

SCOTUS IS CHANGING THE DEFINITION OF AMERICAN CITIZENSHIP

In this post I discussed the Republican plan to rig SCOTUS by selecting SCOTUS nominees who would reliably vote their way on issues important to their base and their donors. They've succeeded. In this post I give a brief sketch of their goals for each group, the means of enforcement, and the impact on the nature and benefits of American citizenship.

1. Donors. There is an oligarchy inside our democracy, as I have been saying for over a decade. It dominates the Republican donor class. Oligarchs want the freedom to do anything they like with their money and the assets they control. They want the freedom to do whatever they think will make them richer. And they really hate the idea of taxation and all forms of redistribution of wealth. Their current goal is to weaken the ability of the federal agencies to regulate, because that reduces the value of their assets.

The first steps were legislative. The Administrative Procedures Act governs the way agencies make rules. Republicans and corporatist Democrats fiddled with it to make it harder for agencies to act quickly, and to increase the cost to the agencies of rule-making. Then the Office of Management and Budget was added as an additional check closer to the President.

Until recently the primary use of the courts was delay. Corporations and their front groups challenged every rule they didn't like. Courts took these filings seriously, and allowed lawyers to spend years in costly litigation. Gradually courts created a new layer of rules that brought delay and increased costs of regulation. But even that wasn't enough.

Right-wing lawyers have been arguing that there is no Constitutional basis for administrative

agencies, and thus no basis for rules made by agencies. This led to the non-delegation doctrine which limited the power of Congress to delegate authority to agencies. The current version is called the major questions doctrine, which says Congress has to be very specific about what it delegates if there is a big effect. It essentially gives SCOTUS the power to overrule any agency action it doesn't like by saying Congress wasn't explicit. As an example, SCOTUS used the shadow docket to strike down a CDC rule extending the nationwide moratorium on evictions in *Alabama Assn. Of Realtors v. Department of Health and Human Services*, [link here](#). The Court said the cost to landlords was so great that Congress had to explicitly give the agency power to make such broad rules.

We get a similar result in *National Federation of Independent Businesses v. OSHA*. In another case on the shadow docket, a 5-4 majority declared that the number of people affected by a workplace safety requirement that people be vaccinated or tested weekly was really big, and only Congress could make such a big decision.

And who gets to decide if a decision is too big? Not Congress. Not the President. Not the elected representatives of the American people. Nope. SCOTUS gets to decide. In these cases the big beneficiaries are the donor class and the anti-vax Trumpists.

2. The religious fanatics. During the pandemic SCOTUS gutted the CDC rules on attendance at super-spreader events, asserting that Churches had to be treated like grocery stores. Here's a more neutral discussion on ScotusBlog. These cases were also part of the general attack on agency rules dealing with the death and misery caused by Covid.

Of course, for the religious fanatics, the most important cases are attacks on *Roe v. Wade*. In the first set of cases, SCOTUS just couldn't figure out how to stop that blatantly unconstitutional Texas bounty law. So they left it in place, seriously impacting abortion

clinics in Texas.

The frontal assault is *Dobbs v. Jackson Women's Health Organization*, which seeks to limit abortions to 15 weeks, or to get rid of *Roe* altogether. The case was argued late last year. Here's a summary from SCOTUSBlog. A decision is expected in June, 2022, and everyone expects a big loss for citizens.

3. Cementing the outcome. It would be possible to get different outcomes if Congress actually represented the will of the majority. To make sure that doesn't happen, state legislatures draw districts that favor the party in power in the state. In *Rucho v. Common Cause*, a 5-4 majority of SCOTUS said that partisan gerrymandering "is incompatible with democratic principles", but sadly courts can't do anything to protect democracy.

Even racial gerrymandering is fine because it's always too close to an election, as the Court held in a bunch of shadow docket cases involving obviously racially gerrymandered districts. Here's a discussion of the problem.

Another challenge to democracy is the idea that state legislatures can make election rules without the checks and balances of their state constitutions, including their governors and courts. This is called the independent state legislature doctrine. I love the idea that this garbage jurisprudence calls itself "doctrines".

Each of these cases essentially means that we don't live in a democracy, that the votes of millions of us don't matter, and in turn, that government controlled by a minority of rich people and religious fanatics cannot be replaced by a majority of voters.

This may bring to mind the principle "one man one vote", an idea laid out in *Baker v. Carr*, and the related cases of *Reynolds v. Sims* and *Wesberry v. Sanders*. Here's the thing.

Computerized map-drawing has made it so that everyone gets an equal vote, but some votes are more equal than others.

4. Citizenship. I went to law school in the early 70s, so most of the important cases we studied in Constitutional Law were Warren Court cases. I learned to think of them as giving practical effect to the rights and privileges of being a US citizen. For example, everyone has a right to counsel in a criminal case under the Sixth Amendment. Until 1963 everyone with money had that right, but those who didn't have money didn't have that right. Then in *Gideon v. Wainwright*, SCOTUS made that right a reality for every American. In the same way, everyone had a right not to incriminate themselves. That was meaningless until *Miranda v. Arizona* made it clear that people must be informed of their rights, including their right to have a lawyer present during interrogation.

Another group of decisions made it clear that there were limits on the ability of states and the federal government to control people's private lives. *Griswold v. Connecticut* said states can't regulate birth control for married people. Cases like this limited the ability of government at all levels to intrude on our private lives.

As a result we gradually gained a full panoply of rights as American citizens, rights which could not be infringed by federal, state and municipal governments.

In this post I cited constitutional scholars across the ideological spectrum saying that originalism and textualism were the conservative backlash against these and many other so-called liberal decisions of the Warren Court. The six conservatives now ruling over us plan to gut those decisions. They were all selected for that purpose. In the future, we will have very few meaningful rights as American citizens. The bulk of our rights will be set by states, many of which are gerrymandered so that a minority can decide what you can and cannot do.

That's not my idea of America.