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Amendment to make US Supreme Court justices accountable to the people

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Anonymous · [a month ago](#) 🔒

This issue was raised in a thread about Sonia Sotomayor, but I think it deserves its own thread.

The constitution has been modified several times, notably with amendments 17-th, 22nd and 25th to recognize political realities that were not foreseen by the framers.

The 17-th amendment introduced the idea that US Senators be elected by the people (instead of by state legislatures or officers).

The 22nd amendment was a reaction of FDR's abuse of the tradition that US presidents serve at most 2 terms.

The 25th amendment (which was almost used against Ronald Reagan) was a recognition that there are occasions in which the President can go nuts without reaching the level of committing an impeachment offense. It enables the cabinet members to do something about it all while giving the sitting president a reasonable way to protect himself/herself from a cabinet led "coup d'etat".

Whatever the intentions of the framers were, the US Supreme Court has become today a partisan body in which its members see as their duty to impose their own political ideology by way of voting/writing opinions that are sourced in their respective ideologies rather than in interpretation of the constitution (this fact is explicitly acknowledged specially by the living constitution judges, four of which sit in the current US Supreme Court).

I read about the proposal below, which sounds very reasonable to me, and I would love to hear about other approaches (or reasons for keeping the current Supreme Court travesty),

<http://www.npr.org/templates/story/story.php?storyId=128168260>

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Joel Kovarsky · a month ago

You had just posted this same link in the preceding thread a few minutes ago. Moving more money into more national elections every few years--on such thin evidence of a beneficial effect--does not strike me as an obvious winner: <http://wfpl.org/post/former-justice-oconnor-says-direct-election-judges-corrupts-system> and <http://www.truth-out.org/news/item/21368-four-years-after-citizens-united-is-campaign-cash-buying-ju...> and <http://onlinelibrary.wiley.com/doi/10.1111/j.1747-4469.1984.tb01050.x/abstract;jsessionid=5AB648BF36...> . From what I can see, direct election would pose at least as many problems, for other reasons, as already exist. Direct election would most certainly not remove partisanship from the process.

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Anonymous · a month ago

To correct an inaccuracy, I posted the link 2 days ago. What I posted recently was the analysis. I think it deserved its own thread, which is why I started it.

I read your links. One thing I have to agree with Sandra O'Connor,

"O'Connor added that the public is starting to view judges with the same contempt they do other public officials because of direct elections and the influence of money. "

This is already happening with US Supreme Court justices with the current system and Gallup polls support this. The travesty started with Roe v Wade, which put those judges who think that the US Constitution is an irrelevant document in the driving seat of US Supreme Court decisions. Sandra O'Connor for instance was part of the Bush v Gore majority that gave us George W Bush. Things have gone very badly in the last decade with decisions like the Obamacare "rewriting of a penalty as a tax" or the striking down of a part of DOMA that had been approved by veto proof majorities for purely ideological reasons (and voted 5-4 along strictly ideological lines).

Sandra O'Connor, and those who defend her view on this matter, are basically in denial of the current reality. We know, from CBS reporting, that Roberts changed his mind after being bullied to do so by Obama and the liberal media. Somebody described this as Robert succumbing to "Washington DC cocktail party pressure".

So, worrying about money when you have justices who can be bullied to change their minds in opinions that have such far reaching consequences is hypocritical. "Missing the forest for the trees" so to speak.

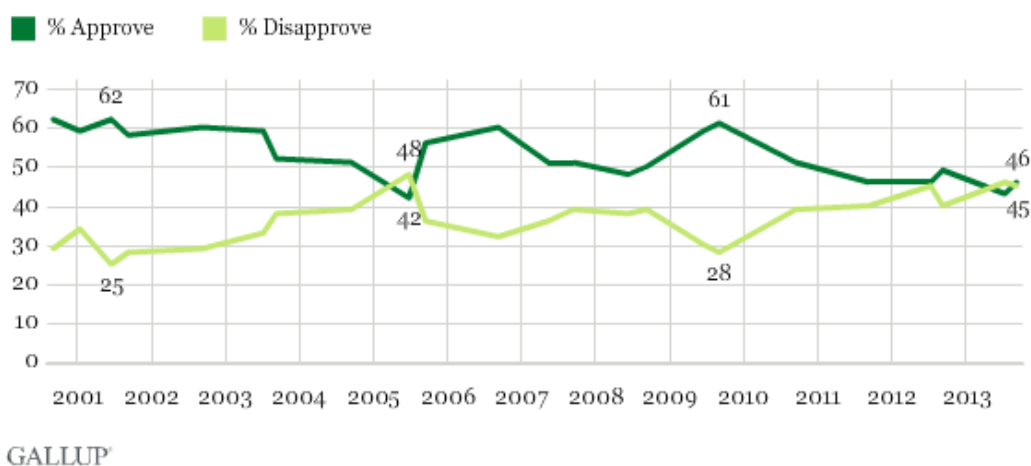
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Joel Kovarsky · a month ago

Anon,

Your opinion does not surprise me, nor does your reliance on the decisions in only landmark cases that did not result in your desired political outcome. I am not missing any forest, just seeing a different one. There is little in anything you have said to convince people that any direct election system would give us a better group of justices. Not that I am a fan of all those outcomes, but I am also not a fan of running things by polls, whose outcomes often depend on how the questions are phrased. Even if the Court's approval ratings are falling, they are holding up better than those of Congress--an indicator of a generally dissatisfied electorate, not one who would arbitrarily agree with your fix. Whatever you do, we are left with a polarized electorate.

Do you approve or disapprove of the way the Supreme Court is handling its job?



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Anonymous · a month ago

" they are holding up better than those of Congress--an indicator of a generally dissatisfied electorate, not one who would arbitrarily agree with your fix"

The Gallup graph that you shared shows a decisive erosion in the support to the US Supreme Court. This is what I said. Your defense is "oh but Americans have an even worse opinion of Congress and the president". Sure, but that defense doesn't hold any ground . See this other poll (middle of the page) about an increase in support to the military which is coincident with a decrease in support to the US Supreme Court and the other institutions <http://www.gallup.com/poll/1666/military-national-defense.aspx> .

So the notion that Americans trust the US Supreme Court in its current form as a symbol of non partisan politics is quite false actually by your own data. The only institution that enjoys

right now across the board support is the military which is both good and bad. It is good that people trust that their armed forces play a crucial role in defending the country but when a population starts to trust the military above anything else significantly, the historical record is not pretty.

For these reasons, I see taking away life tenure and unaccountability from federal judges (not only SCOTUS ones) as a step in the right direction.

You might not like big money influencing the election of judges, but I don't like either the editorial boards of the liberal media doing the same to John Roberts to make him change his position on the constitutionality of Obamacare. Ditto of "DC cocktail party pressure" so that Anthony Kennedy creates non existent rights like gay marriage just to make sure he can continue to be invited to the parties of the liberal Washington DC elite.

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Joel Kovarsky · a month ago

It is not hard to see what the Gallup graph shows; that is why I posted it. The Pew Center has shown similar erosion, including on the part of black support (and liberal democrats) for the court, because they think it is too conservative. And conservative Republicans think it is too liberal. This is a bit like the Affordable Care Act, where polls show a lack of public support, but miss the point that some progressives poll negatively on the act because they did not think it went far enough, i.e. because they want a single-payer option. Good luck with setting up more national elections for this. I hope, based on what I see, that you do not succeed; if it happens, I can live with it (but actually will not likely be around).

I am glad the military generally polls well, but they are not voting on the limits and management of very contentious legal issues. My take remains that the problems with SCOTUS popularity are as much because of the populace as anything the court itself is doing. That still does not lead me to think that elected federal judges are the solution. I'll let others weigh in on this.

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Anonymous · a month ago

"My take remains that the problems with SCOTUS popularity are as much because of the populace as anything the court itself is doing"

Again, that is not born out by the fact of the resilient popularity of the military, an institution which is not without criticism, especially when it comes to the money that is spent in defense and new weapons systems that some see unnecessary.

The bottom line is that the idea that the SCOTUS is increasingly seen as yet another non objective, partisan body is backed by your own data. That invalidates the idea that the SCOTUS, in its current form, is seen as better than other forms that would make it closer to

the people.

People might be happy or unhappy with the SCOTUS upholding Obamacare or striking down DOMA but as the SCOTUS is designed today, there is no available remedy or accountability to put judicial power under check. With elected judges subjected to terms, things would be different. Judges would be less likely to be activists if they know that whatever thing they invent today, can be undone by future elected judges. This is a great feature in those states whose judges are subject to recall elections.

We are right now living under the fiction that SCOTUS judges are objective arbiters of the constitution. Nothing could be farther from the truth.

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[clinton mathews](#) · a month ago 🔒

Joel, the pertinent question here is not whether or not Anon (or you or I, for that matter) agree with SCOTUS decisions, but rather are those decisions constitutionally sound or are they 'activist'? Are they judicial or legislative? The Constitution intended that legislation be generated and approved by elected representatives, not political appointees of any stripe.

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[Anonymous](#) · a month ago 🔒

"The Constitution intended that legislation be generated and approved by elected representatives, not political appointees of any stripe."

PRECISELY! Which is why, since the SCOTUS is increasingly usurping the role of the legislative, we might as well recognize this reality by way of a constitutional amendment. As I said, previous amendments have been passed to address abuses of power (or realization that things were not working as intended) to make government closer to the people they govern.

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[Joel Kovarsky](#) · a month ago 🔒

Clinton,

That is a nice sentiment, but it still depends on who gets to judge the meaning and intent of "activism." There have always been some political components to their decisions. We are not neutral beings, and pretensions of too much objectivity are likely cognitive illusions. I can accept that some ideas are incommensurate, and that there are legitimate differences in legal interpretation and philosophy.

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clinton mathews · a month ago

Joel, thanks for the above. How much 'activism' is too much exists in the eye of the beholder. Many applaud Roe v. Wade, many don't. Most well-read, thinking people, IMHO, would agree that the logic behind the decision was tortured, to say the least, whether they agree with the finding or not. Even people on the bench believe such high profile political matters are best left to the legislative branch for action. I totally agree.

SCOTUS is there to judge law, not write it.

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Joel Kovarsky · a month ago

Clinton,

I also agree that the initial Roe decision is highly questionable legally, whatever my present position on abortion (and I gather you know it differs from yours). This is because of another of my biases: my older son's legal opinion and discussions with him. And he is hardly a conservative.

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Navtej Singh Khandpur · a month ago

I'm not sure I follow the logic of the arguments made by those who would like to see Justices elected by the people. If I understand the reasoning:

- 1) Justices are 'legislating' not adjudicating
- 2) They are swayed by their political leanings, and this is reflected in how they rule
- 3) Presidents appoint Justices and so introduce their political agendas into the Court
- 4) There is no available remedy or accountability to to put judicial power under check
- 5) So the solution is to have elections for Justices

One of the Anonymous posters claims "...With elected judges subjected to terms, things would be different. Judges would be less likely to be activists if they know that whatever thing they invent today, can be undone by future elected judges..."

Here's another possible outcome: With elected judges subjected to terms, things would be different. Judges would more likely to overturn precedent to satisfy the segment of the population that funded their election. They know that what they pass today can be undone by future elected judges so they will try to maximize the return for their investors (sorry, contributors). In essence they would resemble the legislature. People and businesses who want stability in the rule of law are out of luck.

What's more likely: in a regime of elected Justices the Court will end up looking pretty much like the Court has in the past, and reflect the diversity of opinions in the country. There will be

no time for Justices to develop experience on the Court, they will spend most of their time raising funds for their next election. So we'll have a third branch of Congress.

So, to all those people who propose elections for Justices: if we're going to amend the Constitution (or would that be activism?) why don't we do away with the Court altogether, and put all judicial issues to the vote of the people? The technology exists today to put everything to the people. Heck, even American Idol does this! And why stop there? Who needs the President? The Legislature? Power to the people!

Note for non-US readers: American Idol is a TV show where the viewing public gets to vote on the performance of singers. I'm sure you have similar programs in your country.

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Anonymous · [a month ago](#) 🔒

Straw man coming from somebody who didn't read what I wrote in the post.

The 17th and 22nd amendments provide the rationale for the change proposed. Each was enacted as a reaction to a distortion in the balance of political power that the founders didn't anticipate. Up until FDR came along, it was understood, because of the George Washington precedent, that no president would serve more than 2 terms. It was FDR's bypassing of that tradition that made the passage of the 22nd amendment possible. The amendment doesn't have to fit the proposal by William Watkins word by word but the general idea would be that federal judges (not only supreme court judges) would be elected by the people (or nominated by the president, then confirmed by the people) to serve long terms, like 10-12 years that would insulate them from day to day concerns but at the same time would render them accountable to overreach.

What we are talking about here is a US Supreme Court who has become so ideological as to issue many consequential 5-4 decisions whose outcome can be predicted by the ideology of the judges alone. That has to be dealt with.

Some counter that with the argument that a big chunk of decisions that do not make the headlines obtain unanimous majorities but I hope that I don't need to convince anybody that these are not the decisions that divide our country. If a decision is so crystal clear that will get 9-0 or 8-1 (like the first amendment cases I mentioned) there is no reason to believe that those cases would have been decided otherwise had judges been elected by the people. It's the far reaching 5-4 decisions like Bush v Gore, Heller, Chicago, Obamacare, Voting Rights Act, Affirmative Action or Obamacare cases that require checking. Former SCOTUS judges would have no problem finding work if they are kicked out of it (I am sure that they would have a lot of offers to join universities or think tanks) but they would have to face the shame of having been recalled if they over step their authority in the way they regularly do now.

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Anonymous · [a month ago](#)

In other words, with the current state of affairs, I am sure that both Roberts and Kennedy would have gone the way of https://en.wikipedia.org/wiki/Rose_Bird if they had had to face voters for their outrageous activism.

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Navtej Singh Khandpur · [a month ago](#)

Anon two above this post says I didn't read his post and asserts I have created a straw man. Fair enough, Anon is entitled to his/her opinion.

However it is somewhat telling Anon two above doesn't have a problem with the rosy future proposed by Anon in the thread I quoted (https://class.coursera.org/conlaw-001/forum/thread?thread_id=2035#comment-2074), but apparently does not like the future I described. Same Anon, different Anon, who knows?

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Anonymous · [a month ago](#)

Not sure what your point is. Yes, I am the same Anon as that Anon and yes, you are pulling a straw man. I haven't defended that we should transform the judiciary in a third branch of congress. What I have said is that given that the judiciary has subverted on many occasions its constitutional mandate, it has to be put under check.

If you read the history of 17th amendment, which changed the way US senators are elected https://en.wikipedia.org/wiki/Seventeenth_Amendment_to_the_United_States_Constitution , you'll see it was done for similar reasons: the realization that the way the framers intended US senators to be picked had resulted in a lot of corruption and deadlock.

There are 5-4 ideological decisions to hate for both sides of the spectrum:

- Liberals hate Bush v Gore, Heller, Chicago, Citizens United, and last year's decision on the Civil Rights Act
- Conservatives hate Obamacare and DOMA among others.

Each of these decisions was not ruled on strict merits but on ideological grounds. So the proposed change would deal with things like this. The proposed change would not alter the outcome in those decisions that are decided strictly on the merits and within constitutional bounds like the 21st amendment cases I mentioned.

This proposal is about correcting an abuse of judicial power that judges of both political persuasions perpetrate regularly.

The biggest clown of all, in my opinion, is Anthony Kennedy. The four conservatives judges excuse themselves usually in "originalism". The four liberal judges say "I don't give a damn about the text of the constitution, it is my own ideology that matters". Anthony Kennedy is neither. He is his own fake man. Pretending to be an "originalist" when in fact he is a "living constitution guy" who sides with the true living constitution guys only when siding with them fits his own ideology.

I think that if there was a clear candidate for Rose Bird treatment, that would be Anthony Kennedy.

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[+ Comment](#)

[Anonymous](#) · [a month ago](#) 🔒

Our Constitution does set up a system of checks and balances on the court. The President appoints a justice to the court and then the Senate must confirm him or her. The justices serve for life and therefore a vacancy doesn't occur all that often. While that may mean you can't remove a judge it also means that one President doesn't get to pack the court (as FDR tried). The justices are typically appointed by a number of Presidents over a stretch of time. If the country doesn't like the direction of the Supreme Court, they can elect a President that shares their view of who would make a good justice. The court can change over time. But it is a slow process to bring some stability to the law. We certainly don't want the law to say one thing one day and then something else when a newly elected justice is put in office. Also, if the legislative branch doesn't like a particular decision of the court, they can always rewrite a suspect law (and then pass it).

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[Anonymous](#) · [a month ago](#) 🔒

"If the country doesn't like the direction of the Supreme Court, they can elect a President that shares their view of who would make a good justice"

This is strikingly similar to the argument of those who defend parliamentary rule as opposed to clear division of powers and election mechanisms that we have in the US. I don't buy it, really. The only way to put a check to judicial power is well, to put a direct check to that judicial power. That check does not exist today. As I said, the country has done things like this in the past when it was understood that things were not working as expected. Maybe the time to do this to the SCOTUS justices and other federal judges has arrived.

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clinton mathews · a month ago

We have reached a fascinating time in the history of our great country, where the Art. I Congress is frequently unable to write law, and the Art. II President and Art. III SCOTUS feel free to use "phone and pen", and "decisions" to do what they interpret to be the work of the people. Administrative fiat and judicial legislation are not what the founders intended. I guess you 'living constitution' people are ok with it?

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Anonymous · a month ago

Agree Clinton. The polls that show increased polarization and the erosion in trust towards all branches of the federal government are consistent with what you say.

In previous times, these signs preceded significant change push forward by the people. Relevant to this thread, I don't see how much longer we can live under a regime in which SCOTUS judges, who live longer than ever before, can rewrite law as they please without further checks.

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Anonymous · a month ago

Anon(s) and Clinton Mathews and others. What do you think of Roy Moore's judicial philosophy? Is he an originalist, or an activist? Is he the kind of person you'd like to see on the US Supreme Court?

For those who don't know about Roy Moore, you can Google the news on him. Here's a sample of his latest work:

http://blog.al.com/wire/2014/02/alabama_chief_justice_roy_moor_1.html

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Anonymous · a month ago

I don't know enough about the man as to form an opinion.

Of all the justices whose work I am familiar with, Antonin Scalia is the one I find myself more in agreement with, although not in every case. For instance, his refusal to consider the California Proposition 8 case on the merits based on the lack of standing for the appellants is creepy because by doing so he handed executives in states a blueprint to subvert initiatives that they don't like that might have been passed by the people to put a check on said executives. If a governor doesn't like some initiative, he/she just needs to wait to have it declared unconstitutional by some like minded district federal judge (given the ideological diversity of said judges I suppose it would not be difficult to find a sympathetic judge, especially in the

bigger states). Then, because of the ruling Scalia agreed to, there would be no way to defend the initiative in federal court.

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[clinton mathews](#) · a month ago

Ditto, Anon. How the Hell are we to form an opinion about a man's 'judicial philosophy' from a single, unsigned, somewhat biased blog post? My opinion holds, judicial activism should not be practiced by judges, who are not answerable to the sovereign electorate.

↑ 0 ↓ · flag

[Navtej Singh Khandpur](#) · a month ago

Clinton, you say: *"Ditto, Anon. How the Hell are we to form an opinion about a man's 'judicial philosophy' from a single, unsigned, somewhat biased blog post?"* in response to a post by Anonymous, talking about another Anonymous.

See any irony here?

Peace.

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