
OBAMA’S CONSTITUTIONAL LEGACY

*Ilya Somin**

ABSTRACT

President Obama leaves behind a mixed legacy on constitutional issues—one that is likely to remain controversial for a long time to come. Its most dangerous element may be the precedents he set for unilateral presidential initiation of war. More positively, the President played an important role in the establishment of a constitutional right to same-sex marriage, and his Administration’s policies unintentionally led to litigation that resulted in stronger judicial protection for federalism, property rights, and religious liberties. Obama’s judicial appointments are notable for their impressive professional qualifications and strong support for liberal judicial ideology. The long-term constitutional impact of the Obama presidency remains to be seen.

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I. INTRODUCTION

Only a few months have passed since President Barack Obama gave his farewell address¹ and completed his last term in office. Now is therefore

* Professor of Law, George Mason University. I would like to thank Michael Sebring for the valuable research assistance. This Article is an expanded version of a piece I wrote for *The Volokh Conspiracy* blog, hosted at the *Washington Post* website. See Ilya Somin, *Obama’s Constitutional Legacy*, WASH. POST (Jan. 19, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/19/obamas-constitutional-legacy/?utm_term=.14b222236227.

1. See Aaron Blake, *President Obama’s Farewell Speech Transcript, Annotated*, WASH. POST (Jan. 10, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/01/10/president-obamas-farewell-speech-transcript-annotated/?tid=a_inl&utm_term=

an appropriate time to begin to assess his legacy, including his legacy for American constitutional law. Any such early assessment must be provisional, at best. We do not yet have sufficient historical distance from Obama's time in office to reach anything approaching definitive conclusions. This is particularly true of those of us—myself included—who were personally involved in some of the constitutional conflicts of the Obama era.²

Still, we can at least make a start.³ This short essay is far from a comprehensive assessment of Obama's constitutional legacy. But, it does identify several key aspects of that legacy that I believe are likely to have lasting consequences.

President Obama deserves credit for helping to push the struggle for same-sex marriage to a successful conclusion; for appointing some highly capable judges (despite arguable flaws in their judicial philosophy); and for causing the Supreme Court to establish some valuable precedents protecting federalism, property rights, and religious freedom (albeit, often unintentionally). On the other hand, we may well have occasion to rue his overly expansive approach to executive power, particularly when it comes to initiating wars without congressional authorization.

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2. I authored or coauthored amicus briefs and otherwise participated in the political and legal debate over three of the most prominent U.S. Supreme Court decisions involving the Obama Administration, *NFIB v. Sebelius*, *United States v. Windsor*, and *Obergefell v. Hodges*. I opposed the Administration's position in the *NFIB* case and supported it in *Obergefell*. For my involvement in the *NFIB* litigation, see generally RANDY BARNETT ET AL., A CONSPIRACY AGAINST OBAMACARE: THE VOLOKH CONSPIRACY AND THE HEALTH CARE CASE (Trevor Burrus ed., 2013) (reprinting blog posts I wrote on the topic). For a discussion of the arguments raised in my amicus brief in *Obergefell*, see Andrew Koppelman & Ilya Somin, *Gender: The Gay Marriage Fight's Missing Piece*, USA TODAY (Apr. 19, 2015), <https://www.usatoday.com/story/opinion/2015/04/19/supreme-court-same-sex-marriage-constitutionality-discrimination-column/70225124/>.

3. For other early assessments of Obama's constitutional legacy, see Garrett Epps, *Obama Leaves the Constitution Weaker than He Found It*, ATLANTIC (Jan. 3, 2017), <https://www.theatlantic.com/politics/archive/2017/01/obama-leaves-the-constitution-weaker-than-he-found-it/512015/> (concluding that "Obama [left] the Constitution weaker than at the beginning of his terms"); Ilya Shapiro, *Top 10 Ways Obama Violated the Constitution During His Presidency*, FEDERALIST (Jan. 19, 2017), <https://thefederalist.com/2017/01/19/10-ways-obama-violated-constitution-presidency/>.

II. THE LOADED GUN OBAMA LEFT TRUMP

Perhaps the most important constitutional legacy of the Obama Administration is one that does not get nearly as much attention as it deserves: by starting two wars without the constitutionally required congressional authorization, Obama established dangerous precedents that can be used by President Donald Trump and other potentially unscrupulous successors. In the case of both the 2011 war against Libya⁴ and the still-ongoing war against ISIS,⁵ Obama relied on flimsy legal pretexts to initiate wars.

To his credit, Obama has since admitted the Libya intervention was his “worst mistake.”⁶ But he still refuses to recognize it was unconstitutional or that its dubious legal rationale had any connection to the sorry outcome.⁷

In both the Libya and ISIS conflicts, the Obama Administration stopped short of claiming, in the fashion of controversial former George W. Bush adviser John Yoo, that the President has unlimited inherent power to start wars.⁸ But the rationales they relied on instead are not much better. In the Libya case, for example, the Administration advanced the implausible theory that the Libya conflict was not a real war—or even a case of “armed hostilities” covered by the War Powers Act—because “U.S. operations [in Libya] do not involve sustained fighting or active exchanges of fire with hostile forces.”⁹

4. See Ilya Somin, *Obama Admits That His Handling of the Libya War Was His Worst Mistake—But Not That It Was Unconstitutional*, WASH. POST (Apr. 13, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/04/13/obama-admits-that-his-handling-of-the-libya-war-was-his-worst-mistake-but-not-that-it-was-unconstitutional/?tid=a_inl&utm_term=.665b8604bf4a [hereinafter Somin, *Obama Admits*].

5. See Ilya Somin, *Unconstitutional War Against ISIS Expands to Include Ground Combat by US Forces*, WASH. POST (Oct. 30, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/10/30/unconstitutional-war-against-isis-expands-to-include-ground-combat-by-us-forces/?tid=a_inl&utm_term=.758901bcd43.

6. See Somin, *Obama Admits*, *supra* note 4.

7. *Id.*

8. Ilya Somin, *John Yoo's Defense of the Legality of Obama's Military Campaign Against ISIS*, WASH. POST (Sept. 12, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/09/12/john-yoos-defense-of-the-legality-of-obamas-military-campaign-against-isis/?tid=a_inl&utm_term=.d0a66211f5b0.

9. Charlie Savage & Mark Landler, *White House Defends Continuing U.S. Role in Libya Operation*, N.Y. TIMES (June 15, 2011), <http://www.nytimes.com/2011/06/16/us/politics/16powers.html>.

You do not have to be a law professor like Obama himself once was to understand that launching numerous air strikes for the purpose of overthrowing a government qualifies as war, and certainly as “armed hostilities.” If it does not, all sorts of other large-scale military interventions can be justified on similar grounds. Similar problems arise from the Administration’s attempts to stretch the 2001 and 2002 congressional authorizations for the use of military force to cover the conflict against ISIS.¹⁰ These too are holes Trump—or some other future president—could potentially drive a truck through.

In fairness, President Obama did seek congressional authorization when he considered launching air strikes against Syria in the fall of 2013, in response to the Syrian government’s use of chemical weapons against civilians.¹¹ Some scholars argue this action helped reinvigorate the norm of congressional control and offset the impact of the President’s unauthorized war against Libya.¹² But President Obama never conceded that congressional authorization for the Syria strike was a constitutional requirement and certainly never admitted the Libya war had been unconstitutional.¹³ Thus, his actions in the Syria case did little, if anything, to offset the negative precedents set by his other uses of war powers.

Obama’s actions have, quite literally, left Trump a loaded gun he could fire almost any time he wants to. In truth, it is an entire army of loaded guns, to say nothing of loaded missile launchers and aircraft carriers. Perhaps Congress will reassert its constitutional authority over this important field.¹⁴

10. See Ilya Somin, *Still No Legal Authorization for the War Against ISIS*, WASH. POST (June 13, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/13/still-no-legal-authorization-for-the-war-against-isis/?tid=a_inl&utm_term=.69aad51f9fed.

11. See Peter Baker & Jonathan Weisman, *Obama Seeks Approval by Congress for Strike in Syria*, N.Y. TIMES (Aug. 31, 2013), <http://www.nytimes.com/2013/09/01/world/middleeast/syria.html>.

12. See, e.g., Michael D. Ramsey, *Constitutional War Initiation and the Obama Presidency*, 110 AM. J. INT’L L. 701, 714–16 (2016) [hereinafter Ramsey, *Constitutional War*].

13. See generally *id.* at 714 (“Ultimately the president decided to ask Congress for approval . . . , although at the same time he insisted . . . that he had independent authority to order air strikes.”).

14. Ilya Somin, *Congress Should Act to Reclaim Its War Powers*, WASH. POST (Dec. 22, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/22/congress-should-act-to-reclaim-its-war-powers/?tid=a_inl&utm_term=.6e9e7437e675 (discussing Senator Rand Paul’s article and Senator Tim Kaine’s speech about Congress’s power to control the initiation of war).

Principled lawmakers like Democratic Senator Tim Kaine and Republican Senator Rand Paul would like to do just that.¹⁵ But I am not as optimistic as I wish I could be that their counsel will be followed. Most members of Congress—and most of the general public—seem happy to continue ignoring this issue.

The constitutional requirement of congressional authorization is not just a legal technicality. It also helps protect us from initiating dubious conflicts at the behest of a single man, and increases the likelihood of success in those wars we do choose to fight.¹⁶

The constitutional problems raised by presidential initiation of war attracted renewed attention when President Trump ordered an attack on a Syrian air base in April of 2017.¹⁷ In my view, this strike probably did not require congressional authorization because it did not rise to the level of a full-scale war.¹⁸ Some experts disagree, however, including noted war-powers scholar Michael Ramsey.¹⁹ He contends that, under the original meaning of the Constitution, the requirement of congressional authorization applies to “even low-level uses of force” against foreign powers.²⁰ Professor Ramsey also indicated that Trump’s Syria strike undercut his previous relative optimism about the impact of Obama’s legacy on war initiation.²¹

15. Jack Goldsmith, *Senator Kaine on the Forever War*, LAWFARE (Dec. 3, 2016), <https://www.lawfareblog.com/senator-kaine-forever-war> (discussing Senator Tim Kaine’s speech about Congress needing to reclaim power to control war initiation); Rand Paul, *Congress Must Reclaim Its War-Making Powers*, NAT’L INT. (Dec. 20, 2016), <http://nationalinterest.org/feature/congress-must-reclaim-its-war-making-powers-18804?page=show> (discussing views on how Congress must reclaim the power to control the initiation of war).

16. Somin, *Obama Admits*, *supra* note 4.

17. Jordain Carney, *McConnell: New War Bill Not Needed for Trump’s Syria Strikes*, HILL (Apr. 7, 2017), <http://thehill.com/blogs/floor-action/senate/327776-mcconnell-new-war-bill-not-needed-for-trumps-syria-strikes>.

18. See Ilya Somin, *Some Questions Raised by Trump’s Missile Strike on Syria*, WASH. POST (Apr. 7, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/04/07/some-questions-raised-by-trumps-missile-strike-on-syria/?utm_term=.57b7b682e17b.

19. Michael Ramsey, *The Constitution and Syria (Again)*, ORIGINALISM BLOG (Apr. 7, 2017, 10:04 AM), <http://originalismblog.typepad.com/the-originalism-blog/2017/04/the-constitution-and-syria-againmichael-ramsey.html>.

20. *Id.*

21. *Id.* For Ramsey’s relatively optimistic previous view, see Ramsey, *Constitutional War*, *supra* note 12 *passim*.

Even if an isolated small-scale strike does not require congressional authorization, a large-scale war against the Syrian government surely does.²² The United States' ongoing and gradually deepening involvement in the Syria conflict raises the possibility that we will ultimately end up in a broader regional conflict without ever getting congressional authorization or developing any kind of national consensus that such involvement is desirable.²³ In recent months, both liberal and conservative commentators have expressed grave concern about such a possibility and have urged Congress to reclaim its war powers.²⁴

As this Article goes to press, there have been two noteworthy, though ultimately abortive, efforts to reassert congressional control over war initiation. In June 2017, the U.S. House Committee on Appropriations unexpectedly voted to repeal the 2001 Authorization for Use of Military Force (AUMF), which authorized military actions against the perpetrators of the 9/11 attacks and those who aided and abetted them.²⁵ The Obama Administration had stretched the 2001 AUMF to try to justify its war against ISIS, even though the latter is a separate organization from al Qaeda, and often actively in conflict with it.²⁶ The Appropriations Committee proposal, based on an amendment offered by California Democratic Representative Barbara Lee, would terminate the 2001 AUMF within 240 days, during

22. I discuss this issue in detail in Ilya Somin, *Large-Scale Military Intervention Against Assad Requires Congressional Authorization*, WASH. POST (Apr. 6, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/04/06/military-intervention-against-assad-requires-congressional-authorization/?utm_term=.31efca0c92aa.

23. *See id.*

24. *See, e.g.*, David French, *America's War Against ISIS Is Evolving into an Invasion of Syria*, NAT'L REV. (June 19, 2017), <http://www.nationalreview.com/article/448768/syrian-conflict-our-fight-isis-pits-us-against-assad> (generally providing a conservative perspective); John Podesta & Brian Katulis, *Trump's Silent Surge in the Middle East—and the Slippery Slope to War*, WASH. POST (June 20, 2017), https://www.washingtonpost.com/opinions/trumps-silent-surge-in-the-middle-east—and-the-slippery-slope-to-war/2017/06/20/e5f352ac-55c0-11e7-ba90-f5875b7d1876_story.html?utm_term=.98a0e02e950e (generally providing a liberal perspective).

25. Jeremy Herb & Deirdre Walsh, *House Panel Votes to Repeal War Authorization for Fight Against ISIS and Al Qaeda*, CNN POL. (June 29, 2017), <http://www.cnn.com/2017/06/29/politics/house-panel-repeal-war-authorization-isis-al-qaeda/index.html>.

26. *See* the discussion in Ilya Somin, *Assessing Possible Legal Justifications for US Airstrikes Against ISIS*, WASH. POST (Aug. 8, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/08/08/assessing-possible-legal-justifications-for-us-airstrikes-against-isis/?tid=a_inl&utm_term=.1de12df60f3a.

which time Congress could craft a new and narrower AUMF for the conflicts against both al Qaeda and ISIS.²⁷ If it had passed Congress, this would have been a major step. But Speaker of the House Paul Ryan managed to bury the committee proposal without letting it come to a vote before the full House.²⁸

In September 2017, the Senate voted down Republican Senator Rand Paul's proposal to sunset the 2001 and 2002 AUMFs within six months, thereby giving Congress a window of opportunity to pass a new, more limited authorization for the war against ISIS.²⁹ The 61–36 margin by which the Paul amendment was defeated probably understates the true extent of support for repealing and replacing the 2001 AUMF, as a number of Senators voted “no” on primarily procedural grounds, despite their sympathy for the underlying idea.³⁰ Whether the Lee and Paul amendments end up as footnotes to history or become the first steps towards a serious reassertion of congressional war powers is yet to be determined.

For now, President Obama's initiation of two wars without congressional authorization remains a highly dangerous precedent. He would have done better to stick to the principle then-Senator Obama outlined in 2007: “The President does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation.”³¹ We may yet have occasion to lament his failure to live up to his own ideals on this issue.

Obama's overextension of executive power to initiate war was the most dangerous example of numerous similar abuses in other areas, many of them chronicled in my George Mason University colleague David Bernstein's

27. Robert Chesney, *Repealing the 2001 AUMF? A Surprise Vote by the House Appropriations Committee*, LAWFARE (June 29, 2017), <https://www.lawfareblog.com/repealing-2001-aumf-surprise-vote-house-appropriations-committee>.

28. See Rebecca Shabad, *House Democrat Accuses Paul Ryan of Stripping War Authorization Repeal in “Dead of Night,”* CBS NEWS (July 19, 2017), <https://www.cbsnews.com/news/house-democrat-accuses-paul-ryan-of-stripping-war-authorization-repeal-in-dead-of-night/>.

29. See Connor O'Brien, *Senate Scuttles Rand Paul's War Powers Repeal*, POLITICO (Sept. 13, 2017), <http://www.politico.com/story/2017/09/13/war-powers-aumf-rand-paul-senate-242662>.

30. See Jeremy Herb, *Senate Rejects Bid to Repeal War Authorizations*, CNN POL. (Sept. 13, 2017), <http://www.cnn.com/2017/09/13/politics/senate-isis-war-vote/index.html> (noting examples of Jeff Flake and Bob Corker).

31. Ilya Somin, *Obama's Reversals on Executive Power*, VOLOKH CONSPIRACY (June 24, 2012), <http://volokh.com/2012/06/24/obamas-reversals-on-executive-power/>.

book on the subject.³² I do not agree with all of the conservative criticisms of Obama's executive actions, particularly those aimed at his November 2014 decision to defer deportation of many undocumented immigrants.³³ Some of Obama's controversial actions had precedents in similar abuses by previous presidents, including Republican ones. But the overall picture is a deeply problematic one.

III. VICTORY IN THE STRUGGLE FOR SAME-SEX MARRIAGE

Obama's term in office coincided with the dramatic final victory in the struggle for marriage equality, *Obergefell v. Hodges*, the Supreme Court's 2015 decision striking down state laws banning same-sex marriage.³⁴ Obama's role in this battle was somewhat equivocal, but nonetheless crucial.

For a long time, Obama led the fight for marriage equality "from behind," to adapt a notorious phrase from the Libya conflict.³⁵ He spent years pretending to be opposed to same-sex marriage even though he was actually in favor of it—a stance he adopted in order to improve his electoral prospects.³⁶

But when he did finally reveal his true position in 2012, it helped coalesce public and elite opinion in favor of same-sex marriage, ultimately leading to the Supreme Court decision in its favor. Given the Supreme Court Justices' sensitivity to public opinion on such a high-profile issue, it seems unlikely that the Court would have struck down all state laws banning same-sex marriage if the nation's popular liberal Democratic President were still officially against it.

In a February 2015 interview just a few months before *Obergefell* was

32. DAVID E. BERNSTEIN, *LAWLESS: THE OBAMA ADMINISTRATION'S UNPRECEDENTED ASSAULT ON THE CONSTITUTION AND THE RULE OF LAW passim* (2015).

33. Ilya Somin, *Yes, Obama's Executive Action Deferring Deportation for Millions of Immigrants Is Constitutional*, REASON.COM (Apr. 19, 2016), <http://reason.com/archives/2016/04/19/yes-obamas-executive-action-deferring-de>.

34. 135 S. Ct. 2584 (2015).

35. See Charles Krauthammer, *The Obama Doctrine: Leading from Behind*, WASH. POST (Apr. 28, 2011), https://www.washingtonpost.com/opinions/the-obama-doctrine-leading-from-behind/2011/04/28/AFBCy18E_story.html?utm_term=.7334e2a463a0.

36. Ilya Somin, *Reflections on Obama's Misrepresentation of His Position on Same-Sex Marriage*, WASH. POST (Feb. 11, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/02/11/reflections-on-obamas-misrepresentation-of-his-position-on-same-sex-marriage/?utm_term=.97cb42b0d593.

decided, Supreme Court Justice Ruth Bader Ginsburg emphasized the importance of the fact that the country was “ready” for nationwide same-sex marriage and noted that it “would not take a large adjustment” for the public to accept such a decision.³⁷ Historically, the Justices are reluctant to buck majority opinion on sensitive, high-profile issues, such as this one.³⁸

It is possible the Court deliberately avoided deciding the same-sex marriage question when it chose to dismiss on procedural grounds a lawsuit challenging California's law banning same-sex marriage in 2013.³⁹ At the very least, Justice Ginsburg seems to have believed that the Court should act only when the nation is “ready.”⁴⁰ President Obama's shift may have played a key role in allaying any concerns that she and others may have had along these lines. Obama also influenced the outcome by appointing two of the five Justices who voted with the majority in *Obergefell*.

While *Obergefell* was a close 5–4 decision, it has rapidly achieved widespread public acceptance, to the point where it barely registered as an issue in the bitter 2016 presidential campaign. President Donald Trump has said “it is settled law that should not be overruled.”⁴¹ It is significant that the Republican Party seems to have little appetite for attacking *Obergefell*, despite its vehement opposition to same-sex marriage in years prior to 2015.

In my view, *Obergefell* was a correct decision, albeit poorly reasoned.⁴² Many will dispute one or another of those characterizations. Be that as it may, the ruling is likely to be a lasting part of Obama's constitutional legacy.

37. *Ruth Bader Ginsburg: U.S. Ready to Accept Same-Sex Marriage*, DENVER POST (Feb. 12, 2015), <http://www.denverpost.com/2015/02/12/ruth-bader-ginsburg-u-s-ready-to-accept-same-sex-marriage/>.

38. *See generally* BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009).

39. *See Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013) (vacating the judgment of the Ninth Circuit Court of Appeals due to petitioner's failure to demonstrate standing).

40. *See Ruth Bader Ginsburg: U.S. Ready to Accept Same-Sex Marriage*, *supra* note 37.

41. Susan Wright, *President-Elect Trump Supportive of Gay Marriage*, RED STATE (Nov. 13, 2016), <http://www.redstate.com/sweetie15/2016/11/13/president-elect-trump-supportive-gay-marriage/>.

42. Ilya Somin, *A Great Decision on Same-Sex Marriage—But Based on Dubious Reasoning*, WASH. POST (June 26, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/26/a-great-decision-on-same-sex-marriage-but-based-on-dubious-reasoning/?utm_term=.7ba72332b68b.

More generally, the Obama era may well be remembered as the time when gays and lesbians became fully equal citizens to a much greater extent than ever before. Obama deserves a substantial measure of credit for that, even if his performance was far from a profile in political courage.

IV. OBAMA'S IMPACT ON SUPREME COURT DOCTRINE

The Obama Administration's policies led to some major Supreme Court decisions, many of which changed legal doctrine for the better. By far the most high-profile of these cases was a series of rulings involving challenges to the President's signature legislative achievement, the Affordable Care Act (ACA). In *NFIB v. Sebelius* (2012), the Supreme Court upheld the ACA's health insurance mandate by reinterpreting it as a "tax," but also set important limits on congressional power under the Commerce Clause and Necessary and Proper Clause.⁴³ On the latter issue, the Court provided the most thorough analysis of the meaning of "proper" (and the way it limits federal power) that it had ever issued in 200 years of case law.⁴⁴ *NFIB* also partially struck down the ACA's Medicaid expansion, thereby providing the first Supreme Court ruling limiting Congress's spending power in over 75 years.⁴⁵ This unexpected ruling—joined by two of the Court's liberal Justices, including Obama appointee Justice Elena Kagan—was an important part of a more general revival of constitutional federalism in the Roberts Court.⁴⁶

The long-term impact of *NFIB* is still unclear.⁴⁷ But I tentatively predict that these limits on federal power will ultimately prove more significant than Chief Justice John Roberts's awkward attempt to reframe the mandate as a tax. Liberals—including President Obama himself—decried the pro-federalism elements of the decision at the time. But they may have reason to take a different view of constitutional federalism under

43. 567 U.S. 519, 558, 560–61, 574 (2012).

44. *Id.* at 560; Ilya Somin, *The Individual Mandate and the Proper Meaning of "Proper"*, in *THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS* 146–62 (Nathaniel Persily, Gillian E. Metzger & Trevor W. Morrison eds., 2013).

45. *NFIB*, 567 U.S. at 588.

46. For an overview, see Ilya Somin, *Federalism and the Roberts Court*, 46 *PUBLIUS J. FEDERALISM* 441 (2016).

47. For an early evaluation emphasizing the reasons for uncertainty, see Ilya Somin, *NFIB v. Sebelius and the Constitutional Debate over Federalism*, 39 *OKLA. CITY U. L. REV.* 415, 437–38 (2014).

Trump. Liberal states and interest groups have relied on federalism arguments to counter the Trump Administration on sanctuary cities and other issues, a circumstance which has helped stimulate a revival of interest in constitutional federalism on the left.⁴⁸

In 2015, the Supreme Court ruled in the Administration's favor in *King v. Burwell*, thereby saving Obamacare subsidies for people purchasing health insurance on federal exchanges established in the many states that refused to set up state exchanges.⁴⁹ The case was a major victory for the Administration. But the Court also reaffirmed the principle that courts should not defer to executive agencies' interpretations of law on major questions, instead of making their own decisions on such issues.⁵⁰ That could help curb executive power in the future.

In *Burwell v. Hobby Lobby Stores*, yet another ACA case, the Administration suffered a notable defeat when the Court ruled that commercial firms can assert rights to religious free exercise under the Religious Freedom Restoration Act.⁵¹ Although the case was not directly focused on constitutional issues, its reasoning offers important protection to people using the corporate form more generally, including with respect to their ability to assert constitutional rights.⁵²

While I disagreed with many of the Obama Administration's positions in the various Obamacare cases, I also recognize that most of them were at least plausibly defensible. Even when the Administration lost on key issues

48. For examples of prominent left-of-center scholars taking this position, see, e.g., Heather Gerken, *We're About to See States' Rights Used Defensively Against Trump*, VOX (Jan. 20, 2017), <https://www.vox.com/the-big-idea/2016/12/12/13915990/federalism-trump-progressive-uncooperativ>; Jeffrey Rosen, *Federalism for the Left and the Right*, WALL ST. J. (May 19, 2017) <https://www.wsj.com/articles/federalism-for-the-left-and-the-right-1495210904>; see also Ilya Somin, *Trump, Federal Power, and the Left—Why Liberals Should Help Make Federalism Great Again*, WASH. POST (Dec. 5, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/05/trump-federal-power-and-the-left-why-liberals-should-help-make-federalism-great-again/?utm_term=.fd6f2af09acd (discussing newfound liberal interest in constitutional federalism under Trump and arguing that this is a positive development).

49. 135 S. Ct. 2480, 2496 (2015).

50. *See id.* at 2483.

51. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2755 (2014).

52. *See* Ilya Somin, *Religious Freedom in the Commercial Sphere*, STAN. U. PRESS BLOG (Sept. 30, 2014), <http://stanfordpress.typepad.com/blog/2014/09/religious-freedom-in-the-commercial-sphere.html>.

in these decisions, it was usually on a close vote split along ideological lines.⁵³

The same cannot be said for many of the arguments the Administration advanced in numerous property rights cases, which were so extreme that they resulted in a series of lopsided 9–0 and 8–1 defeats in the Supreme Court.⁵⁴ The most recent was *Horne v. Department of Agriculture II*, the famous raisin takings case.⁵⁵ These decisions led to a notable strengthening of judicial protection of constitutional property rights under the Takings Clause—the very opposite of the result the Administration probably hoped to achieve.

There is a similar story to be told about *Hosanna-Tabor v. EEOC*, an important religious freedom case in which the Obama Administration also adopted an extreme position that led to a unanimous ruling protecting the right of religious institutions to choose ministers free of restriction by antidiscrimination law.⁵⁶ To the surprise of even Obama appointee Justice Elena Kagan, the Administration argued that the First Amendment does not protect even the hiring of ministers by religious schools against laws restricting discrimination on the basis of religion.⁵⁷ Justice Kagan thought it “amazing” that the Administration had mounted such a sweeping attack on

53. Both *NFIB v. Sebelius* and *Hobby Lobby* were very close 5–4 decisions on most of the major issues, with the Justices split along predictable right–left lines. *Hobby Lobby*, 134 S. Ct. at 3787; *NFIB v. Sebelius*, 567 U.S. 519, 589 (2012).

54. For examples of lopsided Obama Administration defeats in property rights cases, see, e.g., *Horne v. Dep’t of Agric.*, 135 S. Ct. 1039 (2015) (8–1); *Horne v. Dep’t of Agric.*, 133 S. Ct. 2053 (2013) (9–0); *Sackett v. EPA*, 132 S. Ct. 1367 (2012) (9–0 defeat); *Ark. Game & Fish Comm’n v. United States*, 133 S. Ct. 511 (2012) (9–0). For my discussion of several of these see, Ilya Somin, *Two Steps Forward for the “Poor Relation” of Constitutional Law: Koontz, Arkansas Game & Fish, and the Future of the Takings Clause*, 2012-2013 CATO SUP. CT. REV. 215; see also Ilya Somin, *Supreme Court Shutouts Reveal Reckless Decisions*, USA TODAY (July 22, 2013), <https://www.usatoday.com/story/opinion/2013/07/22/supreme-court-losses-column/2576625/>.

55. *Horne II*, 135 S. Ct. at 1039. For my analysis of that case, see Ilya Somin, *Property Owners Prevail in Raisin Takings Case*, WASH. POST (June 22, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/22/property-owners-prevail-in-raisin-takings-case/?utm_term=.3db874f53cda.

56. 565 U.S. 171, 175, 189 (2012).

57. *Id.* at 188–90; Warren Richey, *Supreme Court Justices Find Government Line in Church-State Case “Amazing”*, CHRISTIAN SCI. MONITOR (Oct. 5, 2011), <https://www.csmonitor.com/USA/Justice/2011/1005/Supreme-Court-justices-find-government-line-in-church-state-case-amazing>.

religious freedom.⁵⁸ Here, too, the Administration ended up helping its adversaries.

In sum, advocates of constitutional federalism, property rights, and religious liberty have reason to be grateful for the Obama Administration's efforts in these fields. They would have been hard-pressed to gain so much ground otherwise. But President Obama himself may be loathe to take the credit.

V. OBAMA'S JUDICIAL APPOINTMENTS

As with most presidents, Barack Obama's judicial appointments are likely to be among his most lasting legacies. President Obama appointed two Supreme Court Justices—Elena Kagan and Sonia Sotomayor—and hundreds of lower court judges.⁵⁹ Many of these judges will continue to serve for decades after President Obama leaves office. For that reason, their full impact is difficult to predict at this point. So far, Obama's judicial appointees are notable for their impressive professional skills, their racial and ethnic diversity, and their near-uniform adherence to liberal orthodoxy on most major constitutional issues.⁶⁰ That uniformity has moved many lower federal courts significantly to the left of where they were when Obama took office.⁶¹

Few can doubt the value of having judges with solid professional skills, and there is also value to having judges from a wider range of racial and ethnic backgrounds. Whether we should approve of the Obama appointees' judicial philosophy is a question that splits observers along predictable ideological lines.

What is true of the Obama judges generally is also true of his two Supreme Court appointees, Justices Kagan and Sotomayor. Both have

58. Richey, *supra* note 57 (quoting Justice Kagan).

59. Lawrence Hurley, *Obama's Judges Leave Liberal Imprint on U.S. Law*, REUTERS (Aug. 26, 2016), <http://www.reuters.com/article/us-usa-court-obama-idUSKCN1110BC>.

60. *See id.* For data on the racial, ethnic, and ideological compositions of Obama's lower-court appointees, see Elliot Slotnick et al., *Writing the Book of Judges: Part I: Obama's Judicial Appointment Record After Six Years*, 3 J. L. & CTS. 331, 348–63 (2015) and Elliot Slotnick et al., *Writing the Book of Judges: Part 2: Confirmation Politics in the 113th Congress*, 4 J. L. & CTS. 187, 235–39 (2016) [hereinafter Slotnick et al., *Writing the Book of Judges: Part 2*].

61. *See* Slotnick et al., *Writing the Book of Judges, Part 2*, *supra* note 60, at 235–39; Hurley, *supra* note 59.

impressive professional skills, and both are predictable liberal votes on most major issues. Had Obama managed to add a third Supreme Court appointee to his record by getting the Senate to confirm Judge Merrick Garland—his nominee for the seat vacated by the unexpected death of conservative icon Justice Antonin Scalia in February 2016—the result might well have been the most liberal Supreme Court in decades.⁶²

I myself take a more favorable view of Justice Kagan—whose nomination I supported⁶³—than Justice Sotomayor, whom I testified against, because of her dubious record on property rights issues.⁶⁴ So far, both have performed on the Court more or less as I would have expected: voting similarly on most issues, but with Justice Kagan showing greater open-mindedness and less tendency to dismiss opposing views in ideologically charged cases. While this is an admittedly subjective judgment, Justice Kagan seems more careful in her rhetoric and more willing to vote against the political left on at least some key issues. For example, in *NFIB v. Sebelius*, she joined Justice Stephen Breyer and the five conservative Justices in voting to strike down the ACA Medicaid expansion.⁶⁵

On one additional point, both Justices Kagan and Sotomayor deserve praise: neither has turned out to be a mere rubber stamp for the President who appointed her. Both have voted against the Obama Administration on some important cases, including several of the property rights and religious liberties decisions described above.⁶⁶ The two Justices deserve credit for their independence, and the President himself deserves some credit for appointing people with that sort of integrity. Nonetheless, the jury is still out on both of these Justices. Justices Kagan and Sotomayor may be on the Supreme Court for many years to come, and their most important decisions might well lie ahead of them. The same is likely true of many of Obama's lower court appointees.

62. See Alicia Parlapiano & Margot Sanger-Katz, *A Supreme Court with Merrick Garland Would Be the Most Liberal in Decades*, N.Y. TIMES (Mar. 16, 2016), <https://www.nytimes.com/interactive/2016/02/18/upshot/potential-for-the-most-liberal-supreme-court-in-decades.html>.

63. Ilya Somin, *Don't Dismiss Elena Kagan*, FORBES (May 11, 2010), <https://www.forbes.com/2010/05/11/elena-kagan-supreme-court-opinions-contributors-ilya-somin.html>.

64. *Judge Sonia Sotomayor's Record on Constitutional Property Rights*, U.S. SENATE COMMITTEE ON JUDICIARY (July 16, 2009), https://www.judiciary.senate.gov/imo/media/doc/somin_testimony_07_16_09.pdf (Testimony of Ilya Somin, Assistant Professor of Law).

65. See 567 U.S. 519, 529 (2012).

66. See *supra* notes 55–56 and accompanying text.

VI. CONCLUSION

I end this essay where I began: It is still too early to make any definitive judgment on Obama's constitutional legacy. Years from now, it might look very different than today. If President Donald Trump turns out to be as bad as I, and many others, fear, Obama's legacy might come out looking good simply by virtue of the inevitable comparison with his successor. If, by contrast, Trump is perceived as a success, Obama's reputation might suffer accordingly. And if Trump or another successor misuses the dangerously broadened executive powers Obama left behind, Obama will deserve—and perhaps receive—a share of the blame.

For now, all we can say for sure is that Obama's presidency is likely to have a lasting impact on American constitutionalism. It is not yet clear whether its bad effects will outweigh the good. We should hope for the best. But, as Obama himself put it, “[H]ope is not blind optimism. It's not ignoring the enormity of the task ahead or the roadblocks that stand in our path.”⁶⁷

67. *Barack Obama's Caucus Speech*, N.Y. TIMES (Jan. 3, 2008), <http://www.nytimes.com/2008/01/03/us/politics/03obama-transcript.html>.