

Cambridge University Press

978-1-107-02140-2 - The Dynamic Constitution: An Introduction to American Constitutional Law and Practice: Second Edition

Richard H. Fallon Jr.

Frontmatter

[More information](#)

THE DYNAMIC CONSTITUTION, SECOND EDITION

In this revised and updated second edition of *The Dynamic Constitution*, Richard H. Fallon Jr. provides an engaging, sophisticated introduction to American constitutional law. Suitable for lawyers and nonlawyers alike, this book discusses contemporary constitutional doctrine involving such issues as freedom of speech, freedom of religion, rights to privacy and sexual autonomy, the death penalty, and the powers of Congress. Through examples of Supreme Court cases and portraits of past and present Justices, this book dramatizes the historical and cultural factors that have shaped constitutional law. *The Dynamic Constitution, Second Edition*, combines detailed explication of current doctrine with insightful analysis of the political culture and theoretical debates in which constitutional practice is situated. Professor Fallon uses insights from political science to explain some aspects of constitutional evolution and emphasizes features of the judicial process that distinguish constitutional law from ordinary politics.

Richard H. Fallon Jr. is the Ralph S. Tyler Jr. Professor of Constitutional Law at Harvard University Law School. A former Supreme Court law clerk, he has taught at Harvard Law School since 1982. He has twice been voted the most outstanding teacher at Harvard Law School by graduating students. Professor Fallon has coauthored several constitutional law and federal courts casebooks.

Cambridge University Press

978-1-107-02140-2 - The Dynamic Constitution: An Introduction to American Constitutional Law and Practice: Second Edition

Richard H. Fallon Jr.

Frontmatter

[More information](#)

PRAISE FOR *THE DYNAMIC CONSTITUTION*, SECOND EDITION

“If you read just one book on the U.S. Constitution and Supreme Court, Fallon’s *Dynamic Constitution* is it. And if you read everything on the subject, this updated edition should be required reading – you will gain fresh and important insights. Why? In two words: breadth and judgment. Across the full range of current Supreme Court decisions, Fallon elucidates doctrine, assesses competing strands of constitutional interpretation, provides historical context enlivened by memorable historical anecdotes, brings into play the background and styles of individual justices, acknowledges the force of practicability in decision making, incorporates recent political science research, and offers a sophisticated judgment of the part politics (only rarely partisan politics) plays in judicial decisions – tracing the Court’s interactions with Congress, public opinion, and social movements, and the ‘political construction’ of its authority. Fallon does it all with clarity and verve and with deep respect for the ‘dynamic’ constitutional enterprise. We are in the hands of a true master of constitutional law.”

– Nancy L. Rosenblum, Senator Joseph Clark Professor of Ethics in Politics and Government, Department of Government, Harvard University

Cambridge University Press

978-1-107-02140-2 - The Dynamic Constitution: An Introduction to American Constitutional Law and Practice: Second Edition

Richard H. Fallon Jr.

Frontmatter

[More information](#)

The Dynamic Constitution: An Introduction to American Constitutional Law and Practice

SECOND EDITION

Richard H. Fallon Jr.

Harvard University



CAMBRIDGE
UNIVERSITY PRESS

Cambridge University Press

978-1-107-02140-2 - The Dynamic Constitution: An Introduction to American Constitutional Law and Practice: Second Edition

Richard H. Fallon Jr.

Frontmatter

[More information](#)

CAMBRIDGE UNIVERSITY PRESS

Cambridge, New York, Melbourne, Madrid, Cape Town,
Singapore, São Paulo, Delhi, Mexico City

Cambridge University Press

32 Avenue of the Americas, New York, NY 10013-2473, USA

www.cambridge.org

Information on this title: www.cambridge.org/9781107642577

© Richard H. Fallon Jr. 2004, 2013

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First edition published 2004

Second edition published 2013

Printed in the United States of America

A catalog record for this publication is available from the British Library.

Library of Congress Cataloging in Publication data

Fallon, Richard H., 1952–

The dynamic constitution : an introduction to American constitutional law and practice /
Richard H. Fallon Jr. – Second edition.

pages cm

Includes bibliographical references and index.

ISBN 978-1-107-02140-2 (hardback) – ISBN 978-1-107-64257-7 (paperback)

1. Constitutional law – United States. I. Title.

KF4550.F35 2013

342.73–dc23 2012032877

ISBN 978-1-107-02140-2 Hardback

ISBN 978-1-107-64257-7 Paperback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party Internet Web sites referred to in this publication and does not guarantee that any content on such Web sites is, or will remain, accurate or appropriate.

Contents

<i>Preface to the Second Edition</i>	<i>page xi</i>
<i>Preface to the First Edition</i>	xv
<i>Prologue: The Affordable Care Act and Other Vignettes</i>	xix
Introduction: The Dynamic Constitution	1
History	2
Original Constitutional Design	5
The Constitution as Higher Law: Foundations of Judicial Review	10
<i>Marbury v. Madison</i> : An Enduring Symbol of Judicial Power	12
Politics and Judicial Review	17
A Preliminary Perspective on How the Supreme Court Interprets the Constitution	19
A Brief History of Judicial Review	24
The Supreme Court Today	33
An Outline of What Is to Come	37
 Part I: Individual Rights under the Constitution	
1. Freedom of Speech	41
The Foundations of Modern Doctrine	42
Proximate Origins of Modern Doctrine	44
Expressive Conduct	54
	v

vi	CONTENTS
	Shocking and Offensive Speech 58
	Remaining Unprotected Categories, Including Obscenity 59
	Commercial Speech 63
	Campaign Finance and Political Advertising 66
	The Broadcast Media 71
	Freedom to Associate and Not to Associate 73
	Concluding Note 76
2.	Freedom of Religion 77
	Introduction to the Establishment Clause 79
	Religion in the Public Schools 82
	Governmental Aid to Religious Institutions 85
	Symbolic Support for Religion 89
	The Free Exercise Clause 92
	Voluntary Governmental Accommodations of Religion 97
	Tensions between the Free Exercise and Establishment Clauses 98
3.	Protection of Economic Liberties 101
	Early History 105
	The Fourteenth Amendment 108
	Substantive Due Process 111
	Modern Contracts Clause Doctrine 118
	The Takings Clause 119
	Concluding Thoughts 123
4.	Fundamental Rights “Enumerated” in the Bill of Rights 125
	Incorporation of the Bill of Rights against the States 127
	Enumerated Rights to Fair Procedures in Criminal Cases 130
	Time, Elections, and Change 134
	The Law on the Books versus the Law in Practice 135
	The Eighth Amendment Prohibition against Cruel and Unusual Punishment 138

CONTENTS	vii
The Second Amendment and the “Right to Keep and Bear Arms”	143
5. Equal Protection of the Laws	149
Equal Protection and the Constitution	152
Rational Basis Review	156
Race and the Constitution: Invidious Discrimination	159
What Did <i>Brown</i> Accomplish?	168
Race and the Constitution: Disparate Impact	169
Affirmative Action	171
Gender and the Constitution	179
Discrimination against Gays and Lesbians	184
Conclusion	188
6. “Unenumerated” Fundamental Rights	191
The Idea of Fundamental Rights	193
Voting Rights: A Conceptual Introduction	195
Voting Rights: The “One-Person, One-Vote” Cases	196
Beyond One Person, One Vote	198
Majority-Minority Districting	201
Equality in the Counting of Votes	203
Sexual Privacy or Autonomy	207
<i>Roe v. Wade</i> and Abortion Rights	209
Gay Rights	214
Rights Involving Death and Dying	219
Fundamental Rights Involving the Family	221
Conclusion	223
 Part II: The Constitutional Separation of Powers	
7. The Powers of Congress	227
Elements of the “Original Understanding”	230
Doctrinal and Conceptual History	234
Crisis and Revision	236

viii	CONTENTS
A Course Correction of Uncertain Scope	238
The Necessary and Proper Clause	242
The Spending Power	243
Congressional Regulation of State and Local Governments	245
Coercion through Spending	248
Concluding Thoughts	251
8. Executive Power	253
The <i>Youngstown</i> Case	256
Foreign Affairs	260
Delegated Power in Domestic Affairs	263
Legislative Vetoes and Line-Item Vetoes	266
Appointments and Removals	270
9. Judicial Power	275
The Character of Judicial Power	278
Limits on Judicial Power	283
Anxieties about Judicial Power	289
Part III: Further Issues of Constitutional Structure and Individual Rights	
10. Structural Limits on State Power and Resulting Individual Rights	301
How Federal Power and Federal Law Can Restrict State Power	302
The Privileges and Immunities Clause	304
The “Dormant” Commerce Clause	308
The States as “Market Participants”	312
Conclusion	314
11. The Constitution in War and Emergency	315
The Power to Initiate War	320
Federal Powers during Wartime	323

Cambridge University Press
978-1-107-02140-2 - The Dynamic Constitution: An Introduction to American Constitutional
Law and Practice: Second Edition
Richard H. Fallon Jr.
Frontmatter
[More information](#)

CONTENTS	ix
War and Individual Rights	324
The Constitution and the “War on Terror”	328
Conclusion	333
12. The Reach of the Constitution and Congress’s Enforcement Power	335
State Action Doctrine	336
The Paucity of “Positive” Fundamental Rights	339
Congressional Power to “Enforce” the Reconstruction Amendments	345
13. Conclusion	353
<i>Appendix: The Constitution of the United States</i>	363
<i>Index</i>	389

Cambridge University Press

978-1-107-02140-2 - The Dynamic Constitution: An Introduction to American Constitutional Law and Practice: Second Edition

Richard H. Fallon Jr.

Frontmatter

[More information](#)

Cambridge University Press

978-1-107-02140-2 - The Dynamic Constitution: An Introduction to American Constitutional Law and Practice: Second Edition

Richard H. Fallon Jr.

Frontmatter

[More information](#)

Preface to the Second Edition

On September 25, 2005, John G. Roberts took the oath of office as the seventeenth Chief Justice of the United States. He replaced William H. Rehnquist, for whom he had once served as a law clerk. Roberts's confirmation marked the end of one era in Supreme Court history and the beginning of another. When I wrote the first edition of this book in 2004, Rehnquist had been the Chief Justice since 1986. More significant, in 2004 the composition of the Supreme Court had remained unchanged for ten years, the second-longest period of unaltered membership in the Court's entire history. Because the Supreme Court sits to resolve hard cases that divide the lower courts, change in constitutional law is a constant, even when the Justices stay the same. But in 2004, stable patterns had emerged in many, if not most, areas. It was possible to write with reasonable confidence about the doctrinal equilibria into which the Justices had settled.

The confirmation of John Roberts to replace William Rehnquist, swiftly followed by Samuel Alito's replacement of Sandra Day O'Connor, inevitably brought change. The Chief Justice is almost invariably the most influential of the Justices in the Court's internal workings. Among other things, the Chief Justice gets to decide who writes the majority opinion in any case in which he votes with the majority. The substitution of Justice Alito for Justice O'Connor was especially consequential, too. Through most of the years of the Rehnquist Court, Justice O'Connor was the "swing," or median, Justice – the Justice whose views

Cambridge University Press

978-1-107-02140-2 - The Dynamic Constitution: An Introduction to American Constitutional Law and Practice: Second Edition

Richard H. Fallon Jr.

Frontmatter

[More information](#)

were most likely to tip the balance between the Court's more conservative Justices and its liberals. When O'Connor retired, to be replaced in 2006 by the more conservative Alito, the Court's center of gravity moved farther to the right. There have been two further membership switches since then, with Sonia Sotomayor replacing David Souter and Elena Kagan succeeding John Paul Stevens.

In this revised second edition, I have updated my discussions of the Supreme Court, of constitutional doctrine, and of the relationship between constitutional law and surrounding political and cultural currents to reflect developments since 2004. As I reflect on them, the intervening changes impress me as both large and interesting, well warranting a new edition.

Another, less important development also deserves mention. Law professors and political scientists have traditionally had quite different perspectives on the Supreme Court. To generalize grossly, law professors have tended to view the Justices as driven by felt obligations of fidelity to distinctively legal ideals, while political scientists have regarded them as ideologically motivated actors with political agendas. In the years since 2004, law professors and political scientists have begun to engage much more with one another's work – to the profit of both, I believe. I remain a law professor, with an abiding conviction that law matters to how the Justices decide cases, but I hope readers will agree that this revised edition is enriched by a number of insights traceable to work by political scientists. Two themes are especially prominent. First, the Supreme Court is a “they,” not an “it.” To understand what the Court has done in the past and is likely to do in the future, we need to attend closely to the frequently varied thinking of each of the nine individuals who make up the Court. Second, the Supreme Court operates within politically constructed bounds. What the Justices can do successfully at any particular time, and what they can make stick through succeeding rounds of judicial nominations and confirmations, depends on the tolerance of political actors and the American public. There has been enormous change in constitutional doctrine over the sweep of constitutional history, mostly

Cambridge University Press

978-1-107-02140-2 - The Dynamic Constitution: An Introduction to American Constitutional Law and Practice: Second Edition

Richard H. Fallon Jr.

Frontmatter

[More information](#)

PREFACE TO THE SECOND EDITION

xiii

shaped and bounded by the demands and expectations of the American people.

In preparing this revised edition, I have benefited from the help and support of Robert Dreesen of Cambridge University Press and from the comments of two anonymous reviewers of my initial proposal for revising the first edition. Alexander Dryer of the Harvard Law School class of 2012 provided invaluable research and editorial assistance.

Richard H. Fallon Jr.
July 2012

Cambridge University Press

978-1-107-02140-2 - The Dynamic Constitution: An Introduction to American Constitutional Law and Practice: Second Edition

Richard H. Fallon Jr.

Frontmatter

[More information](#)

Cambridge University Press

978-1-107-02140-2 - The Dynamic Constitution: An Introduction to American Constitutional Law and Practice: Second Edition

Richard H. Fallon Jr.

Frontmatter

[More information](#)

Preface to the First Edition

This book provides an introduction to contemporary constitutional law for intelligent readers who are not, or not yet, lawyers. It is a reasonably short book, which leaves out much detail. I have also done my best to write it in plain language – or at least to explain the jargon used by courts and lawyers before employing it myself. But the book does not talk down to the reader or omit central considerations. It aspires both to inform and to challenge nonlawyers who are interested in constitutional law, as well as law students seeking an introduction to the subject and lawyers who would like a refresher.

I still remember the intellectual thrill of my own first encounter with a book about constitutional law. It came in 1971, when I was a college undergraduate. The book was Robert McCloskey's *The American Supreme Court*, written in 1960. Over the years, when people have asked me to recommend a book introducing constitutional law to nonlawyers, I have usually named McCloskey's. Increasingly, however, I have done so hesitantly. The organization of McCloskey's book is mainly historical. It discusses successive eras in the history of the Supreme Court, often brilliantly, but without attempting to provide the clear portrait of contemporary constitutional law, and of the debates surrounding it, that some readers want. In addition, *The American Supreme Court* has inevitably grown dated with the passage of time, despite able efforts by one of McCloskey's former students to summarize recent developments in additional chapters. McCloskey's book naturally reflects the political

Cambridge University Press

978-1-107-02140-2 - The Dynamic Constitution: An Introduction to American Constitutional Law and Practice: Second Edition

Richard H. Fallon Jr.

Frontmatter

[More information](#)

and scholarly concerns of the period in which he wrote it, now more than four decades ago. It is time for a new introduction to American constitutional law, written in the twenty-first century for a contemporary audience.

In writing a book for twenty-first-century readers, I have addressed constitutional law from several simultaneous perspectives. First, and perhaps most important, this book sketches the basic outlines of current constitutional doctrine. In chapters with headings such as “The Powers of Congress,” “The Freedom of Speech,” “The Equal Protection of the Laws,” and “The Constitution in War and Emergency,” the book discusses leading Supreme Court cases dealing with the powers of Congress and the President and with such issues as hate speech, race and gender discrimination, abortion, gay rights, and affirmative action. It explains why the Court has analyzed these issues as it has, describes debates among the Justices, and anticipates future challenges.

Second, although the book principally focuses on the present, it locates current constitutional doctrines and debates in historical context. Most chapters include a brief account of what the authors and ratifiers of a particular constitutional provision apparently had in mind. I also describe the Supreme Court’s historical efforts to interpret the Constitution’s language before offering more detailed discussion of contemporary law. In many cases the history is fascinating, often bound up with central currents in the nation’s political, economic, and cultural life. In any event, it is often impossible to understand today’s law without some awareness of the historical context from which it emerged.

Third, the book refers repeatedly to debates about the Supreme Court’s proper role in American government. During the 1930s, when a conservative Supreme Court threatened to thwart President Franklin Roosevelt’s New Deal efforts to revive the national economy, critics called passionately for judicial restraint. Many argued that courts should invalidate legislation only when it was clearly unconstitutional, not when there was any room for doubt. Today, another school of so-called originalists argues that the Supreme Court should consistently enforce the

Cambridge University Press

978-1-107-02140-2 - The Dynamic Constitution: An Introduction to American Constitutional Law and Practice: Second Edition

Richard H. Fallon Jr.

Frontmatter

[More information](#)

PREFACE TO THE FIRST EDITION

xvii

“original understanding” of individual constitutional provisions – what those provisions meant to those who wrote and ratified them. Meanwhile, various others have maintained that the Court plays a vital role in adapting vague constitutional language to the needs of changing times. In summarizing current doctrine, I talk about how these and other competing views both do and ought to affect the Court.

Fourth, this book deals openly with the now familiar insight that loosely “political” values and concerns influence Supreme Court decision making. As any reader of newspapers knows, the Court has “liberal” and “conservative” Justices who attract those labels by reaching conclusions that can plausibly be identified as liberal or conservative most of the time. This is a phenomenon that needs to be explained, not ignored, and surely not denied. At the same time, I do not believe that judicial politics are simply a concealed form of partisan electoral politics. In this book I try to explain the ways in which Supreme Court decision making is and is not (or at least should not be) “political.”

Before concluding this preface, I should probably say explicitly what is perhaps evident already. Constitutional law is an *argumentative* subject. There are certain facts of the matter – what the Constitution says, what the Supreme Court has held in past cases, and so forth. But lawyers, concerned citizens, and Supreme Court Justices all argue ceaselessly with each other about how the Constitution should be interpreted and applied. At some points, this book tries to stand outside of constitutional arguments and explain them dispassionately. Even then, I am probably too engaged by some issues to adopt a truly neutral perspective. At other points, I join the arguments unabashedly and offer my own opinions, partly because I cannot help myself, because I cannot be indifferent, and partly because constitutional law is ultimately inseparable from constitutional argument. To a large extent, to understand constitutional law is to know how to participate in constitutional debates. There would be no better indication that this book has succeeded in introducing constitutional law successfully than if the reader, at certain points, feels both provoked and empowered to argue with my judgments.

Cambridge University Press

978-1-107-02140-2 - The Dynamic Constitution: An Introduction to American Constitutional Law and Practice: Second Edition

Richard H. Fallon Jr.

Frontmatter

[More information](#)

xviii

PREFACE TO THE FIRST EDITION

In one sense, this book has been many years in the making. It reflects my reading and writing about constitutional law, and perhaps especially my teaching, over a period of roughly twenty years. In another sense, the book grows directly from a suggestion by Michael Aronson that I write a brief “primer” on constitutional law for nonlawyers. I am very grateful for his encouragement. Ed Parsons gave me enormously helpful editorial advice at a crucial stage in the book’s gestation and has continued to provide valuable help through the end. I also owe large debts to a number of friends and colleagues who read earlier drafts. Heartfelt thanks go to David Barron, Erwin Chemerinsky, Jesse Choper, Heather Gerken, Ken Kersch, Sandy Levinson, Daniel Meltzer, Martha Minow, Fred Schauer, Margo Schlanger, and Lloyd Weinreb. Whatever the book’s deficiencies, their comments, criticisms, and suggestions made it much better than it would otherwise have been, as did the labors of my extraordinary research assistants, Mark Freeman and Josh Segal.

Cambridge University Press

978-1-107-02140-2 - The Dynamic Constitution: An Introduction to American Constitutional Law and Practice: Second Edition

Richard H. Fallon Jr.

Frontmatter

[More information](#)

Prologue: The Affordable Care Act and Other Vignettes

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.

– *Marbury v. Madison* (1803)¹

[W]hoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver, to all intents and purposes, and not the person who first spoke or wrote them.

– Bishop Hoadly’s Sermon, preached before King George I of England, March 31, 1717

On June 28, 2012, the fate of the Patient Protection and Affordable Care Act – or “Obamacare,” as many called it – hung in the balance. That statute, which aimed to guarantee health care to virtually all Americans, was the signature achievement of the Obama administration, enacted with great fanfare in 2010. On the night when the bill passed the House in final form, by a vote of 219–212, the President had delivered a short, triumphant speech to the American people, celebrating the accomplishment. Banner headlines appeared in newspapers the following day. Two years later, however, the nation braced for another cliffhanger vote on the Affordable Care Act (ACA), this time by the Supreme Court of the United States.

¹ 5 U.S. 137, 177 (1803).

Cambridge University Press

978-1-107-02140-2 - The Dynamic Constitution: An Introduction to American Constitutional Law and Practice: Second Edition

Richard H. Fallon Jr.

Frontmatter

[More information](#)

The fateful moment came shortly after 10 A.M. As a packed courtroom waited and the President watched on television to get the earliest possible report from an observer on the scene (cameras are not allowed in the Supreme Court courtroom), the marshal entered and called out that all in attendance should please rise. The nine Justices – six men and three women – then entered, clad in black robes, and assumed their assigned places behind a large, curved, heavy wooden bench. In the middle Chief Justice John Roberts, a fifty-seven-year-old graduate of Harvard Law School and former Washington lawyer and lower federal court judge, took his seat and called the Court to order. Some observers reported that Roberts looked tired and slightly red-eyed as the Court prepared to “hand down” the results – a term that bespeaks the Court’s stature in the constitutional pecking order – in the final three cases of its “Term,” which had begun the previous October.

Following brisk announcements about the other two cases, Chief Justice Roberts began to summarize the decision in the Affordable Care Act case, titled *National Federation of Independent Business v. Sebelius*² (2012). To the great relief of the Obama administration and to the sore disappointment of others, the Court upheld the most important aspects of the Affordable Care Act by a 5–4 vote. In its most important decision of the year, and possibly its most important decision in many years, the Court did something by essentially doing nothing. It failed to strike down a law enacted by the House and Senate and signed by the President, all following a prolonged national political debate. The Court did not say that the ACA was wise as a matter of policy, as Chief Justice Roberts emphasized in explaining the result, but merely that it did not offend the Constitution. In so holding, Roberts, who is nearly always identified as a judicial “conservative,” joined the Court’s four “liberals.” The other four conservative Justices dissented from the relevant parts of Roberts’s opinion.

2 132 S. Ct. 2566 (2012).

Cambridge University Press

978-1-107-02140-2 - The Dynamic Constitution: An Introduction to American Constitutional Law and Practice: Second Edition

Richard H. Fallon Jr.

Frontmatter

[More information](#)

PROLOGUE

xxi

What can we learn from *National Federation of Independent Business v. Sebelius*? Quite a lot, I shall argue. But, paradoxically, we should steel ourselves not to try to learn too much. It would be a mistake to treat *National Federation of Independent Business*, or any other single case, as “representative,” either of the way that our Constitution works or of the role that the Supreme Court plays in enforcing the Constitution. Anyone searching for a single emblematic case would do well to recall the fable of the blind men and the elephant. Even with our eyes open, we should not mistake a part of the Court’s role for the entirety or conclude that what sometimes happens always happens. We will come back very shortly to the Affordable Care Act case. First, to broaden the frame of reference, here are five additional, relatively recent vignettes. Taken in isolation, any one of them might give a quite different picture of constitutional law and the role of the Supreme Court than would *National Federation of Independent Business v. Sebelius* if we were to look at it alone.

First vignette. On September 12, 2005, John Roberts sat at a witness table in the Senate wing of the U.S. Capitol Building, there to testify before the Senate Judiciary Committee. Roberts appeared as a nominee to become the seventeenth Chief Justice of the United States, put up for the post by President George W. Bush. (Like other Justices of the Court, the Chief Justice must be nominated by the President and confirmed by the Senate.) For the decade before Roberts’s nomination, the Court had consisted of seven Justices appointed by Republican Presidents and two appointed by Democrats. Although conservatives expressed frustration that the Court was not conservative enough – it continued, for example, to uphold abortion rights under *Roe v. Wade*³ (1973) – by 2005, liberals worried that the Court had embarked on, and would continue to pursue, what some called an agenda of “conservative judicial activism” that included the invalidation of economic regulatory legislation passed by Congress. Although Roberts was a lifelong conservative who had

3 410 U.S. 113 (1973).

served in the Reagan administration, he sought to allay fears of “judicial activism” by comparing the role of a Supreme Court Justice with that of an umpire:

Judges and justices are servants of the law, not the other way around. Judges are like umpires. Umpires don’t make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ball game to see the umpire.⁴

Following his testimony, Roberts was confirmed as Chief Justice by a Senate vote of 78–22. One of the negative votes came from Barack Obama, then a Senator from Illinois. Obama believed that Roberts’s conservative views would make him an unduly conservative Justice.

Second vignette. Two years after his confirmation, Chief Justice Roberts wrote the lead opinion for a bitterly divided Supreme Court in *Parents Involved v. Seattle School District*⁵ (2007). By a vote of 5–4, the Court held that local school districts in Seattle, Washington, and Louisville, Kentucky, had violated the Equal Protection Clause when they voluntarily took race into account in assigning students to local public schools for the purpose of promoting racial integration. *Parents Involved* was, in essence, a fight about the legacy of the Supreme Court’s iconic decision in *Brown v. Board of Education*⁶ (1954), which had condemned racially segregated public education by pronouncing that “[i]n the field of public education,” separate, race-based “facilities are inherently unequal.”⁷ The school districts involved in the *Brown* case all maintained formally designated one-race schools. Regardless of the neighborhood in which they lived, all white children went to a white school and

4 Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr.).
 5 551 U.S. 701 (2007).
 6 347 U.S. 483 (1954).
 7 Ibid. at 495.

Cambridge University Press

978-1-107-02140-2 - The Dynamic Constitution: An Introduction to American Constitutional Law and Practice: Second Edition

Richard H. Fallon Jr.

Frontmatter

[More information](#)

PROLOGUE

xxiii

all black children to a black school. Concerned solely with legally mandated segregation, *Brown* did not address the issues that would arise if residential housing patterns, rather than legal mandates, tended to produce public schools that were nearly all white or all black.

The Court had, however, considered race-based school assignments in an intervening decision in *Swann v. Charlotte-Mecklenburg Board of Education*⁸ (1971). In *Swann*, a unanimous Supreme Court – in the midst of upholding a forced busing remedy for past race-based exclusion of black students from all-white schools – had spoken approvingly of the possibility that local school districts might want to undertake further, voluntary efforts (as Seattle and Louisville had done) to promote racial mixing.

In *Parents Involved*, Chief Justice Roberts dismissed what the Court had said in *Swann* about race-based assignments for the purpose of achieving school integration as an ill-considered aside, or “dictum,” that was not necessary to the Court’s actual “holding” about the rights and obligations of the parties before it. What the Court had said in *Swann* was therefore not binding, he ruled. According to Roberts, *Brown* was best read as deeply suspicious of, if not flatly condemning, all race-based school assignments, even those with the purpose of bringing about more racial integration. “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race,” he wrote.⁹ In his view, the Constitution thus forbade Seattle and Louisville from taking individual students’ race into account in making school assignments.

Four dissenting Justices protested vehemently. According to them, *Brown* forbade race-based classifications for the purpose of keeping the races apart and promoting notions of racial superiority and inferiority, and it should not stop school systems from making modest, voluntary, race-based efforts to achieve racial diversity in their public schools. Indeed, in the view of the dissenting Justices, *Brown* supplied grounds

⁸ 402 U.S. 1 (1971).

⁹ *Ibid.* at 748.

Cambridge University Press

978-1-107-02140-2 - The Dynamic Constitution: An Introduction to American Constitutional Law and Practice: Second Edition

Richard H. Fallon Jr.

Frontmatter

[More information](#)

for upholding racially diverse public schools as vital for teaching Americans of all races to live, learn, and work together.

Among the dissenting Justices in *Parents Involved* was John Paul Stevens, who by 2007 had served on the Court for more than thirty years, far longer than any of his colleagues. In a short, unusually personal opinion, he wrote that no member of the Supreme Court that he had joined in 1975 would have agreed with the Court's ruling in *Parents Involved*.¹⁰ Neither Chief Justice Roberts nor any other Justice in the majority contradicted Stevens's claim about how a different Supreme Court with different members would have ruled on the Seattle and Louisville cases in 1975. If one thinks of Justices in terms of an analogy to umpires, one might wonder whether the strike zone had moved.

Third vignette. As I have intimated already, commentators and political scientists invariably classify each of the nine Justices of the Supreme Court as either "liberal" or "conservative." For nearly two decades, the conventional tally has listed five conservatives and four liberals. Given a Court that is so divided, commentators refer to the Justice who is closest to the middle – in this case, the conservative Justice who is most likely to align with the four liberals from time to time – as the "swing Justice." In recent years, the "swing Justice" has been Justice Anthony Kennedy (who, for example, has joined the liberals in upholding gay rights in some cases).

A relatively recent example comes from *Kennedy v. Louisiana*¹¹ (2008), in which Justice Kennedy held that the Eighth Amendment prohibition against "cruel and unusual punishment" barred the death penalty for a crime (child rape) that did not involve a murder or intended murder. Echoing language from prior cases, Justice Kennedy found executing a child rapist who was not a murderer to be incompatible with "the evolving standards of decency that mark the progress of a maturing society."¹² The four dissenting Justices (the conservatives)

¹⁰ See *ibid.* at 803 (Stevens, J., dissenting).

¹¹ 554 U.S. 207 (2008).

¹² *Ibid.* at 419, 435.

Cambridge University Press

978-1-107-02140-2 - The Dynamic Constitution: An Introduction to American Constitutional Law and Practice: Second Edition

Richard H. Fallon Jr.

Frontmatter

[More information](#)

PROLOGUE

xxv

argued that the ruling was inconsistent with the original understanding of the Eighth Amendment and was not dictated by any prior precedent. In these respects, they seem correct. The central issues were whether the Constitution's prohibitions should reflect evolving standards of decency and whether the majority had gauged those evolving standards accurately.

Taking note of Justice Kennedy's capacity to push the Court either to the left or to the right, some constitutional lawyers joke sardonically, "This is Anthony Kennedy's country. The rest of us only live here." (If Kennedy were to leave the Court or if its ideological balance shifted, the same Court-focused lawyers would simply substitute the name of the Justice who would then stand closest to the Court's center for Kennedy's.)

Fourth vignette. On May 2, 2011, Navy Seals, acting at the direction of President Barack Obama, mounted a secret raid on a compound in Pakistan where they found and killed Osama bin Laden. Obama was able to direct the raid because the Constitution makes him Commander in Chief of the armed forces.¹³ Despite the raid's success, it stirred a fair amount of controversy, including over whether there should have been greater efforts to capture bin Laden, rather than kill him. Yet almost no one seems to have thought that how the President used his power as Commander in Chief in pursuing bin Laden was any concern of the Supreme Court. If bin Laden's heirs had brought suit, they would have had no case.

At roughly the same time as the attack on bin Laden occurred, Congress and the President were locked in highly contentious, ongoing debates about how to stimulate a flagging economy. Should the country cut taxes? Expand stimulus spending? And what should it do about a disturbingly large federal deficit? Once again the Supreme Court stood on the sidelines. It is easy for Court watchers to forget (as when they joke about the importance of Justice Anthony Kennedy), but many of

13 Article II, Section 2, Clause 1.

Cambridge University Press

978-1-107-02140-2 - The Dynamic Constitution: An Introduction to American Constitutional Law and Practice: Second Edition

Richard H. Fallon Jr.

Frontmatter

[More information](#)

the most consequential decisions that are made under our Constitution occur with no judicial involvement whatsoever.¹⁴

Fifth vignette. A number of national civil rights laws prohibit discrimination on the basis of such factors as race, gender, national origin, and religion. Some of the antidiscrimination statutes make exceptions for churches. Others do not. The dispute in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*¹⁵ (2012) arose when a church fired a church school teacher who had the title of “minister of religion” and she sued to get her job back, claiming employment discrimination in violation of the Americans with Disabilities Act. The Supreme Court did not bother with the details of why the church had fired the woman who brought the suit. Instead, by 9–0, it concluded that a large issue of constitutional principle was at stake and determined the outcome. With John Roberts writing the opinion, the Court held that the Religion Clauses of the First Amendment, which provide that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof,” forbid Congress from regulating a church’s choice of religious “ministers.”

The Supreme Court’s unanimity in *Hosanna-Tabor* was striking but not particularly unusual. In the “Term” (or year) that it decided *Hosanna-Tabor*, the Court ruled unanimously in 44 percent of its cases. Although it is accurate for many purposes to describe the Supreme Court as ideologically divided between liberals and conservatives, the Justices are not ideologically divided about everything. And if one puts aside the selected sample of cases that come before the Supreme Court, there are far more “easy” constitutional cases than there are “hard” ones. (Going in, not everyone regarded *Hosanna-Tabor* as an easy case.)

Sixth vignette. The Affordable Care Act with which we began was, and is, a nightmare of legal complexity. Before deciding a case, the

14 For discussion of the relative significance of judicial and nonjudicial decisions, see Frederick Schauer, “The Court’s Agenda – and the Nation’s,” 120 *Harvard Law Review* 4 (2006).

15 132 S. Ct. 694 (2012).

Cambridge University Press

978-1-107-02140-2 - The Dynamic Constitution: An Introduction to American Constitutional Law and Practice: Second Edition

Richard H. Fallon Jr.

Frontmatter

[More information](#)

PROLOGUE

xxvii

Supreme Court usually allows the lawyers on the contending sides a total of one hour to present their arguments – thirty minutes per side. In the ACA case, with the constitutionality of a hugely important statute at stake, the Court scheduled six hours of argument, spread over three days. No short summary could do justice to the case. In resuming the discussion, I focus only on the most central and controversial provision – the so-called individual mandate to uninsured individuals (who have incomes too high to qualify for Medicaid) either to purchase health insurance or to pay a penalty. Crucial to the ACA’s strategy of ensuring nearly universal coverage was making some Americans buy health insurance that they do not want to buy (typically because they think that they cannot afford it, even with the subsidies that the ACA provides).

Unlike most other national and state governments, the Congress of the United States cannot pass a law such as the ACA unless some provision of the Constitution authorizes it to do so. In other words, it needs to be able to point to a power-conferring provision authorizing it to enact the kind of legislation in question, even if the law that it wants to pass would not otherwise violate anyone’s individual rights. To illustrate the distinction, before Congress enacted the ACA, Massachusetts required its citizens to purchase health insurance without attracting a significant constitutional challenge. No provision of the Bill of Rights gives citizens a “right” not to be made to purchase health insurance if a state requires them to buy it. But it is a separate question whether Congress has any enumerated “power” that would permit it to order people to buy health insurance.

In defending the individual mandate, government lawyers relied principally on a provision of the Constitution that authorizes Congress “[t]o regulate Commerce...among the several States.”¹⁶ There is a large interstate market in health care and health insurance, they argued, and nearly everyone participates in that interstate market at one time or another, like it or not. Given nearly everyone’s participation in the

16 U.S. Constitution, Article I, Section 8, Clause 3.

Cambridge University Press

978-1-107-02140-2 - The Dynamic Constitution: An Introduction to American Constitutional Law and Practice: Second Edition

Richard H. Fallon Jr.

Frontmatter

[More information](#)

interstate commercial health-care market, Congress, it was argued, engages in a permissible regulation of interstate commerce when it requires purchases of health insurance, also in an interstate commercial market.

In *National Association of Independent Business v. Sebelius*, Chief Justice Roberts sent one chill into the hearts of the government lawyers who had defended the ACA when he announced, from the bench, that he had written the Court's lead opinion and would summarize its holding. For supporters of the ACA, it would have been a better, more hopeful sign if one of the liberals, or even Justice Kennedy, had written the Court opinion. The Chief Justice delivered another chill as he explained to those in the courtroom why he thought Congress could not mandate the purchase of health insurance under the Commerce Clause: although Congress has broad power to regulate people and businesses who are engaged in interstate commerce, the ACA went too unprecedentedly far by ordering people who were not already engaged in a commercial activity to enter the economic marketplace to buy unwanted health insurance. The power to regulate commerce is a power to regulate commercial activity, not inactivity, he reasoned. On this point, the four conservative Justices essentially agreed with Roberts (even though they did not formally join his opinion). In a significant setback for judicial liberals, *National Federation of Independent Business* thus held that Congress lacks authority under the Commerce Clause to require individuals to buy health insurance.

But Chief Justice Roberts was not done. Having held that Congress could not enact the individual mandate under the Commerce Clause, he turned next to an argument on which the government had placed little reliance: what the ACA termed a "penalty" for failing to buy health insurance could instead be characterized as a "tax" on those who chose not to purchase coverage; and such a tax lay within Congress's power to enact under the Constitution's Taxing and Spending Clause.¹⁷ Although

17 U.S. Constitution, Article 1, Section 8, Clause 1.

Cambridge University Press

978-1-107-02140-2 - The Dynamic Constitution: An Introduction to American Constitutional Law and Practice: Second Edition

Richard H. Fallon Jr.

Frontmatter

[More information](#)

PROLOGUE

xxix

Congress did not call the ACA penalty a tax, Roberts reasoned, it was collected by the Internal Revenue Service and had many of the hallmarks of a tax. And in the case of reasonable constitutional doubt about whether Congress had the power to enact legislation, he wrote, it was the job of the Supreme Court to get out of the way and let the politically accountable institutions of government – Congress and the President – decide. The four other conservative Justices angrily objected that the individual mandate, which Congress had chosen not to label as a tax, could not be upheld based on bait-and-switch techniques. But the four liberal Justices, who thought that the individual mandate was permissible under the Commerce Clause anyway, also agreed with Roberts about Congress’s power to enact the ACA under the Taxing and Spending Clause – the provision under which the Court has long upheld the validity of the Social Security system.

Thus was the individual mandate upheld – as a constitutionally permissible tax, even though Congress had not labeled it a tax! And the “swing” Justice was the Chief Justice, John Roberts, who had almost never before been the sole conservative Justice to join the four liberals and thereby produce a 5–4 ruling that liberals welcomed. Placed on the foundation of the Taxing and Spending Clause, Chief Justice Roberts’s opinion was one of the greatest examples of judicial “deference” to Congress and the President – the antithesis of what many people have in mind when they use the loose phrase “judicial activism” – in many decades.

Within days after the decision in *National Association of Independent Business v. Sebelius*, the press, purportedly on the basis of reliable leaks from within the Supreme Court, reported that Chief Justice Roberts had initially planned to vote to invalidate the individual mandate and, more broadly, to join the other four conservative Justices in an opinion striking down the ACA in its entirety. Only at the last minute, the reports said, did he decide to vote to uphold the individual mandate under the Taxing and Spending Power. Roberts switched, the press speculated, to avoid the specter of a Supreme Court dividing along what might have

Cambridge University Press

978-1-107-02140-2 - The Dynamic Constitution: An Introduction to American Constitutional Law and Practice: Second Edition

Richard H. Fallon Jr.

Frontmatter

[More information](#)

xxx

PROLOGUE

appeared to be partisan lines to invalidate the most important federal statute enacted in many years – and this after the Court had similarly split 5–4, with only Republican-appointed Justices on one side and all Democratic-appointed Justices on the other, in a number of other politically charged cases during Roberts’s tenure as Chief Justice. Roberts, the reports said, was moved to his decision by a concern about the Court’s long-term stature or “legitimacy.” It was vital, he was said to believe, that the public not come to regard the Court as a partisan, political institution that predictably divided along what looked like partisan, political lines in its most important cases. I hasten to emphasize that I do not endorse this account but merely report it. I have no independent basis on which to judge it either true or false. I repeat it, however, not as mere gossip but as an indication of the way that some close-range observers believe that some of the Justices sometimes think and act.

With six vignettes now laid out, I will say candidly, at the outset of this book, that I do not find much illumination in the comparison of Supreme Court Justices to umpires – even if that metaphor captures enough of the myth surrounding the Court, and possibly enough of our hopes for it, to provide some comfort to otherwise skeptical Senators in a judicial confirmation hearing. But the complexity of the landscape that we have traversed already, including unanimous decisions and important constitutional questions that the Court does not address at all, makes me skeptical that any other simple metaphor would serve much better. If we are to understand constitutional law, and the role of the Supreme Court within our constitutional scheme, then we should be prepared to try to understand them on their own terms – as complex, multifaceted, tension ridden, and occasionally inspiring. We should expect the future to reflect the past but occasionally (as we have seen already) to bring dramatic surprises.