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ESSAYS

THE CON LAW PROFESSOR WITH JUDICIAL APPOINTMENT POWER

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Conservative or liberal, we are all constitutionalists.[1]

I. INTRODUCTION

Constitutional law professors watch the Supreme Court of the United States: It's a key component of the job. But it is unusual to see a former constitutional law professor in the White House, where he actually holds the power to appoint federal judges.[2] The election of President Barack Obama thus presents a

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1. Barack Obama, *The Audacity of Hope* 88 (Crown 2006).

2. Indeed, few presidents have been professors, although President Clinton taught briefly at the University of Arkansas Law School. *See e.g.* University of Virginia, Miller Center, *American President: A Reference Resource, Bill Clinton*, http://millercenter.org/president/clinton/essays/biography/2 (scroll down to *Law, Politics, and Marriage*) (accessed Apr. 29, 2013; copy on file with Journal of Appellate Practice and Process).

rare opportunity to explore the ways in which a president's time as a constitutional law professor may be reflected in his approach to judicial appointments.

This essay begins with a brief description of President Obama's years on the law faculty at the University of Chicago, putting his experience as a law professor in the overall context of what his life was like at that time. The initial section also explores his other writings and some other likely influences on his constitutional philosophy.

The essay then proceeds to discuss the implications of his time as law professor on the three stand-out aspects of President Obama's judicial appointments—specifically the diversity in his appointments to the federal district courts, courts of appeals, and Supreme Court; the slow pace at which he has nominated candidates for the federal bench; and the moderate nature of his appointees. While the diversity of President Obama's appointees may be unsurprising, given the courses he taught and his public statements about the judiciary and constitutional interpretation generally, that he nominated slowly may be surprising. However, this approach might not be all that unexpected when one considers President Obama's general philosophy of constitutional interpretation and his time as a law professor.

II. OBAMA THE PROFESSOR

President Obama was a lecturer at the University of Chicago law school for twelve years. During that time, he taught Constitutional Law III, which included equal protection and substantive due process. He also taught a course called Racism and the Law and a course that addressed voting rights.[3] Thus, he did not teach the overall general constitutional law curriculum. Subjects he did not cover in his courses would likely have included the structure of the federal government and the first

President Wilson, who was also trained as an attorney and practiced law briefly, was a professor of political science at Princeton, where he developed a pre-law program and unsuccessfully lobbied for the start of a law school. Arthur S. Link, *Wilson, [Thomas] Woodrow*, in Alexander Leitch, *A Princeton Companion* 512 (Princeton U. Press 1978). President Wilson also lectured at New York Law School. *Id.*

3. David K. Nichols, *Professor Obama and the Constitution*, in *The Obama Presidency in the Constitutional Order* 25, 27 (Carol McNamara & Melanie M. Marlowe eds., Rowman & Littlefield 2011).

amendment, just to name a couple of broad constitutional topics that he would not have taught. His emphasis as a teacher was instead on equality and privacy principles. Equality would of necessity have been reflected in his coverage of equal protection, but it would also have made an appearance in his courses on voting rights and racism, for constitutional cases in these areas are grounded in principles of equality and participation.

But it is not only the classes he taught that might help explain the Obama approach to judicial appointments. While President Obama was influenced during his law school days by his own constitutional law professor, Laurence Tribe, for whom he also served as a research assistant,[4] the more seasoned teacher he became at Chicago seemed to modify some of his views through interaction there with his friend and colleague Cass Sunstein, who is now on the faculty at Harvard.[5]

How much Sunstein's view of the constitution influenced President Obama is speculation. Obama did appoint Sunstein to a senior position in the Office of Administration and Budget[6] and listed him as an adviser on Constitutional Law during his campaign.[7] Of course, he appointed Tribe to a position in the Justice Department and listed him as a campaign adviser as well.[8] But of the two, Obama spent more time teaching with Sunstein, who does not view the courts as the principal means of engaging in progressive reform. Instead, Sunstein advocates minimalism, which he describes as "narrow, incremental decisions, not broad rulings that the nation may later have cause

4. Justin Driver, *Obama's Law*, New Republic, http://www.tnr.com/article/politics/magazine/89647/obama-legal-philosophy-laurence-tribe (June 9, 2011) (accessed Apr. 30, 2013; copy on file with Journal of Appellate Practice and Process).

5. *See* Harvard Law School, *Faculty, Cass R. Sunstein*, http://www.law.harvard.edu/faculty/directory/10871/Sunstein. Professor Sunstein, who served as Administrator of the Office of Information and Regulatory Affairs in the Office of Management and Budget during Obama's first term, was apparently also considered for Justice Sotomayor's Supreme Court slot. *See* Jeffrey Toobin, *The Oath: The Obama White House and the Supreme Court* 126 (Doubleday 2012).

6. *See* n. 5, *supra*.

7. Charles Savage, *Barack Obama's Q&A*, Boston Globe & boston.com, http://www.boston.com/news/politics/2008/specials/CandidateQA/ObamaQA/ (Dec. 20, 2007) (scroll down to Question 11: "Who are your campaign's advisers for legal issues?") (accessed Apr. 30, 2013; copy on file with Journal of Appellate Practice and Process).

8. Driver, *supra* n. 4; Savage, *supra* n. 7.

to regret."[9] In addition, Sunstein prefers democratic solutions, urging the Supreme Court to, as Professor Rosen put it,

> be self-aware about the limits of its knowledge—refusing to decide certain cases and agreeing to decide other cases as narrowly as possible in order to save the most hotly contested questions in national life for democratic resolution.[10]

Thus, if President Obama was influenced by Sunstein's thinking, as some suggest,[11] it would stand to reason that he would not appoint judges with extreme positions on politically controversial legal issues, but would instead appoint incrementalists who would respect conclusions reached by democratically elected branches.

Professor Sunstein's approach likely would have had appeal to President Obama, a former constitutional law professor who was once also a state legislator—an elected official likely to believe in democratic means of reform and change. Indeed, President Obama has noted his faith in democracy, describing the constitution's "elaborate machinery" as a means of compelling Americans to enter into a conversation "in which all citizens are required to engage in a process of testing their ideas against an external reality, persuading others of their point of view, and building shifting alliances of consent."[12] He believes in the outcomes of those democratic discussions and has "wondered if, in our reliance on the courts to vindicate not only our rights, but also our values, progressives ha[ve] lost too much faith in democracy."[13] Thus, one might

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9. Cass R. Sunstein, *Radicals in Robes* xiii (Basic Books 2005). Sunstein takes a minimalist approach to, for example, *Griswold v. Conn.*, 381 U.S. 479 (1965) (striking down a Connecticut law prohibiting anyone, including married couples and their doctors, from obtaining or prescribing birth control), emphasizing the ways in which a minimalist interpretation furthers "democratic ideals," including the principle that in order to be enforced, laws should have public support. *Id.* at 98–99.

10. Jeffrey Rosen, *Sunstein and Brandeis: The Minimalist and the Prophet*, 43 Tulsa L. Rev. 885, 887 (2008) (discussing Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harv. U. Press 1999)). More recently, Sunstein has advocated in certain circumstances what he calls "trimming," or the "attend[ing] carefully to competing positions and attempt[ing] to steer between the poles." Cass R. Sunstein, *Trimming*, 122 Harv. L. Rev. 1049, 1055 (2009).

11. *See e.g.* Driver, *supra* n. 4.

12. Obama, *supra* n. 1, at 92.

13. *Id.* at 83.

reasonably expect that President Obama would not only favor an incrementalist approach to constitutional interpretation, but might also put more faith in democratically elected institutions than in the courts.

President Obama's public statements prior to the Supreme Court's decision upholding most of the Affordable Care Act support this assessment. He emphasized judicial restraint, suggesting that the Court should be careful when contemplating the invalidation of a law enacted by Congress. Responding to one reporter's question, he remarked,

> Ultimately, I'm confident that the Supreme Court will not take what would be an unprecedented, extraordinary step of overturning a law that was passed by a strong majority of a democratically elected Congress. And I'd just remind conservative commentators that for years what we've heard is, the biggest problem on the bench was judicial activism or a lack of judicial restraint—that an unelected group of people would somehow overturn a duly constituted and passed law. Well, this is a good example. And I'm pretty confident that this Court will recognize that and not take that step.[14]

But there is a more fundamental aspect of President Obama's presidency that should not go without mention in assessing his approach to judicial appointments. President Obama is in the unique position of being the first African American president of the United States. Scholars assessing his political success in light of this country's history of racism have explained that President Obama's racial background has made him "cautious," characterizing him as, for example, a "lawyer-politician who, when confronted with a problem, typically

14. The White House, Office of the Press Secretary, Press Release, *Joint Press Conference by President Obama, President Calderon of Mexico, and Prime Minister Harper of Canada*, http://www.whitehouse.gov/the-press-office/2012/04/02/joint-press-conference-president-obama-president-calderon-mexico-and-pri (Apr. 2, 2012) (accessed Apr. 30, 2013; copy on file with Journal of Appellate Practice and Process). This comment caused a bit of an uproar in the blogosphere. *See e.g.* Andrew Villegas, *Bloggers Stew over Obama's Warning on "Judicial Activism,"* KHN Kaiser Health News, *Capsules*, http://capsules.kaiserhealthnews.org/index.php/2012/04/bloggers-stew-about-obamas-warning-on-judicial-activism/ (Apr. 10, 2102) (accessed May 1, 2013; copy on file with Journal of Appellate Practice and Process).

prefers to resolve it on the narrowest available grounds."[15] And commentators have also explored the difficulties that President Obama encounters when he discusses issues of race.[16] There is little doubt that this President treads a fine line on race issues as well as on other issues that can disproportionately affect African Americans.[17]

Likewise, President Obama's experiences as the husband of a professional woman have given him a perspective on issues related to sex discrimination that takes into account the differing life experiences of men and women, even men and women who work in similar jobs. Indeed, he has acknowledged that "it's hard to argue with Michelle when she insists that the burdens of the modern family fall more heavily on the woman."[18]

One would be remiss in assuming that President Obama approaches judicial appointments in a way that reflects solely—or even primarily—his time as a professor of constitutional law. A wide range of experiences must play a role in his approach to judicial appointments, but this essay is nonetheless focused on only that one.

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15. Randall Kennedy, *The Persistence of the Color Line: Racial Politics and the Obama Presidency* 111 (Pantheon 2011).

16. For a particularly compelling example, see Ta-Nehisi Coates, *Fear of a Black President*, 310 Atlantic 76 (Sept. 2012).

17. An in-depth discussion of President Obama's status as the country's first African American president is beyond the scope of this essay. Nonetheless, his nomination of judges from diverse backgrounds who are capable of empathizing with ordinary people, *see e.g.* pp. 7–8, *infra*, is perhaps illustrative of the way in which his racial background may influence his approach to judicial nominations.

18. Obama, *supra* n. 1, at 338. And in discussing "the struggles so typical of today's working mother," he has further confessed that

> no matter how liberated I liked to see myself as—no matter how much I told myself that Michelle and I were equal partners, and that her dreams and ambitions were as important as my own—the fact was that when children showed up, it was Michelle and not I who was expected to make the necessary adjustments. Sure, I helped, but it was always on my terms, on my schedule. Meanwhile, she was the one who had to put her career on hold. She was the one who had to make sure that the kids were fed and bathed every night. If Malia or Sasha got sick or the babysitter failed to show up, it was she who, more often than not, had to get on the phone to cancel a meeting at work.

Id. at 340–41. While a detailed discussion of President Obama's marriage-of-equals relationship with his wife is beyond the scope of this essay, it—like his racial background—may be reflected in the emphasis that he places on empathy and diversity when selecting judicial nominees.

III. OBAMA THE PRESIDENT WITH JUDICIAL APPOINTMENT POWER

With this background in mind, what might President Obama's time as a constitutional law professor mean for Obama the President, who has—and must actually exercise—the power to appoint judges? Three things have marked President Obama's early approach to judicial appointments. First is the diversity of the group of judges he has appointed. It's pretty spectacular. Second is the incredibly slow rate at which he got his appointments process up and running—with the exception of Supreme Court Justices. Third is his appointment of rather moderate judges. These three features of his appointments may be explained, at least in part, by his time as a professor and by those he came in contact with during the years he spent on the Chicago faculty.

A. Diversity of Nominees

Over seventy percent of President Obama's judicial appointees in his first two years in office were nontraditional appointees—women and members of minority groups.[19] Over half his appointees were women and more than a quarter were African American. He also made real gains with Asian judges, who amounted to almost ten percent of those he appointed early in his term.[20] And, of course, his two Supreme Court nominees, Justices Kagan and Sotomayor, reflect this diversity as well. Indeed, as one group of political scientists noted, President Obama appointed many "historic 'firsts'" to particular courts as

19. Sheldon Goldman, Elliot Slotnick & Sara Schiavoni, *Diversity on the Bench*, in *Obama's Judiciary at Midterm: The Confirmation Drama Continues*, 94 *Judicature* 262, 288 (May–June 2011) [hereinafter "*Obama's Judiciary*"]; *see also* Todd Ruger, BLT: The Blog of Legal Times, *Obama Has Named More Women Judges than Predecessor*, http://legaltimes.typepad.com/blt/2013/06/report-obama-tops-in-diversifying-federal-bench.html (June 12, 2013, 3:31 p.m. ET) (reporting that President Obama "has successfully appointed a greater percentage of women to federal judgeships than any other president in American history," and discussing an Alliance for Justice study indicating that as of mid-June 2013, forty-two percent of his confirmed nominees had been women) (accessed June 13, 2013; copy on file with Journal of Appellate Practice and Process).

20. *Obama's Judiciary*, *supra* n. 19, at 288.

well, including the most obvious in Justice Sotomayor as the first Latina to sit on the Supreme Court of the United States.[21]

So how does all of this connect with President Obama as the constitutional law professor? Remember that Professor Obama taught constitutional law in classes that covered equal protection and substantive due process, two areas in which race-discrimination cases (including those addressing affirmative action), abortion-rights cases, and sex-discrimination cases are embedded. He taught cases in which people were protected (think *Brown v. Board of Education*[22]) or not protected (think *McCleskey v. Kemp*[23]) because they were members of minority groups or women. Appointing a diverse bench is thus consistent with the role of the federal courts as the protectors of minorities—a principle emphasized in equal protection cases.

This dovetails well with President Obama's public statements about the need for judges who exhibit empathy. On the campaign trail he spoke often about finding judges who had empathy. As he put it,

> You know, Justice Roberts said he saw himself just as an umpire. But the issues that come before the court are not sport. They're life and death. And we need somebody who's got the . . . empathy to recognize what it's like to be a young, teenaged mom; the empathy to understand what it's like to be poor or African American or gay or disabled or old. And that's the criteria by which I'm going to be selecting my judges.[24]

Thus, even though the Obama administration disavowed Justice Sotomayor's comment about a hypothetical "wise Latina," it comes as no great surprise that President Obama's first Supreme Court appointment went to the federal appellate judge who made

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21. *Id.*

22. 347 U.S. 483 (1954) (holding that racial segregation of public schools violates the Equal Protection Clause).

23. 481 U.S. 279 (1987) (holding that study showing disparate sentencing outcomes correlated with race of victim and perpetrator was insufficient to show violation of the Equal Protection clause in death-penalty trial).

24. Sheldon Goldman, Elliott Slotnick & Sara Schiavoni, *Supreme Court Nominations: The "Empathy" Litmus Test?* in *Obama's Judiciary*, 94 *Judicature* at 274 (quoting President Obama's speech to the Planned Parenthood Action Fund on July 17, 2007) [hereinafter "*Litmus Test*"].

it.[25] Indeed, from his public statements, candidate and then President Obama was looking for justices who "got it"—who understood the plight of those less powerful or who had life experiences that differ from the life experiences of privileged white men.

It is interesting that he chose Justice Sotomayor from a field in which three of the four finalists were in some ways better known to him. On the list were President Obama's then-Solicitor General Elena Kagan and Homeland Security Secretary Janet Napolitano.[26] The other candidate on the list was Judge Diane Wood of the Seventh Circuit, who had been a faculty member at the University of Chicago, and continues to be a senior lecturer there.[27] However, "during her interview, Sotomayor's presence and personal narrative especially impressed the President."[28] When President Obama called Justice Sotomayor to tell her that he planned to nominate her, he asked her to "remain the person you are" and "stay connected to your community," which for Sotomayor meant the Bronx.[29] In introducing his new nominee, President Obama explained that "[i]t is experience that can give a person a common touch and a sense of compassion, an understanding of how the world works and how ordinary people live."[30] And Justice Sotomayor knew a

25. *See* Sonia Sotomayor, *A Latina Judge's Voice*, 13 Berkeley La Raza L.J. 87, 92 (2002). The quote was picked up by the New York Times and other news sources during her confirmation. *See e.g.* Charles Savage, *A Judge's View of Judging Is on Record*, 158 N.Y. Times A21 (May 14, 2009); *see also e.g.* Stuart Taylor, Jr., Online Archive, *Identity Politics and Sonia Sotomayor—The Ninth Justice*, http://www.stuarttaylorjr.com/content/identity-politics-and-sonia-sotomayor-ninth-justice (May 22, 2009) (truncated version of *National Journal* essay) (accessed May 6, 2013; copy on file with Journal of Appellate Practice and Process). According to news reports, Justice Sotomayor had repeated these words on several occasions. *See e.g.* Fox News.com, *Writings Reveal Sotomayor's Controversial "Wise Latina" Remark Not Isolated*, http://www.foxnews.com/politics/2009/06/04/writings-reveal-sotomayors-controversial-wise-latina-remark-isolated (June 4, 2009) (accessed May 6, 2013; copy on file with Journal of Appellate Practice and Process).

26. *Litmus Test*, *supra* n. 24, at 275. Sunstein also was briefly considered. Toobin, *supra* n. 5, at 126.

27. *See* University of Chicago, The Law School, *Diane P. Wood*, http://www.law.uchicago.edu/faculty/wood-d/. In addition, Wood's former husband Dennis Hutchinson, also on Chicago's faculty, was Obama's good friend. Toobin, *supra* n. 5, at 129.

28. *Litmus Test*, *supra* n. 24, at 275.

29. Toobin, *supra* n. 5, at 134, 138.

30. *Litmus Test*, *supra* n. 24, at 275 (quoting The White House, Office of the Press Secretary, News Release, *Remarks by the President in Nominating Judge Sonia Sotomayor*

thing or two about the lives of ordinary people: Noteworthy in her financial statement when she was nominated was her considerable credit-card debt.[31]

Even a president who believes that reform is best left to the democratically elected branches of government can see a role for the courts when the majority runs roughshod over the rights of minorities. Appointing minority judges to the bench—instead of attempting to legislate large policy changes that might result in considerable social backlash—could lead the courts to continue in this role.[32]

B. Nomination Timetables

More difficult to understand was the Obama administration's lack of focus on judicial appointments, which led to a slow nomination process. Indeed, President Obama appointed fewer judges during his first Congress than did either of his two predecessors.[33] At first, this might not sound much like a constitutional law professor's approach to judicial appointments. Yet in some ways it is not surprising.

Consider that a Martian reading a constitutional law textbook might reasonably conclude that the only court in this country is the Supreme Court of the United States; almost all the cases in that book would come from the Supreme Court. Thus, President Obama's taking only a month to choose his first Supreme Court nominee is not surprising, even though it took

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to the United States Supreme Court (May 26, 2009), http://www.whitehouse.gov/the-press-office/remarks-president-nominating-judge-sonia-sotomayor-united-states-supreme-court).

31. *See e.g.* Jonathan Weisman, *Sotomayor Details Finances, Key Cases*, Wall St. J. A3 (June 9, 2009) (indicating that Justice Sotomayor owed nearly $16,000.00 to credit card companies and $15,000.00 in dental bills).

32. It is not entirely clear that the sex or race of a judge has an impact on voting behaviors. *See e.g.* Sally J. Kenney, *Gender & Justice: Why Women in the Judiciary Really Matter* 28–40 (Routledge 2013) (canvassing studies and finding that sex of judge has been found to have an impact only in sex-discrimination cases); Nancy Scherer, *Scoring Points: Politicians, Activists, and the Lower Federal Court Appointment Process* 97–98 (Stanford U. Press 2005) (noting that early research on race of judge showed no statistically significant differences between black and white judges and that research on gender of judge yielded mixed results).

33. Notably, in comparison to President Obama's success in appointing fifty-nine judges to the federal district courts and federal courts of appeals during his first Congress, President Clinton successfully appointed 125, and President George W. Bush ninety-nine, during their respective first Congresses. *Obama's Judiciary*, *supra* n. 19, at 293 (Table 1).

President Clinton three months.[34] This is the court that counts the most, so President Obama was prepared to make the nomination quickly. And yet anyone who has practiced law knows that most cases are won or lost in the trial and appellate courts. For most litigants, these are the courts that count. Indeed, the initial battles over President Obama's own premier piece of legislation—the Affordable Care Act—were waged in the lower courts.[35]

So how does one account for President Obama's lack of speed in nominating judges to the federal courts? It appears that the slow pace of his judicial nominations was due in part to difficulties the administration encountered in confirming the point person at the Department of Justice[36] as well as judicial appointments' relatively low priority for the top people in President Obama's administration, at least initially.[37] Rahm Emmanuel, President Obama's first chief of staff, who is not a lawyer, was more focused on proposed legislation.[38] The White House counsel's office focused, on the other hand, on executive authority and foreign policy, including what to do about Guantanamo Bay detainees.[39] And President Obama himself put more effort into his legislative agenda. This is consistent with his faith in democracy and his belief in the power of change emanating from the elected branches of government rather than from the courts.

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34. *Litmus Test*, *supra* n. 24, at 275.

35. *See Mead v. Holder*, 766 F. Supp. 2d 16 (D.D.C. 2011), *aff'd, sub nom. Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011); *Fla. ex rel. Bondi v. U.S. Dept. of Health and Human Servs.*, 780 F. Supp. 2d 1256 (N.D. Fla. 2011), *aff'd in part and rev'd in part, sub nom Fla. ex rel. Atty. Gen. v. U.S. Dept of Health and Human Servs.*, 648 F.3d 1235 (11th Cir. 2011), *aff'd in part and rev'd in part, sub nom. Natl. Fedn. of Indep. Bus. v. Sebelius*, ___ U.S. ___, 132 S. Ct. 2566 (2012); *Liberty Univ., Inc. v. Geithner*, 753 F. Supp. 2d 611 (W.D. Va. 2010), *vacated*, 671 F.3d 391 (4th Cir. 2011), *vacated, Natl. Fedn. of Indep. Bus. v. Sebelius*, ___ U.S. ___, 132 S. Ct. 2566 (2012); *Thomas More Law Center v. Obama*, 720 F. Supp. 2d 882 (E.D. Mich. 2010), *aff'd*, 651 F.3d 529 (6th Cir. 2011).

36. *Obama's Judiciary*, *supra* n. 19, at 265.

37. *Id.* at 265, 272.

38. *Id.* at 273; *see also id.* at 267 (noting that, for Obama, "primary agenda items were bold legislative initiatives, not judges").

39. *Id.* at 265.

C. Moderate Judicial Philosophy

President Obama's nominees have also been remarkably moderate and should have been relatively uncontroversial.[40] Aside from Ninth Circuit nominee Goodwin Liu,[41] Republican Senators should not have found his nominees objectionable. Yet judicial nominees did not make their way to Senate votes because, it seems, the White House did not push for them.[42] That the nominees were moderate, while disappointing to liberals, is not surprising given President Obama's stated position on judicial appointments. Even before becoming president, he had pointed out that

> [b]ecause federal judges receive lifetime appointments and often serve through the terms of multiple presidents, it behooves a president—and benefits our democracy—to find moderate nominees who can garner some measure of bipartisan support.[43]

This statement is consistent with Sunstein's approach to judicial decisionmaking: Avoid taking extreme positions and let democracy take care of most controversial decisions.

Thus, while progressives hoped for a President whose nomination of liberals to the federal bench would balance out some of the very conservative judges appointed by President Obama's Republican predecessors, his public statements had not suggested that he would go in that direction.

IV. CONCLUSION

President Obama's approach to judicial appointments may not have been what his supporters hoped for, but after reviewing his history as a constitutional law professor and his public

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40. *Id.* at 271–72.

41. *See id.* at 272; *see also* Sheldon Goldman, Elliot Slotnick & Sara Schiavoni, *A Tale of Two Nominees: David Hamilton and Goodwin Liu*, in *Obama's Judiciary*, *supra* n. 19, at 282–85.

42. *See Obama's Judiciary*, *supra* n. 19, at 272–73 (suggesting that President Obama was reluctant to engage in the conflicts about social issues that seem inevitably to accompany hearings on judicial nominees, and that senior members of his administration treated passing the administration's key legislative initiatives as a higher priority than nominating the administration's choices for federal judgeships).

43. Obama, *supra* n. 1, at 82.

statements, it is no surprise that he has been more focused on legislation. President Obama believes in democratic reform. The role he sees for the courts is one of moderation, a role consistent with that outlined in the scholarly work of his intellectual kindred spirit, Cass Sunstein.