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IN THE BALANCE

To Leonard and Nora,
hoping that they and the Constitution
will flourish

PREFACE

Striking the Balance on the Roberts Court

After the standard expressions of thanks to the senators, and a graceful reference to his mentor and predecessor William Rehnquist's "devotion to duty over the past year," John Roberts in 2005 launched into the substance of his opening statement in the hearings on his qualifications to be a judge of the U.S. Supreme Court: "Judges and justices are servants of the law, not the other way around. Judges are the umpires. Umpires don't make the rules; they apply them." Umpires and judges "make sure everybody plays by the rules," but "Nobody ever went to a ball game to see the umpire." Asserting that he had "no agenda" or "platform," he said that he did have "a commitment" to deal with each case "with an open mind," and—returning to his opening metaphor, "I will remember that it's my job to call balls and strikes and not to pitch or bat."

Five years later, Elena Kagan addressed the umpire metaphor at her own nomination hearing. Like most Supreme Court nominees these

days, Kagan in July 2010 kept her cards close to her chest, refusing to answer questions about issues that might come before the Court. (This strategy, now routine, might make a skeptical mind question the purpose of these highly publicized hearings.) Yet she was somewhat more open than Roberts had been. She took on Roberts's "umpire" metaphor, saying that while "apt," it also "does have its limits." The metaphor made sense if all it meant was that the judge wasn't supposed to be rooting for one side: "If the umpire comes on and says, you know, 'I want every call to go to the Phillies,' that's a bad umpire." But, she continued, "the metaphor might suggest to some people that law is a kind of robotic enterprise, that there's a kind of automatic quality to it, that it's easy, that we just sort of stand there and, you know, we go ball and strike, and everything is clear-cut, and that there is—that there is no judgment in the process." That, she said, was "not right." Judges "have to exercise judgment."

Some academic critics suggested that her acknowledgment that judges exercise judgment was inconsistent with her statement, repeated so often that it must have been written in her talking points, that decisions were "law all the way down." I think she was making a subtle and pretty deep point: Law all the way down involves the exercise of judicial judgment. "It's not personal views. It's not moral views. It's not political views." But, importantly, it's not a "robotic" or "automatic" enterprise either.

Kagan's confirmation hearings foreshadowed her likely role on the Supreme Court as leading the intellectual opposition to Chief Justice Roberts. During the year that Kagan served as Solicitor General, Roberts seemed to understand the possibility that Kagan would join him on the Court and become a major force there. His tone with her was sometimes sharp. Responding to a question from Justice Antonin Scalia in a relatively obscure case, Kagan treated him as if he were one of her students, asking a question in response. The Chief Justice intervened, "Usually we have questions the other way." Kagan apologized. The

tension between Roberts and Kagan was the most interesting feature of Kagan's tenure as Solicitor General. As Court observer Dahlia Lithwick noted, the tension doesn't come through clearly in the dry transcripts, but if you try to hear them in your mind as you read them, you can get some sense of what was going on. At the end of one sharp exchange, Roberts called the position Kagan took "absolutely startling." Kagan responded: "The United States Government is a complicated place." To which the Chief Justice replied dismissively, "I take your word for it."

The Roberts Court as it matured was closely balanced in partisan terms: five justices nominated by Republican presidents, four by Democrats. It was balanced intellectually as well, with Roberts and Kagan articulating their competing visions of constitutional law as a distinctive blend of law and politics—with the balance slightly different for each. Illinois senator (and former law professor) Barack Obama captured the distinction in announcing that he would vote against Roberts's confirmation:

> While adherence to legal precedent and rules of statutory or constitutional construction will dispose of 95 percent of the cases that come before a court, so that both a Scalia and a Ginsburg will arrive at the same place most of the time on those 95 percent of the cases—what matters on the Supreme Court is those 5 percent of cases that are truly difficult. . . . In those 5 percent of hard cases, the constitutional text will not be directly on point. The language of the statute will not be perfectly clear. Legal process alone will not lead you to a rule of decision. In those circumstances, . . . the critical ingredient is supplied by what is in the judge's heart. . . .

Obama understood that in the 5 percent of cases where the law left things open, "the critical ingredient" comes from outside the law. That ingredient is politics—not the everyday partisan politics we see on Capitol Hill, but a politics of principle, of competing visions about the

best way to arrange our government so that it protects our liberty and our security. To say they are a matter of principle is not to say they are a matter of pure idealism, however. The larger structures that organize our politics—how presidents decide to lead their parties and how interest groups affect nominations and litigation, for example—generate and support those visions and their implementation by the justices.

In the Balance argues that the balance on the Roberts Court has been and will be affected by those political structures and political visions. Chief Justice Roberts and Justice Kagan are both products of those structures and authors of those visions. The future of the Court will be shaped not only by the nominations that President Obama and his successors will make, but by the competition between Roberts and Kagan for intellectual leadership of the Court, as each forcefully articulates differing views about the balance between law and politics. *In the Balance* suggests that we might find ourselves talking about a Court formally led by Chief Justice Roberts—a "Roberts Court"—but led intellectually by Justice Kagan—a "Kagan Court."

THE CLOSE balance on the Roberts Court today is reflected in its decisions: some "liberal," upholding the Affordable Care Act ("Obamacare") and invalidating some of the Bush administration's anti-terrorism initiatives, and some "conservative," upholding a federal ban on later-term abortions ("partial-birth abortions"), the *Heller* gun rights case, and the *Citizens United* campaign finance decision. Still, there's something odd about the Roberts Court's work when looked at as a whole. Judging from the personnel alone, you'd expect that the Roberts Court would be a reliably conservative Court. But, as conservative outrage at the Affordable Care Act decision indicates, it isn't.

Not *completely* reliable, that is—not a ventriloquist's puppet for the Republican Party. Yet, though the picture is mixed, the Roberts Court's decisions correspond to the main constitutional positions associated

with the Republican Party of the early twenty-first century. Presidents Reagan, George H.W. Bush, and George W. Bush got pretty much what they were looking for when they appointed the men who make up the Roberts Court's core. So did Presidents Clinton and Obama on the other side.

This book offers an account of the Roberts Court that tries to make sense of the Court's work as part of contemporary politics, in a way that might make it easier to understand the mixed picture I've sketched. Part of the story involves the politics of appointments, which I examine in chapter 2. Another part of the story involves the *law* part of constitutional law. Throughout this book I argue that we have to take legal arguments seriously, and shouldn't simplistically blame "politics" for justices' decisions. We shouldn't take legal arguments too seriously, though. Judges use arguments tactically, as part of a larger campaign, and we need to focus on the larger strategy the tactics serve. The overall story is about conservatism and liberalism today.

In saying that I offer a political account, I don't mean that the justices take their cues from the platforms or leadership of the Democratic or Republican parties. What the justices do affects what presidents and Congress can do, and the justices know it. But usually the justices have a longer time frame for their form of politics than presidents or politicians do: the justices care about what's going to happen over the next few decades, the politicians about what's going to happen before the next election. A short-term balance can shift with the next appointment to the Court.

The politics of appointments means that justices are chosen because they have general outlooks on the Constitution that are consistent with the general views of the political parties *at the historical moment* when they were appointed. Political parties change. The longer a justice serves, the more likely it is that the "party" with which he or she was affiliated when appointed will change into something else. Most dramatically, Anthony Kennedy's Republican Party wasn't George W. Bush's,

so Kennedy's "Republicanism" isn't the same as Samuel Alito's. The Republican Party in 2013 with an extremely strong Tea Party element was different from the Republican Party when Richard Nixon was elected, and different even from the party when Ronald Reagan was elected. John Roberts's constitutional philosophy was shaped before and during the Reagan years, and there's no reason to think that he's a partisan hack whose views change as new leaders come to the fore in the party. (As I explain in chapter 1, the timing issue matters a lot in understanding Chief Justice Roberts's "betrayal," as conservatives saw it, in the Affordable Care Act decision.)

No one should think, of course, that every decision of the Roberts Court can be explained in partisan terms. There are still the 95 percent of the cases that Senator Obama described where the best explanation for the decisions is what the justices think rules and precedent require. In 2012, for example, the Court decided a case asking whether children born eighteen months after their father had died (their mother had been inseminated with the father's frozen sperm) were entitled to "survivors' benefits" under the Social Security Act. Justice Ruth Bader Ginsburg wrote an opinion for a unanimous Court saying, "Not unless the children counted as heirs under state law." You can wring some politics from this case if you assume the liberals always want to make the social safety net as big as possible, but you'd be pretty foolish to do that. The case presented a straightforward problem in statutory interpretation and administrative law, with no real political overtones. The best explanation for the outcome is that most of the justices thought that "the law" supported Justice Ginsburg's analysis. That's what Chief Justice Roberts meant when he said that a judge's job was to call balls and strikes. He was right, but mostly about cases with no or only weak political overtones.

What about the cases that do have political overtones? I'm quite certain that the justices don't ask themselves what they can do to make the political future of the Republican or Democratic parties rosier (or

gloomier). Yet what they *do* supports many of the positions on the Constitution's meaning that leading partisans take. That's not just convenient, as the Church Lady used to say on *Saturday Night Live*. It results from political structures and strategies that led to the selection of the five Republican appointees and the four Democratic ones, and to the political structures and strategies of the political parties and interest groups.

Yet, even if the justices did think of themselves in purely political terms—which they don't—knowing that wouldn't help us understand what the Court does. Suppose Chief Justice Roberts woke up the day the Court heard argument in the Obamacare case, and asked himself, "How can I decide this case to make it more likely the Republican candidate in November will beat President Obama?" He'd have no way of giving himself a satisfying answer. As one liberal blogger put it on the day the Court granted review in the case:

> So what would be the political consequences of the court's ruling to uphold or strike down or punt on the mandate? If they uphold it, the Obama Administration will claim vindication—which, plus two dollars, will entitle them to a short ride on the Metro. Upholding the mandate means that the right will conclude the only way to get rid of "Obamacare" would be to repeal it legislatively by electing a Republican president, re-electing the Republican House and winning a GOP-controlled filibuster proof Senate. (Or even not filibuster proof, since a number of Democratic senators, under those conditions, would probably go along with repealing it.) The right, in other words, will go into the election even more stoked than it already is. The Democrats, meanwhile, from the president himself on down, bring no passion to Obamacare's defense. It's hard to envision Democratic get-out-the-vote campaigns centered on preserving a health care reform that never kindled the public's, or even the Democratic base's, imagination.
>
> If, on the other hand, the court strikes down "Obamacare,"

> Republicans will take it as vindication and feel more wind in their sails. Democrats will not campaign on battling to pass another version that does pass muster with the courts (as single-payer would, ironically, since it would be a universal governmental program like Medicare). In other words, a slight bump politically for the GOP; none for the Dems.

Basically, a justice thinking about the cases politically could figure that anything he or she was inclined to do would benefit his or her side. It's not like *Bush v. Gore*, where everyone knew that a decision one way would come close to guaranteeing that George W. Bush would take office on January 20, 2001. Under the circumstances of the Obamacare cases the only sensible thing to do would be to put political calculations aside and do whatever the justice's general view of the Constitution says to do.

Every justice has developed ways of thinking about the Constitution's meaning in partisan settings. But no political party tells them what to think, and sometimes the "party" is a messy coalition with factions adhering to accounts of the Constitution's meaning that overlap on many issues but diverge on some. The story of the Roberts Court as a pro-business Court, which I recount and qualify in chapter 5, is an example: many of the cases involve conflicts within the Republican Party, between its business supporters and its localists.

I describe the justices as "Republicans" or "conservatives," "Democrats" or "liberals," because they have differing constitutional visions—the term used in nomination hearings is "judicial philosophies"—that are systematically associated with the two parties. But judicial philosophies are capacious ways of thinking about problems, not checklists of partisan positions. John Roberts's decision to uphold the Affordable Care Act makes the point: as a justice thinks about what his or her judicial philosophy says about a specific case the Court has to decide, there's no guarantee that the justice's conclusions will fit the party's

checklist. But, of course, as the votes of the conservative dissenters show, saying that there's no guarantee doesn't mean that there isn't a pretty good chance of such a fit.

More: The justices have to implement their constitutional visions through law and constitutional doctrine. The legal materials they have to work with are supple and manipulable, but they don't always fit easily into a purely partisan agenda. If the stakes are high enough, justices will set aside the limits that law puts on what a justice can do—as happened in *Bush v. Gore*. But I spend a fair amount of time in what follows laying out the structure of constitutional doctrine because law sometimes matters, and you can't tell when or, maybe more important, how politics dominates law unless you understand constitutional doctrine.

The Supreme Court is a small group of nine people, and law matters sometimes for each of them. My guesstimate is that 90 percent of the justices cast their votes in 80 percent of the politically salient cases in ways that could be read off from the party checklists. In the other cases a justice's position results from the justice's assessment of what the law requires. But we can't tell in advance which justice will "deviate" in which cases. When you aggregate the nine votes, sometimes you'll come up with results that someone who thought that the story was "Republicans versus Democrats" would find surprising. A colleague who does math better than I do calculates that, with the numbers I made up, you could expect on average about one fifth to one quarter of the politically salient cases to come out "counter"-ideologically—that is, on the Roberts Court, come out on the liberal side.

The Supreme Court's work rolls on, regardless of publication schedules. As I was writing this book the Court was considering important cases involving affirmative action, the Voting Rights Act, and gay marriage. The structures I describe give some clues to how to think about

individual cases, but generate no solid predictions. The balance on the Roberts Court is close enough that no one should take large bets on specific outcomes. Still, as Ring Lardner put it, "The race is not always to the swift nor the battle to the strong, but that's the way to bet." So too for the Supreme Court.

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