Book Reviews

PRACTICAL JUDGING

IMPLEMENTING THE CONSTITUTION. By Richard H. Fallon, Jr.[1] Harvard University Press. 2001. Pp. 186. $35.00.

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The first question many legal academics may ask upon seeing *Implementing the Constitution* is, "do we really need another constitutional law book?" At the same time, the fact that the book is by Richard Fallon will offer some reassurance, as he is one of our most thoughtful commentators on constitutional issues. This confidence is shown again to be well-placed; the book is a useful corrective to the too-strident and too-unworldly discussions that frequently dominate discussions of the Constitution.

In this book, Fallon is the voice of Reason: the advocate of common sense and practicality, against both originalism and the type of "high principle" advocated by Ronald Dworkin.[3] To the originalists, he shows how their position, if taken seriously and at face value, would be unworkable, or at least highly unattractive—*and* that few advocates of originalism are actually that dogmatic.[4] (pp. 13-25) A purist on originalism matters would

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3. Fallon also rejects, after only quite brief consideration, the "methodological pragmatism" sometimes advocated by Judge Richard Posner, under which judges are instructed to do whatever is best for the future, unchecked by what courts have decided in the past. Richard A. Posner, *Pragmatic Adjudication*, 18 Cardozo L. Rev. 1 (1996). Fallon asserts, reasonably, that this position, at least when read as radically as it sounds, gives insufficient respect for rule-of-law and democratic values. (pp. 132-33)

4. Fallon also raises the more standard critique of originalism, that it requires an impossible application of decisions made in another time and a quite different context to

have to reject precedent, even rather entrenched precedent, that was contrary to the original meaning of the text, and it is hard to find any theorist who advocates that.[5] However, "if nonoriginalist precedent is 'law,' appropriately enforced by the Supreme Court and even binding on it, then central premises of originalism simply cannot be true." (p. 17) If originalism is not the grounds for *all* judgments of constitutional meaning, then one has implicitly admitted that there are principles *other than* original intention (or original understanding/meaning) involved in the proper implementation of the Constitution, and the question remains of what those other principles are and how we determine when they apply. All self-labeled "originalists" pick and choose, they simply neglect to inform us of the principles they are using for their selection.

To a high principle view, Fallon insists on the importance of the judges' role as practical lawyers, trying to find workable solutions to institutional, structural, and political difficulties. (pp. 26-36) It cannot be the Supreme Court's[6] role (simply) to determine the content of general moral principles like "equality" or "due process," for it is also the Court's function to *implement* the Constitution. Implementation inevitably involves certain compromises and accommodations. (pp. 4-6) Fallon emphasizes what everyone knows, but few much talk about (at least in academic commentaries): that *doing* constitutional law (in contrast to debating it in ivory towers or on talk shows) is largely about what is, over the long run, both workable and acceptable.[7]

What is more, these accommodations are not just the "practical" side of high principle (what Fallon sometimes calls "practical judgments" (p. 6)), but also themselves arguably required by certain constitutional (meta-)principles: in particular, the principle of democracy, and the idea that the Court shares with other institutions the duty to implement constitutional values. (pp. 32-33, 35-36) From both principles, one can derive the view that in

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the problems that face us today. (pp. 13-14)

5. As Fallon points out, the mere fact that the theory diverges so far from our actual practices may be a sufficient basis for rejecting originalism as a sensible ideal. (pp. 24-25) He goes on to argue that a Dworkinian emphasis on principle alone is similarly too far from the way we actually do constitutional law. (p. 28)

6. Fallon's discussion is almost exclusively in terms of the actions and decisions of the Supreme Court, and the Justices on that Court. There is little reference to, or discussion of, the other Federal courts or the state courts.

7. One obvious exception to the above generalization is Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale U. Press, 2nd ed., 1986), though Bickel arguably ends up being far too cautious, while giving too little weight to the importance of principle.

cases where reasonable persons can disagree about the meaning or application of constitutional provisions, the courts should defer to the interpretations of the Constitution express or implicit in the actions of other officials.[8] (pp. 40-41, 55)

These considerations mean that the Court is not necessarily wrong when it implements (through its interpretations and doctrinal rules) somewhat less than the full meaning of certain constitutional provisions. (p. 6) Similarly, the Court may also be responding correctly on the occasions (examples may include *Miranda*[9] and the libel rule of *New York Times v. Sullivan*[10]) when constitutional doctrines are in fact broader than is strictly required by the meaning of the constitutional text. (pp. 6-7, 41-42) To put the same general point a different (and more controversial) way, the Court is bound by an unwritten constitution which supplements, mediates, and sometimes modifies the written constitution.[11] (pp. 112-26)

Fallon focuses on the less glamorous aspect of constitutional law—doctrinal rules and tests—as perhaps the best example of, and argument for, the practical side of implementing constitutional values. (pp. 76-101) Neither originalism nor high-principle theories answer or explain the challenges that are involved in developing doctrine, challenges that go far beyond questions of the meaning of constitutional texts, to considerations of day-to-day implementation. (pp. 77, 80) The doctrinal tests reflect not only reasonable disagreement between the Court and others re-

8. Reasonable disagreement plays a double-edged role in Fallon's view of constitutional theory. As discussed, he thinks that the reality of reasonable disagreement often creates a situation warranting judicial deference to other institutions. On the other hand, Fallon also cites the phenomenon of reasonable disagreement as a justification for judicial review: that reasonable disagreement creates a need and a role for a deliberative non-majoritarian institution. (pp. 9-10)

9. *Miranda v. Arizona*, 384 U.S. 436 (1966).

10. 376 U.S. 254 (1964).

11. The idea of an "unwritten constitution" means only that there are sources of law in constitutional adjudication that cannot be traced to the text of the written constitution; these sources include precedent and interpretive rules, as well as, more generally, past practices and practical considerations. (pp. 111-12, 117-18)

To the argument that references to an "unwritten constitution" raise problems of legitimacy, Fallon reminds us that written constitutions have their own legitimacy problem. (pp. 118-24) While there may have been popular consent to the Constitution at the time of its enactment, it is not obvious why later generations, who have not consented to the document, should be bound by it. Fallon argues that "the legitimacy of the unwritten constitution rests on the same conceptual foundations as that of the written Constitution": widespread acceptance combined with the reasonable justice of its provisions. (p. 122)

garding constitutional meaning, but also reasonable disagreements among the Justices.[12] (pp. 81-82, 92-95, 106-09)

Fallon sees judicial interpretation of the Constitution as connected to majoritarianism,[13] but in a more intricate way than John Hart Ely's view that constitutional interpretation must be confined to representative-reinforcing rulings.[14] Fallon's view is that the Court has the right to offer—as law—moral positions that do not yet have majority support,[15] but these positions must be grounded in "norms that can fairly be imputed to a broad, inclusive constitutional community," and the Court must be sensitive to the long-term acceptability of its conclusions.[16] (p. 48)

While there is frequently a temptation to say of constitutional theory books—especially those that stay close to the line of description of current practices (more rational reconstruction than radical reform)—that they have nothing of interest to tell us beyond affirming (apologizing for?) what we already do. Fallon avoids this charge by discussing in some detail what his approach would have suggested for some of the most controversial recent cases—testing his theory and at least occasionally coming to unexpected conclusions. (pp. 56-74) Most surprising may be Fallon's ambivalence and uncertainty about *Roe v. Wade*.[17] Fallon does not merely question the *reasoning* of *Roe*, a standard position (pp. 62-63); he questions whether the Court should have reached the *result* it did, finding that abortion is constitutionally

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12. Fallon thus takes common cause with Cass Sunstein's advocacy of "incompletely theorized agreements." Cass R. Sunstein, *Legal Reasoning and Political Conflict* 4-5, 35-61 (1996). (pp. 95, 106-07)

13. At other times, Fallon seems to want to raise the (democratic) legitimacy of judicial review by questioning the (democratic) legitimacy of other forms of decision-making: "Even legislation . . . seldom represents the truly considered judgment of a majority of the citizenry about the meaning or applicability of ultimate constitutional principles." (p. 9, footnote omitted)

14. John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard U. Press, 1980).

15. Fallon writes: "The Court can reasonably view itself as having a limited proxy to deliberate about constitutional issues on behalf of the people." (p. 52)

16. Fallon notes that "[t]his stricture leaves ample space for disagreement and personal vision. In moving from general principles to concrete specifications and particular legal conclusions, a Justice must inevitably make contestable judgments about how the community's immanent morality would best be specified." (p. 48)

17. 410 U.S. 113 (1973) (pp. 61-66). Other cases Fallon considers include *Brown v. Board of Education*, 347 U.S. 483 (1954) (pp. 56-60); the recent right-to-die cases, *Washington v. Glucksberg*, 521 U.S. 702 (1997), and *Vacco v. Quill*, 521 U.S. 793 (1997) (pp. 66-69); and *City of Boerne v. Flores*, 521 U.S. 507 (1997) (pp. 69-74). The discussion of these cases is, at all times, subtle and well-reasoned, but the conclusions reached are not especially novel or surprising, though the defense of the Court's go-slow response in *Brown* (pp. 58-59) is particularly well done.

protected.[18] (p. 66) While he accepts that the relevant constitutional provisions cover the decision whether to have an abortion, for Fallon this is of course not the end of the analysis. He argues that the Court was insufficiently attentive to "concerns of democratic acceptability . . . [and] issues of fair allocation of political power. . . ." (p. 66) He notes with regret the way that *Roe* has led to a much greater politicization of the judiciary and the judicial nomination process. (p. 66)

The book also does well on the small but significant factors that frequently sink other law books: *Implementing the Constitution* does not have unnecessary padding (it is a sleek 137 pages, excluding the endnotes); and though portions of the book were published in law journals previously,[19] this book reads nicely as a single argument, rather than the sort of cobbling together of disparate pieces that one too often finds in legal academic books.

I fear that *Implementing the Constitution* is destined to be too little read and too little discussed. That is the usual fate of theories that are sensible rather than sensational, tending more towards the cautious than the intentionally provocative. However, those who prefer thoughtfulness to provocation, and reasoned analysis to conclusory polemic, are well-advised to begin (or, perhaps conclude) their consideration of constitutional theory with Professor Fallon's book.

18. "Even after all these years, it is still not clear (to me, anyway) what the least bad answer in *Roe* would have been." (p. 66)

19. Richard H. Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 Harv. L. Rev. 1189 (1987); *Implementing the Constitution*, 111 Harv. L. Rev. 54 (1997); *How to Choose a Constitutional Theory*, 87 Calif. L. Rev. 535 (1999). (p. x).