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Are Obama's judges really liberals?

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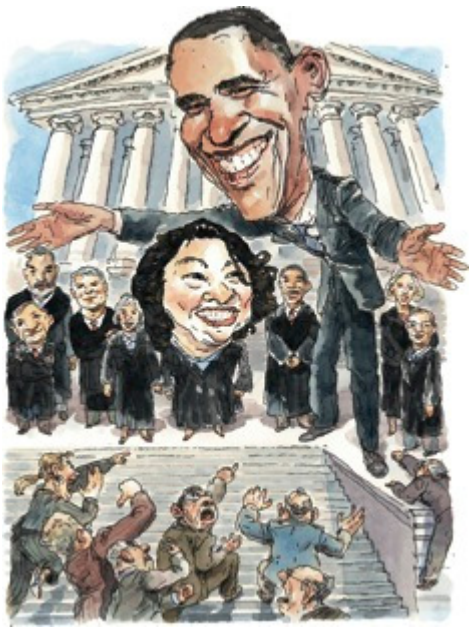

Sonia Sotomayor may be a template for Obama nominations.

The Obama Administration wanted to send a message with the President's first nomination to a federal court. "There was a real conscious decision to use that first appointment to say, 'This is a new way of doing things. This is a post-partisan choice,' " one White House official involved in the process told me. "Our strategy was to show that our judges could get Republican support." So on March 17th President Obama nominated David Hamilton, the chief federal district-court judge in Indianapolis, to the Seventh Circuit court of appeals. Hamilton had been vetted with care. After fifteen years of service on the trial bench, he had won the highest rating from the American Bar Association; Richard Lugar, the senior senator from Indiana and a leading Republican, was supportive; and Hamilton's status as a nephew of Lee Hamilton, a well-respected former local congressman, gave him deep connections. The hope was that Hamilton's appointment would begin a profound and rapid change in the confirmation process and in the federal judiciary itself.

The power to nominate federal judges is one of the great prizes of any Presidency, and Obama assumed office at a propitious moment. After Democrats won control of the Senate in 2006, the new chairman of the Judiciary Committee, Patrick Leahy, of Vermont, significantly slowed down the confirmation process for George W. Bush's appointees to the federal appeals courts. In addition, many federal judges appointed by President Clinton were waiting for the election of a Democratic President in order to resign. Now vacancies abound. Just eight months into his first term, Obama already has the chance to nominate judges for twenty-one seats on the federal appellate bench—more than ten per cent of the hundred and seventy-nine judges on those courts. At least half a dozen more seats should open in the next few months. There are five vacancies on the Fourth Circuit alone; just by filling those seats, Obama can convert the Fourth Circuit, which has long been known as one of the most conservative courts in the country, into one with a majority of Democratic appointees. On the federal district courts, there are

seventy-two vacancies, also about ten per cent of the total; home-state senators of the President's party generally take the lead in selecting nominees for these seats, but Obama will have influence in these choices as well. Seven appeals and ten district judges have been named so far. George W. Bush, in the first eight months of his Presidency, nominated fifty-two. But Obama, unlike Bush in his first year, has had the opportunity to place his first Justice on the Supreme Court, Sonia Sotomayor—and her confirmation has opened up another seat on the Second Circuit court of appeals. Justice John Paul Stevens, who is eighty-nine, has hired only one law clerk for the next Supreme Court term, so a second Obama appointment to the Court may be imminent as well.

"The unifying quality that we are looking for is excellence, but also diversity, and diversity in the broadest sense of the word," another Administration official said. "We are looking for experiential diversity, not just race and gender. We want people who are not the usual suspects, not just judges and prosecutors but public defenders and lawyers in private practice." Yet Hamilton and Sotomayor are the usual suspects—both sitting judges, who had already been confirmed by the Senate. Of Obama's seven nominees to the circuit courts, six are federal district-court judges. The group includes Gerard Lynch, a former Columbia Law School professor and New York federal prosecutor, and Andre Davis, who was nominated to the Fourth Circuit by Bill Clinton. (At the time, Republicans blocked any vote on Davis.) Two of the seven are African-American; two are women; all but one are in their fifties. (None are openly gay.) The one non-judge is Jane Stranch, who has represented labor unions and other clients at a Nashville law firm and is nominated for the Sixth Circuit. They are conventional, qualified, and undramatic choices, who were named, at least in part, because they were seen as likely to be quickly confirmed.

But then, as the first White House official put it, "Hamilton blew up." Conservatives seized on a 2005 case, in which Hamilton ruled to strike down the daily invocation at the Indiana legislature because its repeated references to Jesus Christ violated the establishment clause of the First Amendment. Hamilton had also ruled to invalidate a part of Indiana's abortion law that required women to make two visits to a doctor before undergoing the procedure. In June, Hamilton was approved by the Judiciary Committee on a straight party-line vote, twelve to seven, but his nomination has not yet been brought to the Senate floor. Some Republicans have already vowed a filibuster. (Republican threats of extended debate on nominees can stop the Democratic majority from bringing any of them up for votes.)

"The reaction to Hamilton certainly has given people pause here," the second White House official said. "If they are going to stop David Hamilton, then who won't they stop?"

Republicans in the Senate have not allowed a vote on any of the other nominees, either. So far, the only Obama nominee who has been confirmed to a lifetime federal judgeship is Sotomayor. The stalemate provides a revealing glimpse of the environment in Washington. Obama advisers (and Democratic Senate sources) aver that all the nominees, even Hamilton, will be confirmed eventually, but contrary to the President's early hope the struggle for his judges is likely to be long and contentious.

"The President did not set a good example when he was in the Senate," Orrin Hatch, the senior Republican senator from Utah, told me, pointing to Obama's votes against the confirmation of John G. Roberts, Jr., and Samuel A. Alito, Jr., to the Supreme Court. "You have to be a partisan ideologue not to support Roberts," Hatch said. "There is a really big push on by partisan Republicans to use the same things that they did against us." Hatch himself, who had voted for Ruth Bader Ginsburg, Stephen G. Breyer, and every other Supreme Court nominee in his Senate career, voted against Sotomayor. (The vote for her confirmation was sixty-eight to thirty-one.)

There is a certain irony in this, because Obama has long sought to define himself as something other than a traditional legal liberal. Starting about fifty years ago, after Earl Warren became Chief Justice, the concept of legal liberalism developed a clear meaning: a belief in what came to be called judicial activism. Liberals believed that the Constitution should be read expansively, and that the Supreme Court should recognize newly defined rights—the right, say, to attend an integrated public school, or, later, the right to choose abortion. Conservatives in this era believed in what they called judicial restraint, which suggested that courts should refrain from overruling decisions made by the elected parts of the government. Obama appears to be trying to move away from these old categories, which have, in any case, become scrambled in their meaning. Both sides now claim to embrace restraint and eschew activism.

Obama and his judge-pickers define their choices with the same post-partisan vocabulary that the President uses with most issues: excellence, competence, common sense. And so far Republicans have regarded Obama's claims in this realm with the same skepticism that they have displayed for his arguments on the economy and health care. Still, this is not just a replay of the usual ideological debate. Obama's choice of judges reflects ferment in the world of legal liberalism, which is tied ever more closely to the fate of Democrats in the executive and legislative branches of government. Liberals who once saw judges as the lone protectors of constitutional rights are now placing their hopes on elected politicians like Obama. At its core, Obama's jurisprudence may rest less on any legal theory or nomenclature than on a more primal political skill—the ability to keep

winning elections.

Last August, after Obama had clinched the Democratic nomination for President, a lawyer in New York received a confidential assignment from the transition team. Preeta Bansal, who was then a partner at the law firm Skadden, Arps and formerly a solicitor general of New York State, was asked to prepare a series of memorandums about how a President Obama might transform the federal judiciary. She projected the number of likely vacancies, examined the ethnic and professional backgrounds of current judges, and compiled the first list of possible nominees for the new President to consider.

Through the final weeks of the campaign, Bansal refined and expanded her memos, and after Obama's victory she moved to Washington to work on the transition. There, joined by former campaign staffers, among them Danielle Gray and Michael Strautmanis, Bansal waded into the details of the project. Should Obama announce his first nominations as a group, as Bush did, or one at a time? (Obama chose one at a time.) Should the new Administration coöperate with the American Bar Association, which had traditionally rated nominees but which had been pushed out of the process by recent Republican Administrations? (Obama's team decided to reëstablish the connection, but only after securing a pledge from the A.B.A. that the group would act quickly.) A statistical analysis showed that Republican judicial appointees tended, on balance, to be younger than their Democratic counterparts—a finding that interested the future judge-pickers. (Soon after the Inauguration, the authors scattered: Bansal became general counsel and senior policy adviser at the Office of Management and Budget; Gray joined the staff of Gregory Craig, the White House counsel; and Strautmanis serves as chief of staff to Valerie Jarrett, a senior aide to Obama.)

John Podesta, the White House chief of staff under President Clinton, who was running Obama's transition process, arranged a few meetings for the President-elect to familiarize himself with judicial-selection issues. At one of these sessions, in the transition headquarters, on Sixth Street, the subject was possible Supreme Court vacancies, and Obama made a specific request. He wanted more information on a federal appeals-court judge in New York named Sonia Sotomayor.

It was no surprise that Sotomayor had caught Obama's eye. First appointed to the district court by George H. W. Bush, on the recommendation of Senator Daniel Patrick Moynihan, she had been promoted to the Court of Appeals by Bill Clinton, in 1998. At the time, her confirmation was stalled by Republicans who were concerned, even then, that she might make an appealing Democratic appointee to the Supreme Court. Raised poor in the Bronx, Sotomayor had an inspiring life story, experience as both a prosecutor and a judge, and the potential to be the first Hispanic on the High Court. To those inside the White House who followed the search process after David H. Souter announced his resignation, this spring, Sotomayor was the front-runner all along.

In recent years, the introduction of a Supreme Court nominee has become a major political undertaking. By the time the President announced his choice of Sotomayor, on May 26th, "there were two story tracks—'eminently qualified' and 'an American story,' " an official who was involved with the rollout said. "The first part related to her judicial experience, which was more time as a federal judge than any nominee in a hundred years, but we also raised as a subtext her experience as a big-city prosecutor"—early in her career, Sotomayor was an assistant district attorney in Manhattan. "You always have to worry that a Democrat is going to be called soft on crime, but it's harder to do that if people know she was a big-city prosecutor." The American story related to her childhood, in public housing, followed by her academic success at Princeton and Yale Law School. At the time, several White House officials noted the similarities between Sotomayor's life story and that of Michelle Obama, who also had a working-class upbringing in an inner city and graduated from Princeton, nine years after Sotomayor.

On the question of Sotomayor's ideology—what she stood for—Administration officials used what may become the Obama template. A Supreme Court nomination, almost by definition, raises divisive social issues, like abortion and gay rights, but the White House tried to make Sotomayor sound like a post-partisan figure, much as Obama has tried to position himself. Part of Sotomayor's appeal to Obama was that she was not a law professor or a legal theorist, and on the bench she had written opinions that avoided broad pronouncements and stuck closely to the facts of each case. "Her judicial philosophy was to follow the rule of law, apply it in each case," the official said. "She was not going to be painted as an ivory-tower judge, but a real-world judge. I don't think that she has an ideology—that's what was so great about her."

Obama himself speaks as if pragmatism were a substitute for ideology, or at least an improvement on it. As he said in an interview with the Detroit *Free Press* in 2008, during the campaign, "When I think about the kinds of judges who are needed today, it goes back to the point I was making about common sense and pragmatism as opposed to ideology. I think that Justice Souter, who was a Republican appointee, Justice Breyer, a Democratic appointee, are very sensible judges. They take a look at the facts and they try to figure out: How does the Constitution apply to these facts? They believe in fidelity to the text of the Constitution, but they also think you have to look at what is going on around you and not just ignore real life."

Still, at times the post-partisan language of the White House sounded a lot like that of traditional judicial conservatism. In a set of talking points released before her confirmation hearing began, in July, the Obama team called Sotomayor "a

nonideological and restrained judge." The statement noted that Sotomayor "wrote expressly about the importance of judicial restraint" in her Senate questionnaire when she became a circuit-court judge, and that her opinions "reflect a keen understanding of the appropriate limits of the judicial role."

Sotomayor elaborated on the theme when she testified before the Judiciary Committee. "It's important to remember that, as a judge, I don't make law," she said in her answers to Leahy's first round of questions. "And so the task for me as a judge is not to accept or not accept new theories; it's to decide whether the law, as it exists, has principles that apply to new situations."

Sotomayor's words amounted to an acknowledgment that conservative rhetoric, if not conservative views, had become the default mode for Supreme Court nominees. In the hearings of the two Clinton nominees, Ginsburg and Breyer, in the early nineteen-nineties, both candidates said, essentially, that the meaning of the Constitution had evolved with the times. Ginsburg herself, in her career as a litigator, had been among the first to persuade the Justices to recognize that the Constitution required equal treatment for women. Sotomayor and the Democratic senators who supported her portrayed a much less dynamic process of constitutional change—a fact that was noted by conservative legal scholars. "If you took the hearings we just had, as well as the statements that are being made on the Senate floor, you see a very different dialogue taking place than we saw in connection with Ginsburg or Thomas or Bork or Rehnquist," Leonard A. Leo, the executive vice-president of the Federalist Society, the conservative legal group, said. "It's an acknowledgment of the fact that that's the prevailing and conventional view of what the proper judicial role is in our democratic society. The Democrats said she was a non-ideological, restrained judge. They talked about her judicial modesty. That was language that the Bush White House coined to discuss John Roberts."

Nor did Sotomayor (or her Democratic supporters) offer much more than a tepid defense of the use of racial preferences in affirmative action, another traditional liberal cause. "The Constitution promotes and requires the equal protection of law of all citizens in its Fourteenth Amendment," Sotomayor told the senators. She went on:

> To ensure that protection, there are situations in which race in some form must be considered; the courts have recognized that. It is firmly my hope, as it was expressed by Justice O'Connor in her decision involving the University of Michigan Law School admissions criteria, that in twenty-five years race in our society won't be needed to be considered in any situation.

In the case that drew the most attention during the hearing, Sotomayor had ruled in favor of the city of New Haven, when it voided a promotion exam for firefighters; the results of the test left no African-Americans eligible for promotion, and the city feared a lawsuit charging that New Haven's policies had a "disparate impact." Scarcely any Democrats rose to Sotomayor's defense on the New Haven case, except to say that she had followed existing precedent. "We spent in previous confirmation hearings a very considerable amount of time probing Republican nominees about the extent to which they would entertain disparate-impact claims in the civil-rights arena," Leo said. "One has to assume that the calculation they made was that that is not an issue with which the American people are in agreement with them."

To some degree, the use of conservative language by Sotomayor and her allies was merely an attempt to forestall Republican opposition. (In any case, more than three-quarters of the Republicans in the Senate voted against her.) And it is true that the new Justice appears likely to embrace some traditional liberal positions on legal issues; for example, there is nothing in her background that would suggest any hostility to Roe v. Wade or to abortion rights. In her first case as a Justice, in August, she voted with the Court's three other liberals in an unsuccessful attempt to stop an execution. But the language and substance of Sotomayor's testimony, and the White House's advocacy for her, suggest that the progressive agenda in the Court is not the same as it once was. Not surprisingly, the change is best illustrated by the views and priorities of Barack Obama.

As the outgoing president of the *Harvard Law Review*, in 1991, Obama could have had his pick of judicial clerkships. "I asked him to apply to clerk for me," Abner Mikva, a former federal appeals-court judge in Washington, told me. "I was a feeder. At the time, I was sending clerks to work for Brennan, Marshall, Stevens, and Blackmun. I don't have any doubt that Obama would have got a Supreme Court clerkship if he wanted one."

But Obama decided against taking any clerkship and instead moved back to Chicago, where he joined a small law firm, started teaching law at the University of Chicago, and laid the groundwork for a political career. "He had decided at that point to go back to work in the community that he had worked in as a community organizer," Cassandra Butts, a law-school classmate of Obama's and now his deputy White House counsel, said. "He was very, very clear on that path. He obviously had an incredible number of opportunities to diverge from that path, but he decided that that's what he wanted to do." As Mikva remembered, "He wanted to go back to Chicago, and he wanted politics to be part of the mix."

David Strauss, who was a professor at the law school at the time, told me that Obama "didn't see himself as much as a legal intellectual as a community organizer and a politician. Even when he was teaching at our law school and practicing law, he was a politician—but not in a cheap sense. That's where he saw his future." In 1996, five years after his graduation, Obama won election to the Illinois State Senate, though he kept up his adjunct teaching at Chicago.

In short, Obama chose politics over law. This was a matter of personal preference and temperament, but it also reflected the times. "He came of age at a time when confidence in the judiciary as a vehicle of social change was very low," Geoffrey Stone, who was on the faculty at the University of Chicago when Obama taught there, said. "His generation of lawyers is much less confident of looking to the Court than an earlier one was. In the Rehnquist years, liberals didn't have a lot of confidence in the Court."

By the late eighties, the great activist years of the Warren Court had passed, and there appeared to be little prospect of a revival. When Obama moved back to Chicago, there was only one Democratic appointee on the Supreme Court—Byron White, hardly a liberal, who had been nominated by John F. Kennedy, in 1962. Obama believed that the Supreme Court wouldn't be remaking American society—and probably shouldn't be, either.

Over the years, Obama has expressed admiration for the great liberal Justices of the twentieth century, including William J. Brennan, Jr., and Thurgood Marshall, but he has nearly always distanced himself from their judicial philosophy. In the interview in Detroit last year, Obama described his view of the limits of judicial liberalism. "The Warren Court was one of those moments when, because of the particular challenge of segregation, they needed to break out of conventional wisdom because the political process didn't give an avenue for minorities and African Americans to exercise their political power to solve their problems. So the court had to step in and break that logjam," Obama said, adding, "I would be troubled if you had that same kind of activism in circumstances today."

A traditional liberal might see Obama's view of "that kind of activism" as heretical. Over the years, legal liberals in many respects have defined themselves by coming up with new rights for the Supreme Court to recognize. The most famous of these rights was the right to attend an integrated public school, which the Justices established in 1954 and then attempted, with mixed success, to enforce over subsequent decades. Later, thanks to Ginsburg and others, the Justices found that the Constitution generally forbade discrimination on the basis of gender. With Roe v. Wade, they recognized the right to obtain an abortion. Other claims were less successful. In an article in the *Harvard Law Review*, in 1969, Frank I. Michelman, a professor at Harvard, suggested that the Fourteenth Amendment might require a right to economic equality, not just freedom from discrimination. Some scholars posited a constitutional right to housing, or a right to health care. Many liberals tried for years to persuade the Supreme Court to step beyond desegregation orders and direct that public schools be funded equally. In an interview with Chicago public radio in 2001, Obama explained why he believed that approach had failed, citing the case of San Antonio Independent School District v. Rodriguez, in 1973. In Rodriguez, the Court found, by a 5-4 vote, that unequal funding of school districts in the same state did not amount to a violation of the equal-protection clause of the Fourteenth Amendment. As Obama described the decision, the Court "basically slaps those kinds of claims down and says, 'You know what—we as a court have no power to examine issues of redistribution and wealth inequalities with respect to schools. That's not a race issue, that's a wealth issue, and we can't get into this.' " The Court said that it was up to legislatures to make judgments about redistribution of wealth, not courts—which was fine with Obama. "Maybe I am showing my bias here as a legislator as well as a law professor," he went on, "but the institution just isn't structured that way."

Nor has Obama shown much enthusiasm for the traditional civil-rights agenda, particularly when it comes to voting rights and affirmative action. Obama taught a course on election law at Chicago, and he used the manuscript of a textbook co-written by Richard Pildes, a law professor then at the University of Michigan and now at New York University. In the early nineties, and even today, most liberals in the field supported the creation of so-called "majority-minority districts"—legislative districts that were gerrymandered to help minority politicians win elections. According to Pildes, Obama was skeptical about African-Americans relying on these districts as the sole route to political success. "He was very different from most younger academics, who had very conventional ways of looking at issues like this one," Pildes told me. "He was very interested in the facts on the ground, how this stuff was really playing out, rather than ideology."

Like Sotomayor in her hearing, Obama has expressed little enthusiasm for group-based affirmative action, the kind practiced by the city of New Haven in the firefighter case. As he notes in his second book, "The Audacity of Hope," "An emphasis on universal, as opposed to race-specific, programs isn't just good policy; it's also good politics." Still, the President is a strong believer in redress for individual, as opposed to group, victims of discrimination; the first bill he signed in office, known as the Lilly Ledbetter Act, overturned a Supreme Court ruling that had restricted the statute of limitations for filing such cases.

There is another reason for Obama's skepticism about court-ordered change: that it distracts liberals and progressives from the hard work of winning elections. In the 2001 interview, he said that one of "the tragedies of the civil rights movement was because the civil rights movement became so court-focused—I think there was a tendency to lose track of the political and community-organizing activities on the ground that are able to put together the actual coalitions of power through which you bring about redistributive change. And in some ways we still suffer from that." Five years later, as a senator and all but declared

Presidential candidate, Obama wrote in "The Audacity of Hope" that he had been reluctant to enter the political brawl over President Bush's judicial nominees. "I wondered if, in our reliance on the courts to vindicate not only our rights but also our values, progressives had lost too much faith in democracy," he wrote. "Elections ultimately meant something. . . . Instead of relying on Senate procedures, there was one way to ensure that judges on the bench reflected our values, and that was to win at the polls."

Notwithstanding Obama's protestations, his brand of pragmatism is an ideology, and his reconsideration of what it means to be a judicial liberal has come at the same time as some in the legal academy are examining the same questions. One prominent effort in this vein, which began before Obama even became a candidate for President, has led to a complementary approach to that of the new President.

"The liberal-activist model of the nineteen-sixties and nineteen-seventies said that the Supreme Court would declare that there are rights, and then order the political branches to enforce them," Jack Balkin, a professor at Yale Law School, told me. That approach seemed both unattainable and undesirable to Balkin and Reva Siegel, a colleague at Yale, so they decided to try to rethink the liberal legal agenda. They were inspired in part by a series of memos and speeches that Edwin Meese III, as Ronald Reagan's attorney general in the eighties, had commissioned to articulate a conservative vision for the courts; over the years, the ideas in several of these memos have found their way into Supreme Court precedent. It was Meese, for instance, who first called Washington's attention to the view that the Constitution should be interpreted according to the "original intent" of the Framers, an approach that Antonin Scalia and Clarence Thomas have brought to the Supreme Court.

The main result of Balkin and Siegel's collaboration is a book, "The Constitution in 2020," published earlier this year, which includes contributions from more than a score of leading progressive law professors—some of whom now work in the Obama Administration. At the core of Balkin and Siegel's concept is the notion that "judges don't own the Constitution." By that, they mean that the Constitution, at any given point in history, is shaped by a broad array of forces, including elected officials, activists, and voters. "The Court decided Brown in 1954, but that didn't settle what 'equal protection of the laws' meant," Balkin said. "Politicians and the civil-rights movement shifted the meaning. Martin Luther King changed it. The Civil Rights Act changed it. The organized right changed the meaning when it reacted to busing. The history of race relations in this country is organized around each side claiming the mantle of Brown. But no one ever has the last word."

As proof of this hypothesis, the authors point to the history of the Second Amendment and gun control. The first clause of the amendment refers to the need for "a well regulated Militia" and the second states that "the right of the people to keep and bear Arms, shall not be infringed." For many decades, into the nineteen-eighties, it was widely agreed among judges and scholars that the right to bear arms belonged only to militias, and thus the Second Amendment imposed no limits on the ability of states and localities to enact gun-control laws. Warren E. Burger, the former Chief Justice (and no liberal), said that any other view of the law was a "fraud," and Robert Bork, the conservative hero, said much the same thing. But Meese and his allies in the National Rifle Association were indefatigable in pushing an opposing interpretation, and their position became widely adopted, first in the Republican Party and then among many Democrats. Finally, in 2008, the Supreme Court, in an opinion written by Antonin Scalia (who was appointed while Meese was attorney general), struck down a District of Columbia gun-control law as a violation of the Second Amendment. A fringe position—a "fraud"—two decades earlier had become the law of the land. To Balkin, this is an entirely appropriate example of what he, Siegel, and Robert Post, the dean of Yale Law School, call Democratic Constitutionalism. "Conservatives convinced other people that their vision of the Constitution was a better one, they won elections, they appointed their people to the Court," Balkin said. "This is not lawlessness. This is how the system works."

In a way, Democratic Constitutionalism goes back to the origin of the activism-vs.-restraint debate. In the late nineteenth century, a conservative majority on the Supreme Court embraced a kind of activism when it struck down several state and local measures intended to regulate the economy or to protect workers. In the nineteen-thirties, a conservative majority on the Supreme Court struck down several early New Deal measures; in these cases, the Justices ruled that Congress lacked the constitutional authority to launch such federal initiatives as the National Recovery Administration. Franklin D. Roosevelt initially responded to these defeats with his infamous court-packing plan, but in time he was able to appoint Justices who deferred to legislative judgments about how best to address the Depression. In other words, in that era liberals believed in restraint, and conservatives were the activists. (That flipped in the Warren era.) Notably, when Sotomayor was asked her favorite Supreme Court Justice, she named Benjamin Cardozo, who was a leader in fighting the conservative activism of the thirties on the Court.

"What you'll get with Obama is basically Carolene Products—'Leave me alone on economic issues and protect me on civil rights,' " Richard Epstein, the conservative legal scholar who was interim dean of the Chicago Law School when Obama taught there, said. Carolene Products was a 1938 decision, involving skim milk spiked with non-milk fat, in which the Court set up a

structure that would shape constitutional law for the next several generations. The Justices gave the elected branches a more or less free hand on economic issues but exercised greater scrutiny of measures that affected minorities. "Obama has nothing much he wants from the courts," Epstein told me. "He wants them to stay away from the statutes he passes, and he wants solidity on affirmative action and abortion. That's it."

As David Strauss observed, "Fighting over the courts is not going to be a high-priority issue for Obama or the Democratic coalition. The Republican coalition cares a lot more about it at this point, because they want the Court to change on issues like abortion, affirmative action, school prayer, gun rights. If the courts stay right where they are, that's fine with the Democrats. The Democratic agenda is more democratically focussed on legislation."

In recent years, thirties-style conservative judicial activism, targeting federal legislation, has been returning to the Court. As Cass Sunstein, a former professor at Harvard Law School, writes in the "2020" collection, "Increasingly, conservatives have been drawn to 'movement judges'—judges with no interest in judicial restraint, with a willingness to rule broadly and a demonstrated willingness to strike down the acts of Congress and state governments. Movement judges have an agenda, which, as it happens, overlaps a great deal with the extreme wing of the Republican Party." Sunstein notes that the Rehnquist Court struck down more than three dozen federal enactments between 1995 and 2004—"a record of aggressiveness against the national legislature that is unequaled in the nation's history."

Last week, after a long delay, Sunstein was confirmed as director of the Office of Information and Regulatory Affairs in the Office of Management and Budget. Dawn E. Johnsen, another contributor, has been waiting for months for a Senate vote on her nomination as an assistant attorney general. Harold Hongju Koh, who was the dean of Yale Law School and another writer in the collection, was recently confirmed, also after a long delay, as legal adviser to the State Department. The trouble that these outspoken academics have had in winning confirmation for Administration posts offers another augury of major battles ahead if Obama nominates any of them, or anyone like them, for judgeships.

The Roberts Court, in addition to striking down the D.C. gun-control law, invalidated school-integration plans undertaken by local governments in Seattle and Louisville, and rejected part of the McCain-Feingold campaign-finance law. In an oral argument last week, in a case involving a film critical of Hillary Clinton, the Court appeared poised to strike down another part of the same law. An Obama Court would almost certainly defer more to congressional and other legislative judgments. "You start with the premise that the political branches are the first line of defense of constitutional rights," Balkin said. "If you think that health care is a very important right that people should enjoy, you think that the best way to enforce it is for Congress to pass a law and the President to sign it. This is a very different model from the late sixties." Obama's ambitious legislative agenda, combined with his stated devotion to judicial restraint, signals an approach in synch with this ideology.

During the campaign, Obama criticized George W. Bush for his aggressive use of the powers of the Presidency, particularly regarding the treatment of military detainees. Obama and other liberals saluted the Supreme Court's decisions, in the Hamdan and Boumediene cases, which rejected Bush Administration proposals regarding Guantánamo Bay. But, like most Presidents, Obama has now embraced a more robust conception of executive power than some traditional liberals would prefer. He has issued signing statements, noting his objections to certain legislation on constitutional grounds; he has expressed a willingness to create a system for trying detainees that offers fewer protections than criminal trials do; and his Administration has invoked the state-secrets privilege to keep information away from torture victims who have filed lawsuits. In these areas, Obama has taken less aggressive positions than the Bush Administration did, but the difference is of degree, not of kind.

In some respects, Democratic Constitutionalism, or the Obama version of it, still looks much like traditional liberalism. The deference to the will of the people will go only so far. If, for example, a state legislature were to ban all abortions, there would be little hesitation on the part of most liberals to strike that action down. Same-sex marriage, which many liberals favor, presents a similar dilemma, although Balkin can fit the current struggles into his template. "Same-sex marriage right now is a collaboration, where sometimes courts are leading, like in Massachusetts, and sometimes in other states the courts are teeing up the question and forcing the attention of the polity on it," he said. "But courts can only push so far out against what the people believe. They can lead, but they have to get some degree of take-up from the legislature, or nothing is going to change."

As Obama has said, the role of the Court is sometimes specifically to confront—not ratify—the will of the majority. "One of the roles of the courts is to protect people who don't have a voice. That's the special role of that institution," Obama said in Detroit. "The vulnerable, the minority, the outcast, the person with the unpopular idea, the journalist who is shaking things up. That's inherently the role of the court. And if somebody doesn't appreciate that role, then I don't think they are going to make a very good justice."

This is the paradox of the judiciary—that unelected judges must protect democratic values. Obama's belief that judges reflect the prevailing political environment raises a paradox of its own. He is launching his nominees into an atmosphere that is so poisoned that scarcely anyone can get confirmed. As one of his advisers said, "Post-partisanship has not yet arrived in

judicial selection, or in anything else." ♦

ILLUSTRATION: JOHN CUNEO