and unambiguous one. That leads to his fifth point, namely, that some errors ought to be corrected but some ought not. *Brown v Board of Legal Education*[17] is an example of a likely error in the interpretation of the original meaning of the Equal Protection Clause, but it remains an unshakeable precedent because it advanced "substantive moral justice".[18] His sixth point overlaps with the previous two in that he says that before overruling a precedent, the Justices ought to have regard to T1 meanings and only engage in laying down T2 meanings if it is clear that a correction would be useful in the future. Finally, we should acknowledge that the rules of recognition require judges to sometimes make moral judgments that disagree with the norms, and we must expect that they would do so.

7 It is perhaps the last point that takes Fallon's theme straight into the most interesting and debatable part of his thesis, namely, when judges disagree as to moral issues, how should they resolve them? The

14 Richard H Fallon Jr, *Law and Legitimacy in the Supreme Court* (Belknap Press, 2018) at p 93.
15 384 US 436 (1966).
16 530 US 428 (2000).
17 347 US 483 (1954).
18 Richard H Fallon Jr, *Law and Legitimacy in the Supreme Court* (Belknap Press, 2018) at pp 100–101.

polarisation of the American Supreme Court has led to a situation in which voting according to party lines has become too obvious for anyone to pretend that the Justices do not do so. Fallon thus proceeds to answer the two gripping questions that arise, if not from this morass, then from a genuine academic insight. First, he asks, "To what extent do we have legally and morally legitimate decision making in the Supreme Court today?" and secondly, "If the Court is failing to meet ideal or minimal standards, how could we realistically hope to rectify the current legitimacy deficit?"[19] These are important issues and Fallon gives them the importance they deserve because "[when] we believe others' moral views to be not just mistaken but unreasonable, we will almost inevitably conclude that judicial decisions that reflect those views – with the reflection occurring at the porous intersection between legal and moral decision making in the Supreme Court – are unworthy of respect".[20]

8 It is uncomfortably obvious to the neutral observer, but not to the partisans in America, that the supreme virtue of judicial restraint which Fallon is advocating in this book is ebbing, not slowly, but almost in torrential strength. Fallon concedes that judicial restraint is a creature with chameleon qualities and can often be manipulated. Fallon gives his reasons why even with five votes, the Justices ought to embrace restraint, not only because of the plausibility that the other side will exhibit restraint when it possesses the five votes, but also because, in Fallon's view, it is desirable that to embrace restraint, the underlying norms requires "reciprocity and good faith".[21]

9 Burton subscribed to the view that "The good faith thesis allows that law and morals will provide conflicting guidance to judges whenever the applicable law is unjust and the reasons showing it to be unjust are excluded from judicial deliberations."[22] Good faith seems an attractive enough virtue and is assumed in every judicial opinion though in fact, bad faith in a judge is hardly capable of detection. Justice as fairness is one alternative in arriving at a just result.[23] This only opens the door to an even more difficult inquiry – whether or not law is determinate. If it is, then justice or fairness surely cannot depend on a

19 Richard H Fallon Jr, *Law and Legitimacy in the Supreme Court* (Belknap Press, 2018) at p 155.

20 Richard H Fallon Jr, *Law and Legitimacy in the Supreme Court* (Belknap Press, 2018) at p 158.

21 Richard H Fallon Jr, *Law and Legitimacy in the Supreme Court* (Belknap Press, 2018) at p 161.

22 Steven J Burton, *Judging in Good Faith* (Cambridge University Press, 1992) at p 203.

23 John Rawls, *A Theory of Fairness* (Cambridge University Press, 1971).

judge's personal convictions as to what is fair or just.[24] By postulating that law is determinate and that judges have to instruct themselves as to what the law is, Dworkin imposed a new consideration – integrity, in the law and in the judge.[25] In light of all these complexities, Fallon tries to show in this book, how judges can apply reasonable interpretative frameworks and reason with principled consistency across cases. Ultimately, it ends with the crucial requirement that the judge must not only be enlightened, but also honest and wise. Is that too much to ask for in a judge?

24 Ronald Dworkin, *Law's Empire* (Belknap Press, 1986) at p 259.
25 Ronald Dworkin, *Law's Empire* (Belknap Press, 1986) ch 7.