

# SCOTUS TAKES OVER



Good boy, Congress! Now it's your turn President

SCOTUS has set itself up as the sole arbiter of the constitutional limits on the power of the federal government. We say we have a federal government of limited powers. As I've noted in this series, one of the goals of the Founders was to keep the federal government from interfering in the internal affairs of the states. In the debates on the Reconstruction Amendments, there is a constant return to the idea that the feds shouldn't infringe state power. And there's the 10th Amendment:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Our federalism, or dual sovereignty, may have served political purposes in the late 18th Century, but now it's created monstrous problems. By narrowly construing the limits of federal power and asserting control over congress and the president, SCOTUS has created or ignored horrifying problems and made it almost impossible for us to solve them. In this post I'll look at several of them.

1. **Democracy** In *Citizens United*, the right-wing members of SCOTUS held that laws limiting PAC

spending on elections were somehow unconstitutional. Now billions of dollars are spent on dark money contributions that benefit campaigns, and while we can assume these people are filthy rich, we don't know who they are, and we have no to find out what they expect in return. (Hint: it's not good government.)

In *Shelby County v. Holder* SCOTUS struck down Section 5 of the Voting Rights Act, the pre-clearance provision,

... because the coverage formula was based on data over 40 years old, making it no longer responsive to current needs and therefore an impermissible burden on the constitutional principles of federalism and equal sovereignty of the states. Fn omitted.

In *Rucho v. Common Cause* SCOTUS allowed partisan gerrymandering.

The Court ruled that while partisan gerrymandering may be "incompatible with democratic principles", the federal courts cannot review such allegations, as they present nonjusticiable political questions outside the remit of these courts. Fn omitted.

In *Brnovich v. DNC*, SCOTUS upheld two Arizona laws making voting harder. The two laws had a disparate negative impact on poor people, mostly minorities. The explanation for this decision even in Wikipedia doesn't make sense to me, but then, I'm in favor of voting. It was generally seen as the last step before complete dismantling of the Voting Rights Act.

That destruction was narrowly avoided in the recent *Allen v. Milligan* decision, where John Roberts didn't reverse an earlier case, *Gingles*, discussed here. *Gingles* is a very narrow reading of §2 of the VRA, meeting Robert's lifelong goal of making it really hard to win a VRA case.

A majority of SCOTUS has now decided not to further attack democracy by adopting the ridiculous independent state legislature silliness. Of course they reserved their own supremacy.

These cases make voter suppression easy, and Red states have imposed a startling array of limitations. For example, Texas passed a law limiting drop boxes for mail-in ballots to one per county. In this interview Rep. Terri Sewell of Alabama, a sponsor of the John Lewis Voting Rights Advancement Act, describes some more.

The intent is clear. Continuing centuries of practice, SCOTUS revanchists rule that states are free to restrict voting any way they see fit, no matter the impact on democracy. As a result, SCOTUS is enabling minority rule.

The main impact is on cities, which are routinely cracked and packed to restrict their political power. For example, Texas tightly controls the ability of large cities to govern themselves. Recently cities were forbidden from requiring water breaks for workers as they swelter under a heat dome for the third week.

How long are Dallas, Houston, Austin and San Antonio residents willing to see their taxes spent in small country towns while rural religious fanatics control their personal lives?

**2. Women's Health** As I've noted Alito's decision in *Dobbs* doesn't comport with constitutional law as I learned it in the long ago. But its consequences have been sickening. Jessica Valenti tries to keep track of attacks on women in her substack. Pregnant women are refusing to travel to Red states or plan to leave them over health concerns.

Not content with controlling the lives of women who seek treatment inside their jurisdictions, the anti-women states pass laws with extra-territorial effects, like Texas' SB 8, the Bounty law. These states claim the right to attack citizens of other states who provide care. Blue states are responding by enacting

shield laws, refusing to recognize the demands of the aggressors. Here's an explainer from Vox. Shield laws typically operate to protect all kinds of health care criminalized by legislators in Red States, including gender-affirming care.

This sets up a serious conflict between the states, perhaps reminiscent of the fury over the Fugitive Slave laws. How long will normal people put up with these assaults?

**3. Taking away Congressional power** SCOTUS is working to hamstring Congress. One obvious example is *Shelby County v. Holder*, where SCOTUS said Congress didn't work hard enough to justify renewal of the VRA.

In the middle of the Covid crisis, Congress indicated OSHA should adopt a rule under its emergency authority requiring larger employers to protect their workers. OSHA complied. SCOTUS struck that down on the shadow docket. SCOTUS ruled that Congress couldn't delegate the management of the crisis to an agency but had to do something specific to prove to SCOTUS Congress did its homework.

In *EPA v. West Virginia*, SCOTUS said Congress had to pass a new bill if it wanted to do anything serious about climate change. It created a brand-new constitutional rule to explain its decision, which the creators gave the laughable title major questions doctrine. It says that if 5 members of SCOTUS think something is a big deal, Congress can't delegate authority to an agency under general language, but must specifically authorize the agency to act in a way those 5 oracles think conclusive.

We're told the solution is through the ballot box. How long will we put up with this sham voting regime when SCOTUS feels free to slap down laws that don't meet its ever-changing standards?

**4. Controlling executive powers** In the middle of the Covid crisis, district court judges enjoined enforcement of vaccine mandates for health care workers and rebellious members of the military.

The injunctions were upheld by appellate courts. Then SCOTUS overturned them after an emergency hearing. The lower courts set themselves up as arbiters of the nation's military and health care policies. SCOTUS implicitly agreed that lower courts were entitled to do so, even as it overruled these outrageous decisions.

Shortly after taking office, Biden established immigration enforcement priorities. Ken Paxton, the indicted, impeached, and wildly partisan Attorney General of Texas, filed suit to block those priorities and establish priorities he liked. The lower courts granted a stay and SCOTUS allowed that stay to remain in effect for a year. Then in *US v. Texas*, a recent decision I haven't read, SCOTUS overruled the 5th Circuit. This is typical for any decision of the executive. Courts at all levels feel free to impose stays and screw around for months while the problem festers.

How long can we let the judiciary prevent us from dealing with massive problems before we protect ourselves from their ignorance and their dangerous ideology?

Note: Please remember that you should not say, or even think, that SCOTUS is an illegitimate power-grabbing rabble intent on imposing their minority views. It hurts their feelings and detracts from the sanctity of their holy calling.