Question for the staff: what's the professor's take on judicial activism?

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Anonymous · 2 months ago

I am not after a politically correct answer. The professor knows what I am talking about.

The prime example of judicial activism that even liberal leaning justices that are currently seating in the US Supreme Court reject is of course Roe v Wade. Not only the constitution is silent on the matter of abortion, but the notion of the 3 terms doctrine that was written with the technology of the early 1970s is so wrong that now we are stuck with the notion that states cannot impose important restrictions to abortion all the way up to the ninth month. I see no difference between killing a baby born prematurely at 7 months and killing the same baby while he/she is inside the mother's womb. A very recent example of this, is the rejection of Texas recent law. Out of "fake respect to precedent" we are stuck with a law that was written from the bench by an activist judge.

A more recent one is the US Supreme Court deciding that the Obamacare penalty was a tax even though the word "tax" is nowhere to be found in the Obamacare text, with the sole purpose of upholding a law that was controversial.

An even more recent one is the US Supreme Court striking down a part of DOMA, a law that was passed with veto proof majorities and signed by the sitting president. The US constitution is silent on the issue of gay marriage or polygamy for that matter.

Does the professor think that this judicial activism undermines the already low trust that people have in government?

What's the purpose of voting if an activist court can not only strike down lawfully passed laws that deal with matters about which the constitution is silent but it can also rewrite those laws in order to make them "constitutional" (like it did with Obamacare)?

1 · flag

Anonymous · 2 months ago

I write something to take the thread to the top.

This is not a bogus question. Those who believe in judicial activism, which is very different from strict judicial review, have a very different vision of the US constitution, the role of the US Supreme Court and the ability of Supreme Court justices to impose their ideology on 300 million of Americans than those who believe in originalism. Scalia and Stephen Breyer are polar opposites on this matter. I once watched an interview to Stephen Breyer by Chris Wallace and he scared me. If all 9 justices were like him, we would have an imperial dictatorship from the bench.

Students need to know what's the view of the professor since it will bias a lot of what the class teaches. This is not a scientific class where 2 + 2 = 4 cannot be subjected to opinion. The professor's take on the matter will tell us whether we are getting a "living constitution view" or an "originalist view"

↑ 0 ↓ · flag

+ Comment

José Ramón Díaz Cruz · 2 months ago

Es esta una cuestión complicada para alumnos que todavía no conocemos la constitución de los Estados Unidos.

En el caso que conozco, los jueces tiene una independencia que les atribuye la Constitución, si bien existen siempre los problemas de interpretación. Y no digamos la problemática a del "nasciturus" en los casos de aborto.

Muy complicado plantear al inicio del curso, en mi modesta opinión, un tema tan político.

Buenas tardes a todos.

↑ 0 ↓ · flag

Anonymous · 2 months ago

English please?

↑ 1 ↓ · flag

José Ramón Díaz Cruz · a month ago

I tried, somme days ago, to explains what difficult is for a student that don't know the US Constitution, questions about abort just because is more political than legal.

I think that in new weeks we can have more knowledge and we'll can have the opportunity of answer questions like that.

Thanks

↑ 3 ↓ · flag

 Mark Heyne · a month ago

[trans Google] This is a complicated issue for students who do not yet know the Constitution of the United States.
For I know the judges have an independence conferred by the Constitution, although there are always problems of interpretation. Not to mention the problem to the "unborn child" in cases of abortion.
Very complicated questions to the start of the course, in my humble opinion, as a political issue.
Good afternoon, everyone.

4 · flag

José Ramón Díaz Cruz · a month ago

Mark, many thanks for your translation.

I will do my best in the future with my English.

José Ramón

2 · flag

 Mark Heyne · a month ago

Jose, just pass it through Google translate, that's what i did!

1 · flag

José Ramón Díaz Cruz · a month ago

In all case thanks. Now I've the possibility of written both English or Spanish language, but I need to improve my English. I beg your pardon.

Jose

1 · flag

Wilma Jeanne Merello · a month ago

Hi Jose. I think you are doing very well with your English. Keep up the good work - if you need help, just ask.

0 · flag

Josh Berdeaux · 20 days ago

Buenas tardes Jose:

Espero que esta traslatas correctamente, pero deja ver cómo lo hace.

Aborto parece ser más una cuestión de persona porque está conectado a sus creencias religiosas. Pero la Constitución y las leyes posteriores no pueden tener en la religión cuenta la debido a la separación de iglesia y estado en los Estados Unidos.

Los Estados pueden regular las actividades de aborto. El activismo contra el aborto temprano de la iglesia católica desempeñó un papel grande en la actitud actual hacia el aborto hoy. Pero desde esos primeros días la iglesia está evolucionando hacia posiciones más moderación de él, particularmente con el nuevo Papa.

↑ 0 ↓ · flag

+ Comment

clinton mathews · 2 months ago

An estimated 55 million fetuses have been executed since Roe v. Wade. All in the name of 'women's health' and 'privacy', neither of which appear in the Constitution. I agree that activist judges should be exposed to removal from the bench. Two or three unelected officials should never have so much power without any review by our elected representatives. Our Congress is gutless? Do they quiver in fear when SCOTUS rules a law to be unconstitutional? I trust this matter will be covered in lecture.

↑ **-11** ↓ · flag

Anonymous · 2 months ago

I am the OP. I agree with you. Upon further research (look at the other thread), it seems that indeed the professor believes in judicial activism of the kind that gave us Roe v Wade. So everything he says has to be understood with that caveat.

↑ **-2** ↓ · flag

clinton mathews · 2 months ago

Anon- I have read many of your posts, sometimes much in agreement and sometimes substantially opposed. However, I enjoy thinking about your stimulating expression of opinion. Since the current course is provided by Yale, I did not expect bias from the right to intrude very much. However, I am thus far impressed by Prof Amar's 'balance'.

For more conservative free courses on our beloved Constitution go to Hillsdale College and their : **'Introduction to the Constitution'// History 101 - Western Heritage - 'From the book of Genesis to John Locke'// History 102 - American Heritage - 'From Colonial Settlement to the Reagan Revolution'// Constitution 101 - 'The History and Meaning of the**

Constitution'// Constitution 201 - 'The Progressive Rejection of the Founding and the Rise of Bureaucratic Despotism'. I have taken and strongly recommend all of them.

Hillsdale is a small Michigan College frequented over the years by ultra-right wing luminaries such as Ronald Reagan, Margret Thatcher and their present day political descendants.

↑ -1 ↓ · flag

Anonymous · 2 months ago

I have to warn you that there are several of us posting anonymously. If we seem to be on the same page ideologically speaking, is because perhaps not by accident, most of those supporting the non liberal point of view feel the need to do so (although not all with a conservative point of view are posting anonymously).

↑ -2 ↓ · flag

Anonymous · 2 months ago

BTW, thank your for pointing me to Hillsdale. I will definitely take a look to History 102!

↑ 0 ↓ · flag

 Alec D. Rogers · a month ago

Why does anyone feel the need to post anonymously? Because someone will burn down your house? Attack your family? You plan to say things you can't defend and don't want to suffer public embarrassment?

Just curious as to why anyone feels the need to do so.

↑ 8 ↓ · flag

Anonymous · a month ago

Burning down my house? Certainly not. Losing my job the first time the opportunity presents itself? Who knows. Liberals are hateful and revenge driven creatures. I better do not test that aspect of my peers :-).

↑ -12 ↓ · flag

clinton mathews · a month ago

One more reason retirement in Hawaii is such a nice place to be! Keep in mind, Work is a four letter word,

↑ 0 ↓ · flag

Dom Roguly · a month ago

You can execute a human being, born and a part of society, you can not execute a non-viable fetus. Miscarriage is nature's way of aborting non-viable fetuses; abortion is the human way and it has been and still is part and parcel of the human way of dealing with unwanted pregnancies. Millions of fetuses had been aborted before Roe vs. Wade and true, millions have been since. It is and will be a continuing fact of human response to unwanted pregnancies whether you have Roe vs. Wade or not. The more compelling and accurate statement is that Roe vs. Wade is reducing the numbers of abortions because of heightened social visibility of the issue which has lead to more effective alternatives, including opposition as well as sex-education and birth control.

↑ 1 ↓ · flag

clinton mathews · a month ago

Am I to believe that any "unborn" full-term fetus that makes its way down the birth canal and is stopped short to let the abortionist puncture its skull, thereby ending its non-life, is ok with you? (ref: Kermit Gosnell). "...abortion is the human way...". Of what, aborting non-viable fetuses? "...Roe v. Wade is reducing the numbers of abortions.....". What planet do you live on?

↑ -2 ↓ · flag

Wilma Jeanne Merello · a month ago

Hi Don and Clinton. Roe vs Wade was (and still is) a very controversial matter. There is more than just one issue here.

First, there are scientific facts:
1) at what stage is a fetus considered to be a "human life"
2) at what stage is a fetus considered to be "viable"

Then, there are religious and moral perceptions:
3) "Thou shalt not kill" is not just a Christian concept; it is the same for many religions around the world. Keep in mind we are not talking about war, we're talking about an innocent, defenseless fetus/child.
4) if you don't want to become pregnant, why not take the necessary precautions BEFORE you get pregnant? There are methods of birth control that do not involve killing an unborn child; abstinence (continuous or rhythmic), barrier methods (condoms, sponges, etc.), hormonal methods (birth control pills, patches, etc.), implantable devices (IUD, implantable rods, etc.), and sterilization - to name a few categories.
5) if you don't want to raise the child, there is always adoption. This is even an option for special needs babies and children - I personally know a couple who adopted two little children with Cerebral Palsy, loved them, and raised them to adulthood. The girl died recently, at age 30 but the boy is still alive and well (but still receiving total care) at age 35.

When all is said and done, each person must be able to live with the choices they make.

0 · flag

 Theresa H Haskins · 21 days ago

I have, and always will have, a strong opinion on abortion. Although there are several reasons I am against it, I would have to say the easiest to understand is this: I was born in 1962 and immediately placed for adoption. I was adopted as an infant by the most amazing couple, MY MOM AND DAD; who were unable to have children. I had the MOST AMAZING childhood; loved beyond comprehension and treated like a queen. My birth mother, for whatever reason, wasn't able to (or chose not to) keep me. I am grateful abortion wasn't legal or easily accessible or I may have never been given a chance at life (or given birth myself to three wonderful children). No matter when anyone would have considered my life "viable," I would have to say from the MOMENT of conception.

2 · flag

Wilma Jeanne Merello · 21 days ago

Hi Theresa. Thank you for that beautiful comment. You've said it much better than anyone else could.

1 · flag

+ Comment

Joel Kovarsky · a month ago

The initial question here was about Prof. Amar's "take on judicial activism." I am sure we will hear more about this later in the course, but perhaps there is some clue here: http://writ.news.findlaw.com/amar/20021213.html ("How Should the Supreme Court Weigh Its Own Precedent"). Since this "anonymous" here, and I presume elsewhere in these boards, has particular questions about Roe v. Wade, perhaps this entry is of some relevance:

" **The *Casey* Approach: Retaining *Roe v. Wade* Despite Reservations** The most important modern discussion of stare decisis came in the 1992 case of *Planned Parenthood v. Casey*. In *Casey*, a majority of the Supreme Court explained why it was retaining the "essential holding" of *Roe v. Wade* notwithstanding substantial "reservations" that (at least some of) the Justices had about the correctness of the *Roe* decision itself. The Court explained that while the rule of stare decisis is not an "inexorable command," a decision to overrule an earlier case "should rest on some special reason over and above the belief that [the] prior case was wrongly decided." For the *Casey* majority, it was unclear that even an egregious error in interpreting the Constitution in the first case (here, *Roe*) would constitute special justification for overruling the mistake."

I will be interested to see what else is mentioned as our course moves along. Prof. Amar does give some indication about his feelings concerning the Affordable Care Act, at least in terms of how to

defend it: http://www.law.yale.edu/news/15229.htm .

↑ 2 ↓ · flag

clinton mathews · a month ago

If the killing of a reported 55 million unborn children doesn't reveal an 'egregious error' in the Roe v. Wade decision creation-from-whole-cloth (and a dose of penumbra) of a new form of 'privacy', (which word doesn't appear in the Constitution), I can't imagine what it would take. Granted, SCOTUS only acted because Congress failed to act, but that reason could justify unlimited judicial activism on any and all subjects,

↑ 0 ↓ · flag

+ Comment

Anonymous · a month ago

Seems to me that someone who would write a book on America's "Unwritten" Constitution would favor judicial activism.

That appears to be consistent with his stance on the Preamble, and when he discusses "implied powers" as he does.

I'm not saying that's good or bad, but it's hardly a surprise from a Yale Law Professor....

↑ 0 ↓ · flag

Anonymous · a month ago

I have the same opinion from watching the first lectures but it would be nice if the professor openly admitted his bias for the sake of accuracy, especially for those students for whom this is the first contact with US constitutional law.

↑ -3 ↓ · flag

Joel Kovarsky · a month ago

Anon,

Exactly how many law school courses (or other political ones) have you seen where a professor walks in and lists their biases as a preliminary to the class? Not many, and they all

have them. We all have them. If you read the opening to his first book, he tells you it is an "opinionated biography," and it is quickly apparent where he is headed. I am grateful to have an articulate and carefully considered professor (and there are some more conservative legal thinkers who would also be very good teachers, and likely irritate liberal leaning student in any sort of massive, open, online course).

↑ 2 ↓ · flag

Anonymous · a month ago

"Exactly how many law school courses (or other political ones) have you seen where a professor walks in and lists their biases as a preliminary to the class?"

None, but that's precisely my point. I am a science guy. In science there is usually little room for bias except for "editorial bias" (namely, we spend money studying this vs that). At the end of the day, careers are made and destroyed by the ability of scientific theories to model accurately natural phenomena (or to apply those theories to build stuff like the internet). A few years ago, the stock of Edward Witten skyrocketed when it was widely thought that pretty soon experiments would be designed that would confirm string theory as a theory of everything that would allow to unify quantum physics and relativity. He was even given a Fields Medal with that expectation. Now that we have LHC experiments that fail to confirm predictions that are exclusive to string theory, his stock is not as high as it used to be. If string theory continues to be unable to be confirmed experimentally, Witten's name will become a footnote in the history of physics. If, for some reason that seem implausible now, that confirmation comes, Witten will be seen as the Einstein of his generation.

All my previous Coursera classes were also scientific. The only heated argument I got into once was about the particular choice of a problem to illustrate some computer science algorithm.

That's a minor disagreement. Here we are talking about the meat that divides Americans and that is at the core of that partisanship you referred to in that other thread. People become cynical when something is presented as "objective" when it is really a one sided presentation of a given topic.

↑ -1 ↓ · flag

clinton mathews · a month ago

Check with Hillsdale College for some excellent FREE on-line courses covering political history from Moses to Obama, and much coverage on why the Constitution is the way it is, and why it should be honored and not over-written by progressive legislators, presidents, and courts. Hillsdale is unabashedly conservative right from the git-go.

↑ 0 ↓ · flag

Joel Kovarsky · a month ago

Anonymous (I hope there is just one of you at the moment),

My life has also been in science, specifically in medicine. But your sense of the "purity" of scientific investigation is also open to question: http://www.h-net.org/reviews/showrev.php?id=33669 . That is a review of:

Steven Shapin. *Never Pure: Historical Studies of Science as if It Was Produced by People with Bodies, Situated in Time, Space, Culture, and Society, and Struggling for Credibility and Authority*. Baltimore: Johns Hopkins UP, 2010.

I would agree that most other Coursera offering would not be as heated, but some are. You should have seen the boards for the Univ. of Melbourne's class on climate change. I do not have a problem with the contentiousness here.

0 · flag

Anonymous · a month ago

Joel,

Nobody I relate intellectually with understands science that way. That is not to say that there aren't people who do (the string theory controversy is a good example where its defenders are stretching the meaning of the word "science" just to make string theory fit) but in general, science is pretty good at self correcting. If string theory continues to be unconfirmed by experiment, its status will decline once its last defenders die (even today you don't see string theory as "sought after" as it was 10 years ago by new grad students). There is something beautiful about science being confirmed by empirical evidence that is simple not available to soft disciplines. I put the current controversy about climate change in the same situation (a topic I don't want to get into). Suffice it to say that those who predicted a doomsday scenario have had their case seriously undermined when the predictions they made failed to materialize, both in terms of the average temperature or things more outrageous like the inundation of Manhattan.

With respect to the professor bias. I enjoy the lectures but I must admit that it is a bit disappointing to see a biased presentation that is presented as "objective". The only classes that I have taken from Yale type of institutions were again, science classes. I had repeatedly heard about "liberal bias" in the humanities at Ivy League institutions but this is the first time I encounter it explicitly and I find it frustrating.

Shortly after I arrived to the US I took a class on US government from my local community college. While the instructor of that class did not have the pedigree that this professor has, the presentation, as far as I remember, was much more balanced. I learned about "originalism" and "living constitution" back then. The actual text of the constitution was also presented without the "extra commentary" that is preparing us for a "living constitution" second half of the

course. For somebody who truly wants to understand the US, these things need to be talked about openly.

↑ 0 ↓ · flag

Joel Kovarsky · a month ago

Anonymous,

Most of the people I know do not think about science that way either, but they perhaps they should, at least occasionally. Shapin is not some fly-by-night analyst: http://www.fas.harvard.edu/~hsdept/bios/shapin.html .

I do understand your position, here and elsewhere, and know that this is not something that will reconcile itself here. I do not mind the professor's "biases" for the purpose of this course. Many are also aware of competing opinions. Sometimes I get the sense that a course critique is a bit like a negative book or article review, where the reviewer wants the author to write their version, not the original author's. But that is just me.

Many of us have testimonials about various classes we have taken or teachers who have impressed us or approaches we value. You are entitled to yours.

↑ 0 ↓ · flag

Anonymous · a month ago

Another source of disagreement might be what my expectations about the class were vs how things are turning out to be. I had expected this class to be the "Yale version" of the class that I took at the community college: a source to understand US government and its politics for those who are not familiar with it. It has been 12 years that I took that community college class and I can still remember that instructor's comments about "originalism" vs "living constitution". That was a very practical class. This class is increasingly becoming a well, and impressively, researched justification of the "living constitution" point of view. Again, nothing to object except that it is not being presented as such.

So, if your only knowledge of US constitutional law is what you are likely to learn in this class, you might come with the impression that people like Scalia or Thomas are nut jobs who somehow managed to make it to the US Supreme Court defying all protections against such people making it to the SCOTUS when in fact the tradition they represent has been fundamental for keeping the constitution relevant for more than 200 years.

↑ 0 ↓ · flag

+ Comment

Anonymous · a month ago

I wonder if you are also confusing judicial activism with your own political viewpoint. I can't help but notice that all of the cases you cite as examples of judicial activism are also cases that conservatives criticize. That is I can tell from your post that you are reading your own political viewpoints into your interpretation of the Constitution. I'm guessing you are conservative and you are against abortion, against the Affordable Care Act, in favor of DOMA. To understand how the court reaches many of its decisions today, you need to examine the extensive case law that proceeds it and quite frankly, this course hasn't gotten anywhere near accomplishing that yet. Also, I'm not saying I disagree with an argument about judicial activism but rather suggesting that you could have an objective and perhaps more productive argument about the subject without politicizing the argument itself.

↑ 3 ↓ · flag

Anonymous · a month ago

I hope you understand it goes both ways, namely, that your rationalization about "examine the extensive case law that proceeds" is also a red herring that supporters of the "living constitution" introduce to justify getting away with inventing non existent rights (Roe v Wade), rewriting laws in order to uphold them (Obamacare) or striking down laws that they don't like (DOMA). In each of these opinions, particularly the Obamacare and DOMA cases, there was division across partisan lines, which is to say, that you seem to be saying that Kennedy, who was in the minority of the Obamacare decision but in the majority of the DOMA decision, doesn't know how to interpret the case law that backed Obamacare.

A better, and simpler, explanation is that Kennedy voted as he usually does according to his libertarian ideology: conservative on the business related cases, liberal on the social cases. Then, case law is constructed to "fill the gaps" required to arrive to a result that was decided via voting without any regard to that case law in the first place.

We are all better off when things are transparent, be it with SCOTUS judges admitting to their own biases or the professor admitting to his. Transparency does not prevent bias but makes for a healthier debate.

↑ -1 ↓ · flag

+ Comment


Alec D. Rogers · a month ago

Let's start with this. What is "judicial activism"?

Please define it as explicitly as you can.

In one of the books Amar does address one related question regarding what we do with a precedent we think is wrongly decided. He has opined that the Constitution itself is the supreme law - NOT the court's

decisions. Therefore absent exceptional circumstances we should have no problem reversing it. He doesn't say Roe was wrong, but I'd say his view would be that Casey was wrong. Either a case is right or wrong. If wrong, you should generally reverse. He probably would say Roe was the right outcome, but poorly reasoned. Instead, he notes that the laws involved with Roe were enacted prior to the Constitutional amendment guaranteeing the vote to women, and therefore constitutionally suspect.

I'd note that he is EXTREMELY critical of the doctrine most associated with "activism" - that is substantive due process. He fairly savages this doctrine in his writings.

↑ 4 ↓ · flag

clinton mathews · a month ago

Let's start with this. What is "right" and what is "wrong"? Please define as explicitly as you can.

↑ -2 ↓ · flag

Jeffrey Perkins · a month ago

Judicial Activism - (noun) - a term used by a party to denounce the instance(s) in which a judge's decision does not agree with aforementioned party's personal opinion. *i.e. every post in this thread.*

↑ 6 ↓ · flag

Navtej Singh Khandpur · a month ago

Agree with Jeffrey Perkins. I put it a little more colloquially in this comment in another thread: https://class.coursera.org/conlaw-001/forum/thread?thread_id=1851#post-4452

The fact that Clinton Mathews is unable or unwilling to directly answer Alec Rogers question shows how polarizing the subject is, and how difficult it is to have a reasonable debate about it.

↑ 1 ↓ · flag

clinton mathews · a month ago

Unwilling, Navtej! My stated position in these posts is that the Constitution provides for legislation to be created by Congress and signed (or vetoed) by the President, and that neither POTUS or SCOTUS have the duty or authority to legislate, either by the "phone and pen", or by court decision. You reference Jeffery Perkins' tongue-in-cheek definition, and there is a good deal of truth in it. However, it is not particularly helpful to the debate. I doubt we could find much agreement in a one paragraph definition, but that misses the point as well. Please comment on what I say the Constitution provides.

↑ 0 ↓ · flag

Navtej Singh Khandpur · a month ago

Clinton, I hope we agree what the text of the Constitution says is constant; the interpretation of the text has changed over time.

I'm sure we will go over decisions made by the Court in the past, and see that the Court has changed its views as society has changed. This is not a recent phenomenon, and I believe all sides of the debate can point to what they believe are examples of 'originalism' and 'activism' from their point of view.

You asked earlier *'Let's start with this. What is "right" and what is "wrong"? Please define as explicitly as you can.'* In my opinion views on that too have evolved over time as society has changed. No matter what decision the Court makes, there will be some people who will be extremely unhappy with the decision and will find a way to rationalize their dissent.

I think we live in a remarkably strong country with a robust system of government and have weathered many constitutional crises, real and otherwise. I have no reason to believe we won't continue to do so, even though for some people in the moment (now or in the past) the end is nigh upon us. It is the constant back and forth and passionate debate that keeps us going. So, thanks for engaging with me in this debate.

0 · flag

Anonymous · a month ago

NSK,

Your view on the constitution can be nicely summarized in two words "living constitution".

I understand the view but I don't share it. My biggest problem with that view is that it undermines the rule of law. The rule of law means that every single educated citizen in the Republic plays by the same rules, which include a very clearly defined way to change said rules, be them "operational rules" (such as federal laws) or more "principled rules" (the US constitution).

The living constitution view affirms explicitly or implicitly that rules can be changed outside the process explicitly designed for enacting that change by having friendly federal judges. In many cases, you don't even need friendly SCOTUS judges. A few district, court of appeals ones are enough given the SCOTUS limited capacity to take new cases.

So I understand your view but precisely because I understand it, I find it to be a very important threat to our way of life.

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Anonymous · a month ago

To put it in different terms, the reason I disagree with the "living constitution" view is the very same reason I disagree with government bailouts of US banks or GM: it undermines the basic principle of fairness that makes the US the robust country it is.

Those countries in which there are different rules for different people (particularly those in which the powerful write rules as they see fit without any kind of check by the governed) are also corrupt and have low standards of living. You can see that in places like India or Iran. I don't want the US to become like them.

1 · flag

Navtej Singh Khandpur · a month ago

Anons (one and two posts above), we'll have to agree to disagree.

In the post two above, I read your view as being quite absolutist--this is what the Constitution says, there are rules to change the Constitution, the rules are being broken. I think this whole discussion is about the first point: how to interpret the text of the Constitution, and I believe the interpretation can evolve over time. Take, for example, Justice Rehnquist's evolution of thinking on *Miranda* culminating in his opinion in *Dickerson*.

In the post immediately above, you seem to be claiming that the level of the standard of living in India and Iran is a result of different rules for different people in those countries. There's a lot I don't know about the domestic situation in those countries, so perhaps you can point me to some research that supports your claims? Thank you.

0 · flag

Anonymous · a month ago

NSK,

This is one of those things that cannot be scientifically defined, however you have things like this http://www.transparency.org/cpi2013/results . You will notice that those countries that Transparency International sees as more corrupt are also the countries that do worse economically, be them India, Iran or even Russia.

Corruption is, by the very definition, not playing by well established rules.

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Navtej Singh Khandpur · a month ago

There may be correlation, but if you are a scientist you know correlation does not imply causation.

And I notice you are silent on the matter of Justice Rehnquist's evolution on Miranda. Or

Plessy for that matter. Did Rehnquist subscribe to the 'living constituion'?

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Anonymous · a month ago

Sure, I know that correlation does not imply causation. I also said that this is one of the things that cannot be scientifically proven. But there are many indicators to affirm what I said. Another one: intellectual property (which as we learned this week is explicitly mentioned in the constitution). Those countries who do badly in terms of intellectual property protections are also, generally speaking, poor. When you combine all these factors, you see a picture emerging of "rule of law + strict observance of it" correlated with prosperity and success. Similarly, legislative chaos and corruption is correlated with economic difficulties and failure. And so you don't accuse me of being discriminatory with Middle Eastern or Asians, the same reasoning explains why the PIGS countries are these http://news.bbc.co.uk/2/hi/8510603.stm and not countries like the UK, Germany or Sweden. In the Americas, the poor countries are the Latin American countries, not the US or Canada. So whether one causes the other or both happen with a high correlation is not very important. The idea is that the biggest problem that I see with the "living constitutionalists" is that overtime people reach the conclusion that observance of the law doesn't matter and that our country descends into the same chaos as other superpowers did when corruption became widespread.

I don't know much about Renhquist's evolution on Miranda, but Plessy was a "living constitution argument" that the SCOTUS came up with to fit the racism of the day. I don't see what kind of twisted mind can read the XIV-th amendment (or the process that led to its passage) and reach the conclusion that "separate but equal" is what the XIV-th amendment intended.

0 · flag

Anonymous · a month ago

From reading your comments about poor countries basically equals poor rule of law which you described as everyone following different rules against the so called "living constitution " Is your arguement against the "liberal view". this is a silly argument mainly because what made the constitution great was it that it established this rule of law that you speak of and among other things was able to evolve because this document set out to give people rights given to them by god which we will learn well evolve like it or not to include slaves from being thought of as 3/5 to being 100 percent apart of we the people. From Dred Scott to the 14th amendment to Lockner v. New York to the NLRB decisions. To the decisions that set forth are Miranda rights to the social security and full time 40 hour work week or child labor laws you know things conservative label liberal or progressive at the time to a low women the right to vote and then the right to an abortion.

This view is not everyone plays by different rules like one rule for corporations and rules for people. Oh and corporations are people.

A lot of the so called job creators take advantage of these poor countries low wages by out sourcing American manufacturing jobs to increase profits and damaged the American manufacturing so bad it is Unrecognizable from it's hey day. lot of those countries enable by years of terrible foreign policy.

0 · flag

 John Kenneth Hardcastle Signature Track · a month ago

I see it this way: HOW CAN A CONSTITUTIONAL COURT **NOT** BE JUDICIALLY ACTIVIST?

The judges are interpreting the Constitution; they are considering circumstances through the prism of the Constitution and setting precedent in the process, that IS, in my view, what truly call judicial activism.

0 · flag

 Alec D. Rogers · a month ago

John - in the US, because we have a written constitution unlike the UK is generally said not to have (I understand an argument can be made that it has many written elements) judges are considered to be more constrained in how they can rule. As Prof Amar often notes in his writings - it is the Constitution and NOT a court's interpretation that is the law of the land. In US political dialogue we frequently charge that a court ruling we don't like is not faithful to the written constitution and hence "activist" in that it is rewriting it rather than interpreting it. It's all very subjective of course, but no one ever admits to being an "activist" as opposed to "interpreting."

0 · flag

 John Kenneth Hardcastle Signature Track · a month ago

Sorry to say, Alec, but I am completely at odds with you over this.

Written constitution or not - it is commonly accepted that we do NOT have a Constitutional court in Engand and Wales (I use the phrase 'England and Wales' because we have a distinct legal system in England and Wales divorced from Scotland). That has probably **not** changed even post-1998 and the Human Rights Act; the Courts can interpret law to be Convention (European Convention on Human Rights) compliant where possible, but the most that it can do where a law is very clearly intended (by Parliament) to be contrary to the Convention is to issue a 'declaration of incompatibility' thereby inviting the government to go back to the legislature to say 'think again' - but Parliament is supreme and the courts cannot tell Parliament - the legislature - what the law is.

That is NOT the case where you have a constitutional court. Where you have a Constitutional court - the court interprets and gives a definitive decision on what the law is - or what the Consitutiton says about the law. It can strike down laws made by the legislature - and in that

sense you very definitely have, in my opinion, judicial activism - striking down laws. How can overruling the legislature NOT be regarded as 'activist'?

I accept the point that you are making by saying they 'interpret' and are not 'activist' - but it strikes me that this is just semantics. If Judges tell the legislature and the executive what the law is - what the Constitution means; if they have the power to declare a law to be invalid and unconsitutitonal, then in my book (particularly when you are, like myself, from a jurisdiction without a constitutional court), that is activist - whether it is activist with a capital 'A' or a soft 'a', I'm perhaps more open about.

0 · flag

 Alec D. Rogers · a month ago

John - you're simply walking into a strange conversation, without understanding that certain terms such as "activism" do not mean to those in that conversation do not mean to you what it means to those in that conversation.

Activist is common accepted in US legal parlance as meaning "substitute the judge's preference for what the law should be with the lawgiver's." For instance, if Congress were to pass a law making it a crime to criticize the President, no Court would uphold it, but no one would say it was an "activist" decision.

It might be "semantics" but that's how people in the US use the phrase. If you want to use the phrase differently, by all means do so, but don't be shocked when US lawyers tell you you're not using the term correctly in the narrow sense of the conversation we have about the proper role of the judiciary.

Also, note that your characterization of a Constitutional Court would not necessarily fit the US Supreme Court in the opinion of many experts, including Professor Amar's.

0 · flag

 John Kenneth Hardcastle Signature Track · a month ago

Well, on that note, I shall leave you to it.

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+ Comment

William Hoke · a month ago

First, statistics cannot define judicial activism. Counting decisions invalidating executive, legislative, or state actions is not it. Rather I feel it is a decision unsupported by a clear and reasonable understanding of the Constitution. Suppose a city enacts harsh laws effectively banning guns. Overturning that would not be judicial activism. Roe v. Wade and the recent DOMA decision are, and I

support abortion. The justices wanted the decision and concocted various arguments and precedents to fake the shroud of law. The Constitution is a great document, but we have gotten so far beyond any rational compliance that constitutional law is a bit of a joke. This situation is largely the result of an amendment process that has become effectively impossible for substantive changes. Interstate commerce is one section that has become meaningless. Is anything NOT interstate commerce? Most of our ad hoc changes are reasonable and supportable; just not constitutional.

0 · flag

Joel Kovarsky · a month ago

This seems a fair perspective. For all the complaints on the board re: the "judicial activism" of the court, it is surprising just how many more recent decisions constrain federal authority: https://depts.washington.edu/constday/controversies/

"Since 1995, the Supreme Court has struck down or limited the reach of numerous federal laws passed by Congress in such policy areas as civil rights, crime, and economic regulation. These rulings have not attracted as much public or political attention as court rulings related to abortion, gay marriage, and criminal justice, but they are arguably much broader in their impact and potential to precipitate fundamental constitutional change."

If someone want to take a look, the information is available: http://en.wikipedia.org/wiki/List_of_United_States_Supreme_Court_cases . The focus of complaints on these boards has been Roe, ACA, DOMA and maybe a couple of others. As you already note, hardly a representative sample.

0 · flag

Anonymous · a month ago

As I have said numerous times, the issue of judicial activism is one that should concern all Americans regardless of their political persuasion.

Perhaps those of us conservatives are better a making an issue of things like the repeal of DOMA or the "a penalty is a tax" issue of Obamacare, but the left has also had its own issues with what they perceived as judicial activism from conservative judges: Bush v Gore, Heller or the Civil Rights Voting Act.

The only plausible remedy that I see to this situation is the election of judges so that they will need to be accountable to voters if they overstep their authority.

For a country that was founded in fear of absolute rule, now we have a group of 9 unaccountable oligarchs dictating policy to Americans without any check to their power. True, they cannot pass their power to their children, but, as things are right now, they pass the power to their ideological children. The two Obama appointments were the results of 2 retirements by judges who wanted to make sure that their view of their constitution remains. I

predict a wave of conservative retirements as soon as a Republican president is elected.

0 · flag

Navtej Singh Khandpur · a month ago

Mr Hoke, you talk about a "...clear and reasonable understanding of the Constitution..."

Who exactly would you have establish this 'clear and reasonable' understanding? Do you allow for the possibility that in a democracy different people (including learned scholars) may in good faith come to different conclusions about what is 'clear and reasonable'?

0 · flag

William Hoke · a month ago

Mr. Khandpur -

You are of course correct, "clear and reasonable" can mean many different things to many people, but my examples were gun control and gay marriage. In the case of gun control we have the 2nd amendment sitting there. Perhaps it doesn't apply to a city's laws, but by its very existence it makes overturning the city's ordnances not unreasonable. DOMA is a different case. Gay marriage has never existed in the US and was not even imaginable in 1868, when the 14th amendment was passed. Fitting it into "equal protection" and calling all those who passed/signed it bigots is irrational. (Yes, I know they referenced the 5th amendment, but I guess they were confused.)

I wish "clear and reasonable" had mathematical clarity, but I cling to the belief that people, once stripped of their ideology (?), can come to some common ground.

0 · flag

Navtej Singh Khandpur · a month ago

That's a fair comment, however I don't recall the Supreme Court calling anyone a bigot in *Windsor* when they struck down part of DOMA.

Where I was headed with my earlier post above (and I didn't complete my thought) was that we do in fact have a panel of people who determine the 'clear and reasonable' understanding of the law and the Constitution. They are called Judges and Justices. We may not agree with them some or most of the time, but that's the system we have. Call me naive, but I believe they all act in good faith and by and large the country is better off for their contributions.

0 · flag

Anonymous · a month ago

NSK,

Anthony Kennedy called all of us who do not agree with him bigots
http://www.nationaljournal.com/domesticpolicy/scalia-high-handed-kennedy-has-declared-us-enemies-of-...

And as it so happens, Kennedy calling opponents of gay marriage bigots had the effect of several activist judges across the nation striking down gay marriage bans at the state level (case in point Utah) until the SCOTUS was forced to intervene to say, let the process proceed.

0 · flag

Mark Nisson · a month ago

Kennedy did not say that all who disagree with him are bigots. He merely explained how DOMA trampled on the constitutional rights of same-sex couples and their children. It was Alito, in his dissent, who interpreted the majority's view as holding the dissenters out as "bigots or superstitious fools." In other words, Alito mistook an interpretation of the rights granted to all of us under the Fifth and Fourteenth Amendments for a personal attack.

0 · flag

Navtej Singh Khandpur · a month ago

Mark, get ready for the tirade from Anon! How dare you use facts to point out the inaccuracies in his arguments! :-)

0 · flag

Anonymous · a month ago

In his words,

"DOMA rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one State to the next."

"[M]arriage is more than a routine classification for purposes of certain statutory benefits."

"DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government."

"In determining whether a law is motived by an improper animus or purpose, '[d]iscriminations of an unusual character' especially require careful consideration. DOMA cannot survive under these principles."

"The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States."

"The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence."

"DOMA writes inequality into the entire United States Code."

"The differentiation demeans the couple, whose moral and sexual choices the Constitution protects and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples."

"[T]hough Congress has great authority to design laws to fit its own conception of sound national policy, it cannot deny the liberty protected by the Due Process Clause of the Fifth Amendment."

"DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others."

So the notion that DOMA seeks to do all those things to gay couples and their children (including humiliation) was used by a judge in Utah to say that the same logic applies to their ban on polygamy.

There, you have it, Kennedy saying that bigotry was the only reason behind DOMA, which of course, can also be used to say that bigotry is what drives bans on polygamy or incestuous marriages. After all, incestuous same sex marriages cannot procreate, so what can drive the prohibition of a father from marrying his adult consenting son but bigotry, according to the Kennedy logic?

↑ 0 ↓ · flag

Mark Nisson · a month ago

I didn't say Kennedy didn't find that the purpose of DOMA was to discriminate; he had to make such a finding in order to overturn the law. But he did not say, as you claimed, that anyone who disagrees with him personally is a bigot. Perhaps that's a small distinction when you get down to brass tacks, but I think it's important to keep the discussion focused on the law.

As to your question about fathers marrying sons, that's a red herring for no other reason than you haven't identified a class of people being discriminated against. Or do you know of some actual cases where such would-be father-son marriages are being thwarted by anti-incest statutes?

↑ 0 ↓ · flag

Anonymous · a month ago

Kennedy calling us "bigots" vs those quotes is really a splitting hairs discussion. The notion that DOMA was passed with the intention of humiliating the children of gay couples doesn't hold any ground. Perhaps all marriages are destined to humiliate the children of single

mothers too, with that twisted logic. Why should some children have a mother and a father and others have to live with only a mother? Let's ban fatherhood altogether so that these children of single mothers feel better with themselves!

The banning of incestuous same sex marriages is not a red herring by any means. To this day, incest remains banned in all 50 states. In fact, Washington state, where gay marriage was approved by the people, even marriage between first degree cousins is banned. The ban applies to both same sex and normal marriages. I haven't heard of any case challenging this reality yet, but I wouldn't be surprised if Kennedy calling us bigots could be used to invalidate bans against same sex incestuous marriages. As I said, it was the very logic that a federal judge in Utah used to weaken a ban on polygamy.

0 · flag

Mark Nisson · a month ago

The majority didn't say DOMA was passed with the intention of humiliating children of same-sex couples. It did say, quoting the House Report, that DOMA was passed in order to "promote an 'interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws.'" The effects of the law on both the people DOMA was designed to hurt and their children was cited as confirmation of the stated purpose.

As to the ban on incestuous relationships, I'm not aware of a federal statute that, like DOMA, was enacted specifically to injure kissing cousins where such relationships have been sanctioned in one or more states. Thus, the Supreme Court has no reason to even look at the issue.

0 · flag

Anonymous · a month ago

Mark,

All your arguments have been about minutiae like the difference between Kennedy using the word "bigot" and he calling us every epithet in the book to convey the meaning of "bigot" except the word itself. This last comment of yours is in the same vein.

For a more in depth analysis of the meaning of the DOMA decision, coming for a defender of gay marriage, and law professor at Boston College: http://prospect.org/article/slippery-slope-polygamy-and-incest "The Slippery Slope to Polygamy and Incest". Now, this article was written in July 2013. In December 2013, a federal ruling agreed http://www.sltrib.com/sltrib/news/56894145-78/utah-polygamy-waddoups-ruling.html.csp "Federal judge declares Utah polygamy law unconstitutional". Note that the Utah case was a state case not a case involving federal recognition of polygamy.

Now you can spend a whole year splitting hairs and focusing on minutiae but to deny that affirming that DOMA was based on bigotry, as Kennedy did, will not have repercussions in

existing bans on incest and polygamy is to be very ignorant of the rationale that Kennedy invented to strike down DOMA. Maybe not this year or the next. But if future SCOTUS justices continue to buy the Kennedy rationale, the end of bans to incest and polygamy could happen in the next decade. And we will have nobody but the leftist/libertarian ideological judges to blame. Unless, of course, you think that incest and polygamy are not bad things for society at large. As the defenders of gay marriage say, in which way a father marrying his consenting adult son affects other marriages or harms society in anyway? How is detrimental to society that 4 women decide to voluntarily enter in a marriage relationship with one man and have children with him? Why do those children have to be publicly humiliated in the same way the children raised by gay couples were before the DOMA decision? The slippery slope is clear except for the most dogmatic defenders of gay marriage.

↑ 0 ↓ · flag

Mark Nisson · a month ago

You're sort of going off the rails here, aren't you? Of course DOMA was enacted out of sheer bigotry. That's obvious, and I'm not arguing otherwise. Instead, I'm taking issue with you interpreting Kennedy's words as a personal attack, as if he was judging YOU.

But he wasn't judging you. He was judging the validity of a federal statute that was intended to injure a class of people for no other reason than the people who voted for it had a *moral* issue with what they saw as the encroachment of gays and lesbians into their narrow-minded views of how society ought to be.

As to whether the rationale Kennedy used to invalidate DOMA will lead us down some dangerous slippery slope toward legalization of incest and polygamy, that seems doubtful, especially on the incest front, and even the Utah decision has only narrow application.

Besides, your assumption seems to be that no one in their right mind would ever want to see polygamy gain legal protection. Personally, I don't have a problem with the practice from a legal standpoint, so your little scare tactic didn't work.

↑ 0 ↓ · flag

Anonymous · a month ago

I am not going off rails at all. The basic accusation that Anthony Kennedy made to those who voted for the passage of DOMA (and to Bill Clinton when he signed it) is that it they were driven by bigotry. You can try to distract with splitting hairs discussions but that is the bottom line.

Now as Kent Greenfield above recognizes, the SCOTUS in a majority, legally binding opinion claiming that the only reason behind DOMA was bigotry, opens the Pandora box to incest and polygamy. And I would add, even to marriage itself. Why should children of single mothers have to put up with a society that promotes "happy families" made of a mother and a father through the force of law when Kennedy above says,

"The differentiation demeans the couple, whose moral and sexual choices the Constitution protects and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples."

I can rewrite this to say,

"The differentiation demeans the mother, whose moral and sexual choices the Constitution protects and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by single mothers."

So there you have it. The "profound rationale" that Kennedy used to strike down DOMA doesn't hold any serious scrutiny unless you are open to incest, polygamy and even to the ban of marriage altogether. In fact, the libertarian position is that government should not be in the marriage business at all. That "marriage" should be left to religious institutions and that government should only be concerned with civil contracts of any kind (single mothers, normal couples, gay couples, polygamous couples, etc).

You might not see the slippery slope but those more learned than you in federal law (even those who support the DOMA decisions) see it clearly. The Utah case polygamy was narrow, but things are not going to happen overnight. In fact, judges got too excited with Kennedy's reasoning and started to strike down statewide gay marriage bans on the Kennedy rationale (even though the DOMA case was a federal case). The SCOTUS decided to put some order to the nonsense, but they are in an untenable position now. If deciding that states who only recognize marriages between one man and one woman do it out of bigotry, they cannot prevent another Roe v Wade ruling on the matter if the want to aspire to some kind of consistency. Doing so which will polarize American society for another 40 years as the Roe v Wade ruling did. Preventing this was perhaps Ginsburg's calculation when she decided to back Kennedy on DOMA but to deny standing to the appellants in the California Proposition 8 case. What she probably underestimated is activist judges' creativity when it comes to interpreting SCOTUS majority opinions. So the Utah judge that struck down Utah's same sex marriage ban used the Kennedy rationale to do so. Now the SCOTUS is headed for another Roe v Wade ruling which will accelerate the making of the SCOTUS as an elective body or to some reasonable decision that buts a break to the travesty. Either way, division is likely to follow. If the issue another Roe v Wade, we will see a return of the "cultural wars" which ironically will be more detrimental to those who are in the minority: gay couples. If they rule reasonably, and decide that marriage is a states' issue, the gay lobby will react as furiously as they usually do when they lose.

↑ 0 ↓ · flag

Mark Nisson · a month ago

You misunderstand the DOMA decision (it *was* about state's rights), you throw up red herrings about the demise of marriage (not happening), you predict a "return" of the cultural wars (as if those wars didn't exist prior to Roe v. Wade), and, most absurdly of all you see a

restructuring of the Supreme Court into an elective body.

I understand you believe the country is going to hell in a handbasket under Obama, and that traditional conservative values are under attack. But to go off half-cocked with fearful predictions isn't productive.

I suggest you start paying attention to the course and stop proselytizing.

0 · flag

Anonymous · a month ago

Mark,

Actually while technically Kennedy used a "states right" rationale to strike down DOMA, the substance was not about state rights. Law professor Kent Greenfield, and two federal judges (in two different cases) understood the premise of the DOMA decision for what it is: those who disagree with gay marriage are bigots.

Your appeal to me "proselytizing" is really funny when I am the one who has brought to the table an exquisite legal analysis by a law professor supporter of the DOMA decision and two federal court decisions inspired by the DOMA case. Your answers have all been red herrings and calling me names. Funny how the liberal mind works!

0 · flag

+ Comment

Jeffrey Perkins · a month ago

So the implication is that the Judiciary has gotten too political, therefore we should politicize the appointment process?

1 · flag

Anonymous · a month ago

Pretty much, out of respect to transparency. As I said, the 17th and 22nd amendments were passed to modify the way US senators were elected and to put terms limits in place as a reaction to perceived abuses of power.

Maybe in an ideal world non partisan judges exist, and maybe during the first decades of the Republic judges strove for non partisanship, but nobody can seriously say with a straight face that the most consequential, and divisive, US Supreme Court decisions of the last 40 years were motivated by anything other than partisanship.

Electing judges would not affect the outcome of decisions that are clear cut (anymore than

things that unite Americans affect congress). But it's the controversial and divisive ones that would have an extra check.

↑ -1 ↓ · flag

Joel Kovarsky · a month ago

Anonymous (no. 1,2,3,4...whatever),

It appears impossible to reach consensus on this:

http://depts.washington.edu/constday/_resources/Brown-Marnie1%20_Y_.pdf

http://uchicagolaw.typepad.com/faculty/2007/09/are-appointed-j.html

I know of no experiment to run, because of different means of selecting state vs. federal judges. Here is the abstract from that second link:

"Although federal judges are appointed with life tenure, most state judges are elected for short terms. Conventional wisdom holds that appointed judges are superior to elected judges because appointed judges are less vulnerable to political pressure. However, there is little empirical evidence for this view. Using a dataset of state high court opinions, we construct objective measures for three aspects of judicial performance: effort, skill and independence. The measures permit a test of the relationship between performance and the four primary methods of state high court judge selection: partisan election, non-partisan election, merit plan, and appointment. The empirical results do not show appointed judges performing at a higher level than their elected counterparts. Appointed judges write higher quality opinions than elected judges do, but elected judges write many more opinions, and the evidence suggests that the large quantity difference makes up for the small quality difference. In addition, elected judges do not appear less independent than appointed judges. The results suggest that elected judges are more focused on providing service to the voters (that is, they behave like politicians), whereas appointed judges are more focused on their long-term legacy as creators of precedent (that is, they behave like professionals)."

If there were any truth to that statement, particularly about long-term legacy, I would go with the appointed federal judge. We have enough politicians.

↑ 0 ↓ · flag

Anonymous · a month ago

I think that the very article you provide makes a great case for the election of judges.

The abstract (I have not read the whole article) makes it very clear that there is no empirical difference in the quality of their opinions only that elected judges "are more focused on providing service to the voters" vs appointed judges who "are more focused on their long-term legacy as creators of precedent". Which is a nice way of saying that appointed focus on

imposing their views on people.

The principle of government of, for and by the people is accountability TO THE PEOPLE not that unaccountable professionals impose their view on the rest of us. Those "professional judges" would make great university law professors, but they make horrible members of a branch of government which is right now unchecked by the people.

↑ 0 ↓ · flag

Anonymous · a month ago

Joel,

I would add that you are on record saying that you are a physician. It is not surprising that you put "physician paternalism" ahead of "accountability to the voters". Don't get me wrong, as a scientist I would love to have a bully pulpit out of which impose my own ideas to other people. But it is the government of all Americans we are talking here, not of the "professional class". Fairness requires that these judges are elected, not appointed for life.

↑ 0 ↓ · flag

Joel Kovarsky · a month ago

I come to different conclusions. One thing is that if this were a national, popular vote, looking at the demographics, would not rural and more conservative voters be disenfranchised? How closely would they, during the course of a campaign, pay attention to who would focus on the law itself? And then when the next popular swing comes, in comes the next judicial candidate promising "whatever" to the people. I simply cannot see the value there. The only way we would find out is to uproot the current system, and you apparently favor that. I hope I am in the majority, at least for now.

I cannot accept your premise that we have a branch of government that is "unchecked by the people." The branches check themselves, even though the system can, at times, be dysfunctional and lopsided, depending on who thinks they are getting their way--or not.

↑ 1 ↓ · flag

Anonymous · a month ago

Joel,

There are many ways that SCOTUS justices could be elected. One way would be to appoint one per appeals district. That would take care of the issues you raise (and it would preserve federalism).

Judicial power is right now unchecked because there is no remedy to an unfair decision other than impeaching the justices (which is not going to happen because of the Chase precedent).

Your own articles make a great case for having federal judges elected vs the status quo.

0 · flag

Joel Kovarsky · a month ago

To anonymous re: physician paternalism--that is a very low and snarky blow, and hardly accurate or necessary. The political spread of physicians is all over the place; we are not remotely a uniform voting block. You post anonymously and make proclamations, and you accuse me of paternalism?

More to the point, is there a compromise that makes sense, given the objections to "tenure." Could you have, say, a 4-5 term limit to the federal bench. A 20-25 year term ought to be enough, as long as you do not completely disenfranchise (economically) those judges who have served their allowable term. This would allow more flexibility, but not for so many swings in popular mood. I would acknowledge that life-expectancy in the late 18th century was far less than now, and not something that might have raised so many concerns.

2 · flag

Anonymous · a month ago

Short comment to "physician paternalism", you brought your condition of physician to another discussion, not me. Because my own experiences, I do not trust "experts" as ethic human beings any more than I trust non experts. Expertise is 100% orthogonal to ethics as shown by white collar crime being committed almost exclusively by "experts". So, you bring a study that shows no significant difference in outcome between "non elected judges" and "elected judges". In a situation like this, fairness would point to the need of having elected judges unless of course, one is promoting his/her own tribe of "experts". Physician paternalism affects all physicians across the board, regardless of political ideology or medical specialty.

Now, to your proposal. I find it acceptable. I see long terms appropriate. I'd say 10 year terms with a 2 term limit so that judges have to face voters twice and cannot stay for very long. Economically speaking, if said judges follow the pattern of former presidents and congressmen, I don't think there is much to worry about. They would be in high demand by universities and lobbyists, particularly those lobbying for changes in federal law or arguing cases in the US Supreme Court. In fact, I'd argue that having elected judges is likely to increase the pool of interested parties in becoming federal judges since it would not force them to a low salary life (by the standards of the people with the background of those who end up in courts of appeals or the SCOTUS).

0 · flag

Joel Kovarsky · a month ago

Anonymous,

I mentioned that I was a physician, and you chose to distort the issue and paint us with the same brush. It is safer for you, because no one knows who you are. But it is easier to predict your reaction to any statement here than to assess the individual political perspectives of any single physician. I do not paint every Republican with the same brush. You are much easier to pigeon-hole.

0 · flag

Anonymous · a month ago

Joel,

Are you going to deny that 99% of physicians, irrespective of their ideology or specialty, ARE NOT in tune with "physician paternalism"? Really? Because I have seen it in action both in private (the doctors that I have had) as well as on TV. On FOX there is a program called "Sunday call" where you have two physicians, one Republican another Democrat dealing with so called "health matters". "Physician paternalism" is in full display by both of them regardless of their agreement or disagreement on the politics.

0 · flag

Anonymous · a month ago

Anonymous,

You are tarnishing our entire clan. It is hard to carry on a conversation when the validity of all expert opinion is denied. That is not something likely to be of value to any major university. Do you invalidate all opinion there...except non-expert?

1 · flag

Anonymous · a month ago

Anonymous,

No, I do not invalidate opinion of experts. What I am saying is that when it comes to political opinion, "expert opinion" provides no premium when it comes to deciding issues on a political basis. Expert opinion might inform policy makers, but policy making remains a political act, not an "expert act". As such, isolating "policy makers" from their own intellectual bias is always good.

At the beginning of the republic, only white land owners were able to vote. The constitution has been increasingly changed as to increase the pool of people whose "political opinion"

matters when it comes to voting. We might like or dislike congressmen and US senators but they are there because the people voted for them.

Now, there is increasing evidence (the cases I provided below and others) that in the last 40 years, the most divisive and consequential SCOTUS decisions (including the Bush v Gore) were based on ideology. The study that Joel provided, even if anecdotal, says that for this type of decisions, elected judges and professional judges are no different only elected judges are accountable to their constituency in a way that federal judges are not. I see it as the next logical step to submit federal judges to voter accountability.

↑ 0 ↓ · flag

Joel Kovarsky · a month ago

To anonymous speaking for 99% of physicians:

You have a lot of axes to grind. At this point, I will step away.

↑ 1 ↓ · flag

Anonymous · a month ago

Note Joel, that we are finally in agreement on something (election of federal judges to long terms).

You denying physician paternalism is tangential to that issue, but it doesn't mean that physician paternalism is not endemic among doctors :D.

↑ 0 ↓ · flag

Joel Kovarsky · a month ago

Anonymous,

We are not in agreement regarding the elections, only the term limits.

As to the whole paternalism thing, that is an issue you electively decided to raise and pursue. It was not my choice, and has nothing to do with this course. But you know that.

↑ 0 ↓ · flag

Anonymous · a month ago

The only reason I raised physician paternalism is to attack your preference of "professionals" vs "accountability to the people".

Since the matter seems to be "trust in professionals" vs "trust the people" (not actual outcomes per your own study), personal bias, in your case "physician paternalism" is material.

Does anybody find surprising that people who make a living out of having their opinion being given deference based on "expertise alone" are going to favor "expert opinion" over "accountability to voters"?

My point is that when it comes to political decisions, "expert opinion" is irrelevant so we should modify the legal system as to be as inoculated as possible against it because it has the possibility of corrupting decisions that are by their very nature political. The list of 5-4 decisions that I provided below were voted on purely ideological lines.

0 · flag

Joel Kovarsky · a month ago

Those "professionals" are politicians themselves. It is hard to know whom to trust, but why you or your opinions? As to your assertion that expert opinion is "irrelevant" to political decisions, that strikes me as more nonsense. Our world is built on technical advice being given to members of Congress. The outcomes are unpredictable, and the expert positions may not be the final determining element--but you void too much.

You also presume that I trust in professionals more than the people. Sometimes yes, sometimes no. I do not see the value in an absolutist position.

0 · flag

Anonymous · a month ago

You are mistaken.

I am not against "expert opinion" informing policy. What I am against is "experts" making policy because of their "expertise alone". Policy makers should be as inoculated as possible from areas in which they hold high expertise because they are going to be likely biased by their own expertise.

As I said, I am a scientist. If we had a genuine scientist as say, POTUS, very likely big chunks of money would go to things that I love (NASA, big science projects like https://en.wikipedia.org/wiki/Superconducting_Super_Collider , etc). However, those projects are not cheap. Spending on them would be always at the expense of something else. So the guys making those decisions must be as removed as possible from their expertise.

I feel very strongly about this after having worked with many "experts". Before I attended graduate school at a very prestigious university I had this romantic idea that "expertise" made people more "ethical". My experience is that not only expertise and ethics are orthogonal, but that expertise in fact biases decisions. So it is precisely because I know a lot of "experts" (even after I graduated I continue to work surrounded by them) that I strongly believe that policy making should not be at the hands of experts that are not accountable to voters. I have no problem with "experts" being elected, but these "experts" are then subject to accountability

by the people, which is what matters at the end of the day.

0 · flag

Anonymous · a month ago

So *in extremis* we should have ill-informed and uneducated politicians. I think we're almost there.

And reading the thread above, it's hard to believe someone who claims to be a scientist does not provide any evidence for sweeping generalizations.

0 · flag

Anonymous · a month ago

Straw man. I did not say that elected politicians should be uneducated. What I said is that when it comes to making political decisions, as are most if not all of those 5-4 decisions I mention below, expertise is both irrelevant and probably counter productive. This said, I have nothing against "experts" running for elected office. Equal rights doesn't mean treating experts worse. It means treating them as equal as the rest, not better, not worse.

With respect to physician paternalism, it is one of those things that it is very difficult to define mathematically or scientifically. There are surveys, and policy decisions, however that speak that physician paternalism is alive and well. For instance, one of the most controversial provisions of Obamacare is the creation of https://en.wikipedia.org/wiki/Independent_Payment_Advisory_Board (which was distorted by Sarah Palin as a "death panel" even before Obamacare was enacted).

The rationale of the IPAB is that a group of 15 unelected physicians know better than the patients themselves about certain medical choices. That's pure physician paternalism at display. The AMA supported Obamacare as a whole without qualifications that it disliked parts of it, so one has to assume that the AMA supports the rationale behind the creation of IPAB.

0 · flag

Joel Kovarsky · a month ago

The physicians did not set up the idea of the IPAB themselves. I do not know all the behind-the-scenes details as to what prompted that. As to assuming AMA support, maybe, but fewer than 20% of physicians now belong. As to paternalism, this is just you being annoyed with the profession, however much you protest, and has little to do with anything here. Engineers would advise on bridges, lawyers advise on all sorts of things, and there are many other scientific groups that give opinions--even various statements specifically for the court. You acknowledge the difficulties in objectively demonstrating your point, which is more a reflection of your personal irritation (not that those irritations are unique).

As to the IPAB: http://www.forbes.com/sites/carolynmcclanahan/2012/10/04/what-is-the-independent-medicare-advisory-b...

"Who is on the Board? The Board will consist of 15 full time members appointed by the President. Congress has to help nominate 12 of the 15 members. Only a minority of the members can be health care providers and they all have to be confirmed by the Senate."

That is generally confirmed by other descriptions. If you want a more extensive explanation, maybe you should look elsewhere: http://www.nejm.org/doi/full/10.1056/NEJMp1005402 . Our health care system was a mess, and any attempted overhaul would have led to bitter fights. It is hard to see what this has to do with judicial activism, although based on posts here you will find a way. As to the AMA and the board, they were not too happy with it, as a whole, but they also lacked full internal consensus: http://www.ama-assn.org/ama/pub/advocacy/topics/independent-payment-advisory-board.page? .

0 · flag

Anonymous · a month ago

Joel,

The reason I cannot show mathematically physician paternalism is because there are things in life that cannot be scientifically defined. How do you define "uplifting music"? You just can't, period. However, you can speak of an attitude that is common among physicians that they know better than their patients.

Your point about engineers advising about bridges is a non sequitur. The role the AMA played in the passage of Obamacare was not played by the ASCE (American Association of Civil Engineers) in passing the stimulus package of 2009 which contained a great deal of infrastructure projects. In fact, the ASCE played no role whatsoever in the amount of money allocated to infrastructure by the stimulus package.

Physicians, because their professional work involves working with other people who seek their expertise on matters that in many cases are of death or life, have for that reason developed an attitude of seeing themselves almost as God emissaries.I am not the first to make this observation of "doctors as the new pastors" http://www.telegraph.co.uk/health/healthnews/8811170/Doctors-should-fulfil-role-of-local-priest.html .

This paternalism makes physicians, as represented by the AMA's support of Obamacare, believe that they can play a role making decisions that affect other people. This attitude is not remotely as widely present in practitioners of other knowledge based professions. Not even the different associations of lawyers have this attitude that "they know best because they are doctors". When it comes to Obamacare, Ezekiel Emanuel has been repeatedly referred as the architect of the law. I see no Nobel Prize winner in physics, not even Einstein, with the kind of ego to believe that they can plan the lives of 300 million of Americans.

So I am not irritated against physicians, I am just making the point that physicians are more prone to paternalism than other professions and the support of the AMA to Obamacare is probably the best example of that attitude (as it was its opposition to healthcare reform when Nixon tried to pass something similar).

That only 20% of doctors are members of the AMA doesn't refute my point. The AMA still plays a big role in the life of Americans that other professional bodies do not. I don't see the American Physical Society or its members being as influential in society as the AMA and its members are any time soon.

↑ 0 ↓ · flag

Joel Kovarsky · a month ago

Very few professions are so integrally tied to such a huge portion of the economy. Your continued discussion of paternalism is of virtually no value. The ACA had support from numerous agencies, including the AMA, and that was not without a great deal of discussion. In the end, it was a consensus view, and explained here: http://www.medicarenewsgroup.com/news/medicare-faqs/individual-faq?faqId=d7a04b02-28b7-47dd-a838-885... . Your assertion of "paternalism" in this decision is not defensible, except by your own insistence. And you tie judicial activism to an attempt to overhaul a portion of the economy that was driving us all into the poor-house? This is not about whether you liked the outcome or that ongoing revisions will be needed. This is the sort of intellectual nonsense where people dislike the government getting involved in their health care, but would be appalled if someone touched their Medicare.

As to "God emissaries," I do not know how to proceed with this. People often dislike those in authority. And you cite an article in the UK Telegraph?

Just out of curiosity, due you consider the American Nursing Assn. maternalistic?http://www.nursingworld.org/healthcarereform Do not answer that. Nearly 50% of American medical students are now women, so this just opens up other issues.

↑ 0 ↓ · flag

Anonymous · a month ago

Judicial activism is tied to physician paternalism because of Obamacare! It is clear that you are in favor of Obamacare.It is clear that you support what the SCOTUS did in order to uphold Obamacare.

Therefore your own bias is pertinent to a discussion of whether upholding Obamacare was constitutional. And the most prevalent bias among physicians is their paternalistic attitude that they think they know better than non doctors. If you haven't watched Ezekiel Emanuel defending Obamacare in front of Megyn Kelly, you should https://www.youtube.com/watch?v=7XD7650Rl04 . That attitude is the one I am referring to. You can say that I find it irritating, sure, but it is a fact that many doctors suffer from it :D.

0 · flag

Navtej Singh Khandpur · a month ago

Anon (and there may be multiples of you on this thread), it seems like any push-back you don't like is a 'straw man'. And in other posts you make sweeping generalizations (e.g physician paternalism), or fail to provide any supporting evidence for your claims. At best you relate anecdotes of your own experiences, or link to items that support your opinions. And one (or some) of you misrepresent facts and substitute your own opinions for 'truth'.

For example, one of you says *"...The rationale of the IPAB is that a group of 15 unelected physicians know better than the patients themselves about certain medical choices".* That's certainly not how I read the Wikipedia link provided in the same post. How do you come to that conclusion? One of you claims to be a scientist (or had scientific training). It's not evident in those posts.

Best wishes.

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Joel Kovarsky · a month ago

Navtej,

See post above: https://class.coursera.org/conlaw-001/forum/thread?thread_id=1704#comment-2260. The "15 physician" statement was just completely wrong, as you can see. There are several links there, including a lawyer writing an explanatory essay in the New England Journal of Medicine.

0 · flag

Anonymous · a month ago

NSK, JK,

I stand corrected that there is no statutory requirement that all 15 be physicians, but that is how the IPAB was portrayed in the media http://www.forbes.com/sites/scottatlas/2012/10/21/ipab-president-obamas-nice-way-to-ration-care-to-s... .

That said, it is just one point. The AMA, which by JK's account represents 20% of all physicians, endorsed Obamacare and none of the links provided make it look like they do not like the idea of an IPAB (a substantial majority of its members I predict will indeed be doctors).

Joel spoke of engineers providing advise to the construction of bridges but that is not what we are talking about here. The right analogy would be that http://www.asce.org/People-and-Projects/People/Bios/Stevens,-Robert-D-/ would have been as involved in writing the

details of the parts of the Obama stimulus package that were dedicated to infrastructure as Ezekiel Emanuel was in writing the details of Obamacare. Physicians see as their "prerogative" to tell other people what to do in a way that other knowledge based professionals do not.

The support of the AMA was not just some random endorsement, it was an active promotion of the law with all its resources at its disposal. I do not know of any of other group of professionals that have such a high sense of entitlement. And it is not because their knowledge does not impact lives. I wonder what would happen if suddenly hackers became infected with a similar sense of paternalism/entitlement when it came to guarding our online communications. The damage that Snowden caused to the NSA or the Target hacking should give you an idea of the power that those hackers could have in our daily lives if they started to think as physicians do.

But I digress. The basic point is that Joel's condition as physician cannot be detached from his support to the perversion of Obamacare that Roberts perpetrated to make it constitutional. Whether Joel is a member of the AMA is also irrelevant since doctors in general love this idea of paternalism.

↑ 0 ↓ · flag

Joel Kovarsky · a month ago

Anonymous,

Your sweeping personal assertions based on my training as a physician are really quite remarkable. Not that you will care, but quite a few physicians never liked the ACA, and other groups wanted "Medicare for all." You are just spouting nonsense for your own purposes. You have elected to personally disbelieve the plans for the IPAB that state that only a minority of its members can be "health care providers" (and not all of those will be physicians).

I suppose you can construct your own world, but that does not help anyone on these boards, and it distracts from more legitimate discussions of judicial activism. Your own "activism" seems quite extreme, but people can evaluate your remarks here on their own.

↑ 1 ↓ · flag

Navtej Singh Khandpur · a month ago

Anon, once again, you choose not to address the flaws I (and others) have pointed out in your posts.

Thanks for the discussions, but I really need to spend my time more productively and engage with people with open minds, sound arguments based on facts, and from whom I can learn.

Take care.

0 · flag

Anonymous · a month ago

I take issue with the "open mind" accusation with by implication means that I am 'narrow minded". I am not "narrow minded", rather I see the lawlessness that results when corruption becomes widespread among those in power.

The Obamacare decision was a corrupt decision. Ditto of DOMA. Obama thinks that the Citizens United and Civil Rights Act decisions were also corrupt decisions.

The only way to put an end to this "corruption" is to put those who perpetrate the corruption under check and that would be the SCOTUS themselves who right know enjoy unchecked power.

I you want to learn about how the type of corruption that the SCOTUS judges are perpetrating can ruin a prosperous civilization I encourage you to read about the Roman Empire. We are following exactly the same path they followed. They were destroyed from within just as we are being destroyed from within by people like Anthony Kennedy.

The issue of Roman destruction of within was part of the arguments the framers had about the perils of democracy.

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+ Comment

 SYED TAMJEED AHMAD · a month ago

https://www.facebook.com/groups/257423277767316/, please join this group where we all coursemates can discuss our topics.

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Anonymous · a month ago

I understand that you want to promote yourself. What do you think is the purpose of these boards other than DISCUSSING TOPICS RELEVANT TO THE CLASS?

I see the "I want my 15 microseconds of fame" as the greatest sin of our current generation. In previous generations, it was "15 minutes of fame". Now people fight for "15 microseconds of fame". How pathetic, really. There are a great number of interesting conversations going on in the boards here, no need to go to your Facebook group to have the same type of discussions.

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Navtej Singh Khandpur · a month ago

I agree with Anon's sentiment that the discussion can be held in the discussion fora here. The rest, not so much.

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Anonymous · a month ago

NSK,

Happy we agree on something!

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Stanley H Kelley · a month ago

Instead of discussing "judicial activism" in the abstract why do we not discuss it in the concrete. In 1803 in the case of Marbury v. Madison the Supreme Court, in an opinion written by John Marshall, invalidated a part of the Judiciary Act of 1789 which gave the Supreme Court original (as against appellate) jurisdiction of writs of mandamus. His opinion for the court was that Article III of the Constitution specified the matters where the Supreme Court had original jurisdiction and the Congress could not expand what was in the Constitution. He further reasoned that a court, in cases where laws conflict, must decide which law is operative. Since, he said, there would be no point in having a written Constitution if it could be changed by a Act of the legislature, the Constitution must take precedence over Acts of Congress where they conflict.

This was very controversial at the time. Jefferson bitterly criticized it at the time as giving the unelected branch dominance over the elected branches when it was far from clear that the Constitution envisioned or intended it.

The question then becomes: was the Marbury decision an act of "judicial activism" or not? Whatever any of us think the power of the courts to invalidate Acts of Congress has become firmly entrenched in our jurisprudence.

1 · flag

Alec D. Rogers · a month ago

Good question Stanley. Personally, I find it well reasoned. Marbury itself does not quite stand for what is sometimes portrayed as it involved the Court's own conduct (i.e. that the Court could not act in an unconstitutional manner). The notion that the Court was the constitutional conscience for ALL of the branches is, I believe, a more modern concept embodied in such decisions as Cooper v. Aaron. There's a ton of debate among academics on all of this (some of whom claim Marbury shouldn't be accorded the iconic status it has), and I'm only very lightly

fluent in it.

↑ 0 ↓ · flag

Anonymous · a month ago

Yes, but as I said, amendments 17-th and 22nd were passed when things were not working as expected. That line of thinking would have demanded that US senators still be elected by state legislatures and that another FDR would have risen. Ironically, if the 22nd amendment had not been passed, I see Ronald Reagan as the only recent president who could have pulled an FDR-esque string of wins.

↑ 0 ↓ · flag

Stanley H Kelley · a month ago

Marbury was the case in which the Court first asserted its power to invalidate Acts of Congress. That means that it has the final word on the meaning of the Constitution in the cases which come before it. That power is firmly entrenched now and it appears unlikely to be changed. What academics debate now (and have debated for a long time) is neither here nor there. Many Congresses have come and gone since 1803 and none have passed an amendment which would overturn John Marshall's ruling. They could have done so but have not. So do you think it was "judicial activism" or not?

↑ 1 ↓ · flag

Anonymous · a month ago

I repeat my answer with regard to amendments 17th and 22nd. The notion that Marbury justifies ANY such intervention is what is preposterous here.

We have had 200 years since Marbury, especially the last 40, which shows the abuses that follow when one branch of government is left to grow beyond its original intent. Honestly, I don't see anything from 1803 as making me believe that the framers thought that the Marbury ruling would mean that DOMA is unconstitutional or that those who believe that marriage is between one man and one woman are "bigots" as Anthony Kennedy called us.

↑ 0 ↓ · flag

Stanley H Kelley · a month ago

I do not know quite what your point about the 17th-22nd Amendments is. As far as I can tell they were adopted in the way prescribed in the Constitution itself and have all been operable since they were adopted.

The case involving DOMA is a separate case I doubt that the "framers" had thought much about marriage between same sex people. My question concerned whether was Marbury the result of "judicial activism."

Another question in arguing for "original intent" is the "intent" that of those at the Convention only or would it include the intent of those who were at the ratifying conventions? Might it also include the intent of those who elected the members of the ratifying conventions? Intent is hard enough to discern in the case an individual. For a collectivity it is much harder.

0 · flag

Anonymous · a month ago

My opinion is that in a way it was. But it was acceptable to the parties involved, ie, the framers, because it was let stand. The stretch is to think that Marbury justifies the judicial activism that has been going on in the US since Roe v Wade.

The 17th and 22nd amendments are relevant because both were born out of perceived abuses of power (that of state legislatures -in which corruption was the way US senators were selected- and of FDR -which is the first president that defied the George Washington precedent of serving only 2 terms).

Today we have a judiciary that has taken judicial review to limits well beyond what a case like Marbury intended. The only way to address it is via a constitutional amendment.

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 Alec D. Rogers · a month ago

Stanley, it would probably help if you told me what you considered judicial activism to be. That the Court could not hear a case under jurisdiction that the Constitution did not grant it doesn't strike me as some sort of unreasonable conclusion.

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Stanley H Kelley · a month ago

I do not use the term "judicial activism" myself, that is why I put it in quotes. It seems to me that most people who use it mean only that they disagree with the ruling in a particular case so that the use of it adds nothing to the discussion. If one disagrees with a ruling then one should state what in particular they disagree with. Otherwise there is no basis for a real discussion. I did not say that Marbury justifies anything. I did say that it seems to have become settled law because the Congress has never really challenged it.

Meanwhile, I would still like your comments on whose intent is included in the phrase "original intent."

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+ Comment

 Alec D. Rogers · a month ago

Well, this thread has taken many turns.

On the question of electing federal judges, I'm a little bit ambivalent. Certainly if we believe that judges do nothing but use law as masks for their policy preferences (and a variant of the argument - MUST do so because law cannot be anything other than politics as there is no truly useful means of neutral decision making) than I'm not sure how we could justify NOT electing them.

I believe it's possible to separate law and politics. To rule one way as a judge when you would rule another as a legislator if your honest reading of the Constitution so required. That this is POSSIBLE is my premise going forward. Therefore, I prefer the continued appointment of judges. In my view our current professionalization of the courts with judges being more technocratic (e.g. virtually all of the US Supreme Court justices were US Courts of Appeals judges with the exception of Kagan - we see no appointments of sitting senators or other office holders any longer) has led to improved outcomes with politics (i.e. the judges political preferences) playing less of a role.

One interesting question is that of lifetime appointment. I wonder if sitting on the court for decades, esp. the US Supreme Court, could lead justices to feel they are omnipotent. A 12 year terms rather than life tenure might make some sense?

↑ 0 ↓ · flag

Anonymous · a month ago

And your evidence for your position is?

Because, frankly, I can point to several consequential and divisive SCOTUS cases decided 5-4 based solely on ideology in which "case law" was artificially crafted to fill the gaps,

- Bush v Gore
- Gonzales v. Carhart
- Heller
- Chicago
- Citizens United
- Obamacare
- DOMA case
- Civil Rights Act case of 2013

6 of those cases were decided by the conservative view having the upper hand, while 2 were decided by the liberal view having the upper hand but I see no sane person defending that they were decided on the merits, frankly.

This is an issue that affects both left and right.

↑ 0 ↓ · flag

 Alec D. Rogers · a month ago

That's a long list of controversial decisions. I see no evidence that the opinions on both sides were merely the judge's personal preference. Do you really believe John Roberts supported ACA for example?

0 · flag

Anonymous · a month ago

Alec,

Absolutely. Maybe he didn't support the "content of the law" but he definitely became convinced about the ideological point that invalidating such a far reaching law would create some kind of crisis (which is ironic in the aftermath of Bush v Gore). Breyer has repeatedly said that "purpose and consequence" has equal footing as "precedent" when considering the constitutionality of a law. So yes, Roberts backing of Obamacare was ideological, but of a different kind. Further, it is well documented that he changed his mind because of political pressure precisely because of concerns about "consequence" http://www.washingtonpost.com/blogs/the-fix/post/cbs-news-john-roberts-changed-his-mind-on-health-ca... .

The Obamacare decision provides perhaps the best example, of all recent controversial 5-4 decisions, as to why judges need to be elected. What Roberts did was a travesty. Worst of all, it backfired badly because the public support of the SCOTUS is now lower than what it was before it validated Obamacare.

0 · flag

Anonymous · a month ago

Also, another important data point is that Anthony Kennedy, who was the swing vote in all those decisions except for Obamacare, is on record admitting that he is a libertarian. You can predict his vote in each of those decisions based on his libertarian ideology alone.

0 · flag

 Alec D. Rogers · a month ago

I have heard lots of people say they could predict the outcome after the fact. If all of these cases were nothing more than political preferences with judicial masking, why even bother having a court at all? Another House of Congress doesn't seem useful.

And why are your posts anonymous?

0 · flag

Anonymous · a month ago

I am posting anonymously to inoculate myself from liberal bullying, which has happened in other threads -even though I was posting anonymously- as I predicted. This helps keeps the conversation on the merits.

The prediction is possible especially with the liberal judges and Anthony Kennedy. The latter is a reliable "libertarian" vote. Without knowing anything about legal precedent, you can predict how he is going to vote close to 100 % of the time:

- If his vote benefits business, he will vote for, otherwise, he will vote against.

- If his vote expands "social issues" like gay marriage or abortion, he will vote for, otherwise he will vote against.

The only exception that I have seen to this pattern is Gonzales v. Carhart but his votes on the Obamacare, Voting Rights Act and DOMA cases were entirely predictable.

0 · flag

Jeffrey Perkins · a month ago

Marsha Ternus - beginning at the 11:22 mark of an excellent interview -

"The 3 of us could, under the Judicial Ethics code, could have formed campaign committees and raised money but we discussed whether we should do that and the three of us agreed, with little hesitation, that we shouldn't do it. We thought it was unseemly for judges to be out campaigning like politicians. We received our appointments under a merit-based system. Not because of our politics or our political connections. So it would have been contrary to the way we viewed our office to be out there on the campaign trail.

We also didn't want to be raising money for our campaign to retain our seats and then face the prospect as sitting judges of seeing those very attorneys or parties that contributed to our campaigns appearing before us in court. which would have required us to recuse ourselves. Part of the philosophy of a Supreme Court is that all 7 perspectives, hopefully diverse perspectives, are brought to bear on each case that comes to court. If we started to recuse one or two of us, then the court would not function in the way it was intended to function."

This regards the **political** fallout suffered by three justices after their retention was denied following a unanimous decision by the Iowa Supreme Court in *Varnum v Brien*. That entire retrospective is a practical rejection to this idealist concept that elections would serve our interests in the court of law.

Above it all, if her quote and demeanor do not exude competence in the post of a Justice, then I don't know what else to add.

I've also converted from this notion that anonymous posters can contribute much worth

considering. It really does undermine your credibility in these instances, people. Especially if you're going to slander others by names and professions. That said, not being able to address the appropriate party or which anonymous poster has made what point, this will continually devolve into a faceless forum of counter-productive pot-shots.

Thanks,

Jeff

↑ 0 ↓ · flag

+ Comment

Anonymous · a month ago

The Affordable Care Act was passed by a super majority in both houses (60 votes in the Senate to avoid the filibuster) and signed into law by the President. Congress clearly had the authority to pass the law under the commerce clause of the Constitution since health insurance has a major impact on interstate commerce. The fact that the Supreme Court upheld the law allowed our democratic process to work.

↑ 0 ↓ · flag

Anonymous · a month ago

Technically not true.

The final version of Obamacare was passed through reconciliation because of the election of the Scot Brown. His election undermines the legitimacy of Obamacare, BTW.

But besides, DOMA, was passed with veto proof majorities and signed by the sitting president. It was stricken down by ideologically motivated judges. So if we are going to talk about democratic legitimacy, DOMA had more democratic legitimacy than Obamacare ever will.

↑ 0 ↓ · flag

+ Comment

Anonymous · a month ago

Do I dare ask how the election of Scott Brown undermines the legitimacy of Obamacare?? Why can't we have a discussion with constitutional arguments without partisan bias?????
There is certainly an argument about the abuse of the filibuster undermining our democracy. You can have an objective argument without resulting to biases but somehow Anon you only argue your own political point of view.

↑ 0 ↓ · flag

Anonymous · a month ago

Because the election of Scot Brown made it clear that those voting for him did not agree with Paul Kirk's vote in favor of the Obamacare version that passed the US Senate (it was a direct counter argument to the 60 votes supermajority ; in fact, the election of Scott Brown showed that the people those US senators are supposed to represent were not voting with their constituencies in mind). Scott Brown's campaign was all about stopping the passage of Obamacare and he won.

This said, I am not saying that Obamacare was passed illegally. Procedurally speaking its passage was legal. We are talking about the idea of striking down laws that have democratic legitimacy. DOMA had more legitimacy than Obamacare and was stricken down. For purely political reasons, the supremes decided to uphold Obamacare while they decided to invalidate a part of DOMA. Democratic legitimacy played no role in either case, only the supremes' own ideology.

↑ 0 ↓ · flag

Anonymous · a month ago

Wasn't Scott Brown defeated for re-election after only two years? Isn't that a counter arguament to your aurgument?

↑ 0 ↓ · flag

Anonymous · a month ago

Not really because when Scott Brown was first elected the whole rationale he provided for his election was stopping Obamacare. It was a special election with a single issue in the ballot.

The 2012 election was a general election in which people vote with a lot of issues in mind.

So to summarize: the 2010 election that elected Scott Brown was a single issue election. The 2012 election in which he was defeated, not so much.

↑ 0 ↓ · flag

Stanley H Kelley · a month ago

Is that a revealed truth or just your interpretation? Are you really in a position to know why the voters of Massachusetts voted as they did in either 2010 or 2012?

↑ 0 ↓ · flag

Anonymous · a month ago

Obviously it is my interpretation, but this is a very minor point. As I said, Obamacare was

legally passed, that is not what I am questioning here. What I am questioning is that it passed "solidly". In fact, it didn't. After the election of Scott Brown, Obama was forced to take the Senate version, as passed, pass it untouched in the house (otherwise he would have had to face a filibuster that he would have not been able to pass after the election of Scott Brown), then go back to the senate and change the law to its final form through the reconciliation process that only required 51 votes.

Compare that with DOMA: 342–67 in the House, 85-14 in the US Senate, signed by Clinton. So the notion that SCOTUS justices need to feel bound by democratic laws that pass "solidly" and that such "binding" forced them to uphold Obamacare flies in light of the DOMA travesty.

The simpler, and more realistic, explanation is that the outcome in both Obamacare and DOMA can be explained by the ideology of the justices.

↑ 0 ↓ · flag

 Robert Prince III · a month ago

Anonymous: i dare not read and evoke thought upon your writtings, although I respect everything that you wrote. I understand preventative protective measures, but I would like to declare a statement before I get off. I support SCOTUS law.

↑ 0 ↓ · flag

+ Comment

James Raths Signature Track · a month ago

An earlier post wrote: In 1803 in the case of Marbury v. Madison the Supreme Court, in an opinion written by John Marshall, invalidated a part of the Judiciary Act of 1789 which gave the Supreme Court original (as against appellate) jurisdiction of writs of mandamus. His opinion for the court was that Article III of the Constitution specified the matters where the Supreme Court had original jurisdiction and the Congress could not expand what was in the Constitution. He further reasoned that a court, in cases where laws conflict, must decide which law is operative. Since, he said, there would be no point in having a written Constitution if it could be changed by a Act of the legislature. (End o quote).

Didn't Article III, Section 2 say that the Congress could make exceptions to the mandate of appellate jurisdiction? When Congress did make exceptions, including the Writ of mandamus, why did Marshall et al find it unconstitutional? Jim

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A post was deleted

 Alec D. Rogers · a month ago

An exception implies that it can withhold jurisdiction from the court's appellate jurisdiction. In

this case, the Court has NO jurisdiction - not original jurisdiction. See, e.g. Ex Parte McCardle.

In Marbury, the Court was presented with the case under its original jurisdiction (i.e. the case originated there rather than having gone to a lower court first), which the Judiciary Act of 1798 seems to have allowed for.

But he Constitution states that “the Supreme Court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the Supreme Court shall have appellate jurisdiction.”

Marbury held (among many other things) that because it granted original jurisdiction to the US Supreme Court in a case where the Constitution did not provide for original jurisdiction, that provision of the Judiciary Act of 1789 was unconstitutional.

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+ Comment

Stanley H Kelley · a month ago

I am still wondering what someone who thinks of themselves as an "originalist" has to say about my previous question as to whose intent is being talked about. Those who participated in writing it, those who participated in ratifying it, those who voted for the ones at the ratifying conventions? And how does one ascertain the "intent" of a group?

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Alec D. Rogers · a month ago

Stanley - you rarely hear "original intent" these days, but "original understanding." Generally we're talking about a consensus understanding at the time of ratification. We can look at how words were used, consult dictionaries of the time, look at the debates to see whether a provision had an agreed upon meaning, etc. Sometimes we can discern what a phrase was understood to mean by both sides at the time of ratification and using that understanding is, I think, pretty much mandatory. Sometimes we can't discern a common understanding of the Constitution's meaning in a certain case and we need to use other tools.

Don't make the mistake of believing (a) if we do enough research, we can always determine the original meaning; or conversely (b) because we can't always know the original meaning there's no use for ever using it. Both are equally illogical in my view.

You'll see a lot more from the professor on these issues in the second half of the class.

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Stanley H Kelley · a month ago

A concrete case: the Congress which passed the 14th Amendment and submitted it to the States maintained a school system in Washington, D.C. which was segregated by race. In Plessy v. Ferguson the Supreme Court ruled that Louisiana's law requiring racial segregation in public facilities (in the particular case it involved railroad cars) did not violate the 14th Amendment's requirement of "equal protection of the laws" and instituted the doctrine of "separate but equal."

In 1954 the Court ruled in Brown et. al. v. Board of Education of Topeka, Kansas et.al. that public schools must be de-segregated "with all deliberate speed" in order to comply with the Amendments requirement of "equal protection."

The question is which decision was right and which was wrong? Especially important is how "originalism" relates to this in light of the segregated Washington, D.C. school system maintained by the Congress which proposed the Amendment.

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 Alec D. Rogers · a month ago

(A) Plessy was wrongly decided. (B) Brown was correctly decided, but should have overturned Plessy rather than accommodating it (I understand Amar to take this view as well).

The schools in DC were segregated, but they were not done so by a mandate of Congress but rather than local school board. The fact that it did not then use its supervisory authority to overturn DC's segregated schools constitutes an act of omission. The fact that it was not challenged **may** have reflected that the DC schools for African-Americans were first rate for the time, but I'm not a scholar in the field - it's just a guess.

Further, I'd argue that it's perfectly possible for government to violate the clear and objective meaning even of its own law. For example, Congress enacted the sedition acts shortly after the First Amendment. It's doing so meant it wasn't faithful to the First Amendment - not that the First Amendment must not mean what we think it means.

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Stanley H Kelley · a month ago

Would you say that the 1954 Court erred in using sociological evidence to show that segregated schools were inherently unequal? Is that what you mean by saying that Brown was "accommodating Plessy?"

I will also note that the Congress which passed the 14th Amendment could have integrated the schools in DC but did not. I have no knowledge as to why.

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James Raths Signature Track · a month ago

For Alec Rogers. Thanks for your informative comment and response to my question. If the Supreme Court made a mistake and accepted a case (Marberry's suit) on original jurisdiction when tghey should not have done that, how does tghat make the Judiciarty Act unconstitutional?

Thank you.

Jim

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Alec D. Rogers · a month ago

The Judiciary Act of 1789 supposedly said that the Supreme Court had original jurisdiction in suits where a writ of mandamus was sought. The Court's opinion held that the Constitution's grant of original jurisdiction was limited to those cases spelled out in the Constitution, and therefore couldn't be expanded by statute. Therefore the statute was unconstitutional and could not be enforced, i.e. the case had to be dismissed without Marbury getting his commission.

The case actually can get very complicated as to what the statute really said, and there have been many interesting questions raised about whether it was engineered, but the above is the standard "Marbury 101" account.

For years Marbury has been taught as "establishing" judicial review. A very few professors including Prof Amar's casebook co-author Sanford Levinson believe its an intellectually dishonest and irrelevant case. But if asked the safe answer is that Marbury is the basis of judicial review.

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Anonymous · a month ago

Hey Anon, here's something to make your day. http://thinkprogress.org/lgbt/2014/02/12/3284561/federal-judge-kentucky-recognize-sex-marriages-stat...

What are you going to do about all these lbrul judges appointed by RINOs? Impeach?

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James Raths Signature Track · a month ago

Thank you Alec. The professor says that "judicial review was in the air." But what evidence is there of that. He cites Hamilton's Federalist 78 -- but Hamiltgon is just a wityness, and he barely attended the Convedntion half the tgime. If the idea of judicial review was "in the air," why wasn't it in the Constitution?

Further, why isn't some of the uplifting language of the Declaration found in the Constitution?

Jim

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Joel Kovarsky · a month ago

I am not sure you could ever have the soaring language of the Declaration in a constitution intended as the basic scaffolding for the political and administrative structures of a nation. Those are quite different things, not to mention different authorial styles at the outset. Here is an interesting piece on the rhetorical style of the Declaration: http://www.archives.gov/exhibits/charters/declaration_style.html . They testify that this document was "perhaps the most masterfully written state paper of Western civilization." That same site (US govt. archives) also has a section on the Constitution (and the Bill of Rights), and looking at the descriptions you can see quite a few differences in terms of intents and authorship.

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