



Justice Waits for a Nine-Member Supreme Court

By Michele Jawando and Billy Corriher March 14, 2016

Within an hour of the news of Justice Antonin Scalia's passing on February 13, Senate Majority Leader Mitch McConnell (R-KY) said the Senate should not consider any U.S. Supreme Court nominee until the next president is inaugurated in 2017.¹ Since then, most Senate Republicans have signed on to Sen. McConnell's obstructionist threat, including Judiciary Committee Chair Charles Grassley (R-IA).² This dereliction of constitutional duty is unprecedented. The longest it has ever taken for a Supreme Court nominee to reach a confirmation vote is 125 days.³

In 2012, the American people re-elected President Barack Obama to do his job for another four years, and that job includes fulfilling his constitutional obligation to fill any vacancies on the Supreme Court. Likewise, the Senate must do its job and "advise and consent"⁴ on the nominee. The Constitution contains no exception to those obligations for presidential election years.

Down one justice, any 4-4 tied votes from the Court would result in a default upholding of decisions by regional circuit courts or state supreme courts.⁵ Some circuit courts could make federal law for the entire nation. In other areas of the law, Americans could have different constitutional rights in different parts of the country.⁶ The U.S. Supreme Court could hold some of these cases over until its next term—which starts in October—leaving millions of Americans waiting for justice.⁷

When the Supreme Court cannot decide the nation's most critical and divisive issues, countless lives hang in the balance. Tens of millions of women live in states with laws that are shutting down abortion clinics. More than 6 million Americans have loved ones who are unauthorized immigrants fearing deportation. There are millions of students graduating high school unsure of whether the Supreme Court will allow states to choose affirmative action to diversify colleges. The Court's redistricting cases could affect millions of voters or even the entire country. Millions of public employees who rely on strong unions could have their economic security threatened. Thousands of Americans work for religious employers that are arguing that their right to religious freedom outweighs the rights of their employees to access the contraceptive health care to which they are legally entitled.

Americans cannot afford to wait another year for answers to these crucial questions. As senators refuse to act, the public pays the price of obstructionist politics. If these senators follow through on their threat and refuse to vote on any Supreme Court nominee until 2017, their blatant obstruction could harm the Court's ability to make decisions for two terms.¹⁵ The millions of Americans whose lives and livelihoods are on the line would have to wait for justice.

More than 6 million family members of unauthorized immigrants and DREAMers

The Supreme Court is reviewing a ruling from the 5th U.S. Circuit Court of Appeals in *United States v. Texas* that struck down the Obama administration's Deferred Action for Parents of Americans and Lawful Permanent Residents, or DAPA, and expanded Deferred Action for Childhood Arrivals, or DACA, plans.¹⁶ These plans would allow nearly 4 million unauthorized parents and DREAMers to request temporary protection from deportation and authorization to work.¹⁷ This would ensure that the 6.3 million family members of these immigrants are not torn from their loved ones.¹⁸

Expanded DACA applies to unauthorized immigrants who entered the United States before 2010 and before their 16th birthday.¹⁹ DAPA applies to parents of U.S. citizens or lawful permanent residents who have lived in the country since 2010.²⁰ Both plans exclude immigrants with criminal records.

The 5th Circuit's order to block the plans was unusual in that it halted implementation across the entire nation, not just within the 5th Circuit. The court claimed that a nationwide injunction was required because of the Constitution's mandate of a "uniform rule" for immigration across the country—and the two-judge majority in the case took it upon itself to decide the scope of this rule.²¹

Unauthorized parents and children are languishing in a cruel limbo of uncertainty. Two Colorado parents who represent the millions who could benefit from DAPA, Alejandro and Estrella, have three children who are U.S. citizens.²² "It's really sad when your children know this struggle," said Estrella, "When you have to explain to your kids what would happen if you're taken away. ... You know your children shouldn't have to go through that. They should be worry-free."²³

More than 100 million Americans are waiting for the Supreme Court to decide critical issues that affect their lives:

- *United States v. Texas*: More than 6 million U.S. citizens with family members who are unauthorized parents or DREAMers⁸
- *Whole Woman's Health v. Hellerstedt*: Around 18 million women of reproductive age in 12 states with targeted regulation of abortion providers, or TRAP, laws⁹
- *Zubik v. Burwell*: Hundreds of thousands of Americans who work for religious institutions and their families, including more than 750,000 employees of Catholic hospitals alone¹⁰
- *Fisher v. University of Texas at Austin*: Around 1.5 million students of color who graduate high school each year¹¹
- *Wittman v. Personhuballah*: 1 million voters in Virginia and 2 million in North Carolina¹²
- *Evenwel v. Abbott*: 75 million children and 11 million unauthorized immigrants¹³
- *Friedrichs v. California Teachers Association*: More than 7 million public-sector workers¹⁴

The Center for American Progress found that implementing DAPA and the new DACA, along with the original DACA policy from 2012, “would dramatically raise the wages of all Americans by a cumulative \$124 billion over a decade”²⁴ and add an estimated \$230 billion to the country’s gross domestic product in 10 years:

*When approximately 5.2 million individuals are able to work legally and live without fear of deportation, they will have greater opportunities to find new jobs that match their skillsets and will be even more economically productive. Their lawful work authorization will make them less vulnerable to wage theft and workplace exploitation. These factors all lead to higher wages and more job security, which translate into more tax revenue generated and more economic activity across the nation.*²⁵

Despite these high stakes, the 5th Circuit stretched the law to strike these plans down when it ruled that Texas had standing, the kind of “concrete” injury that the Constitution requires to bring a lawsuit. Since Texas law allows unauthorized immigrants with “lawful status” to obtain driver’s licenses, the 5th Circuit reasoned that the costs of issuing these licenses amounted to a concrete injury to the state.²⁶

The dissenting judge noted that nothing requires Texas to offer such licenses, and she quoted a 1993 law review article by future Chief Justice John Roberts arguing that a lower burden for standing when states sue the federal government would transform courts into “ombudsmen of the administrative bureaucracy, a role for which they are ill-suited.”²⁷ The dissent argued that the majority’s approach effectively allows “the states, through the courts, to second-guess federal policy decisions.”²⁸

Texas’ argument also ignores precedent and a long history of deferring to the executive branch on immigration decisions. In 1999, the Supreme Court said that at each stage of the removal process, “the Executive has discretion to abandon the endeavor, engaging in a regulator practice (which had come to be known as ‘deferred action’) of exercising that discretion for humanitarian reasons or simply for its own convenience.”²⁹ Congress also granted the president explicit authority to establish “national immigration enforcement policies and priorities” in 2002.³⁰ A 2012 ruling authored by Justice Anthony Kennedy said the “broad discretion” entrusted to immigration officials extends to “whether it makes sense to pursue removal at all.”³¹

Without nine justices, the Supreme Court could be unable to muster a majority in this case, leaving millions of families across America waiting for an answer.

18 million women of reproductive age in 12 states

The Supreme Court is reviewing another 5th Circuit case this term involving Texas' targeted regulation of abortion providers, or TRAP, law. Eleven other states have similar laws, and together, these laws could limit access to constitutionally protected abortion care for the 18 million women of reproductive age in those states.³² Nearly 1 million women in Texas could live farther than 150 miles from a clinic that provides abortion services, thanks to a Texas law that requires clinics to both have doctors with admitting privileges at nearby hospitals and meet the same standards as ambulatory surgical centers.³³

Since 2010, TRAP laws have become a popular strategy to attack women's reproductive rights by imposing medically unnecessary³⁴ and often impossible-to-meet regulations on abortion clinics under the guise of protecting women's health and safety.³⁵ In reality, these laws have one purpose: eroding women's reproductive rights by shutting down abortion clinics. Rights without access are meaningless for millions of women in states with TRAP laws.

The Supreme Court should find Texas' law unconstitutional because it erects an "undue burden" on women's right to abortion. Determining whether a burden is "undue" requires weighing the harm to women's rights against any benefits the law provides.³⁶ When a federal court struck down Wisconsin's TRAP law, the judge found that the law's "only purpose ... was to restrict the availability of safe, legal abortion."³⁷

Justice Ruth Bader Ginsburg lamented that "women of means" in states with TRAP laws will have a right to an abortion because they can "afford a plane ticket, a train ticket, or even a bus ticket."³⁸ Abortion access should be available to all women, not just a wealthy few.

One hundred and thirteen female attorneys filed a brief with the Court describing their own abortions.³⁹ One of the attorneys, a public defender, describes how she broke her family's intergenerational cycle of teenage pregnancy:

*If I had not had an abortion, I would have never been able to graduate high school, go to college, [or] escape my high-poverty rural county in Oregon. ... I have seen the effects of teenage motherhood for women in my family, my friends, and loved ones. I have seen all the dreams deferred, the plans derailed, the poverty endured.*⁴⁰

Until there is a majority decision by the U.S. Supreme Court to settle this issue, the scope of a woman's constitutional right to an abortion will essentially depend on where she lives and whether she can afford to travel. Millions of women are waiting for certainty. Until then, some states will continue to respect women's constitutional rights, while others will keep eroding *Roe v. Wade* by making it virtually impossible for some women to access abortion care.

Hundreds of thousands of employees of religious institutions

The Supreme Court is also hearing a challenge to the accommodation provided to religious employers that object to the employer-provided contraception coverage requirement in the Affordable Care Act, or ACA. The lawsuit, *Zubik v. Burwell*, claims that merely requesting the accommodation, which would allow employees to access contraception coverage through a third party if their employer has a religious objection, represents a substantial burden on the employer's religious beliefs. The religious nonprofits in *Zubik* "claim that submitting a form stating that they have a religious objection makes them complicit in the government providing insurance coverage that they find objectionable."⁴¹

The case could affect hundreds of thousands of employees of religious institutions and their families if these employers choose to assert religious freedom in order to justify exceptions to the law.⁴² More than 750,000 Americans work for Catholic hospitals alone.⁴³ Lawsuits claiming that the contraception mandate violated the right to religious freedom were filed by more than 100 employers, 70 of which employ more than 9,000 workers in total.⁴⁴

In *Hobby Lobby v. Burwell*, the Supreme Court ruled that the ACA contraception mandate violated the religious rights of closely held, for-profit corporations, extending religious rights to corporations for the first time in history.⁴⁵ The Court allowed closely held corporations to assert religious rights under federal law, and it decided that these newly created rights trumped employees' rights to the health care to which they are legally entitled.⁴⁶

If the Court puts the rights of employers above the rights of employees in *Zubik*, the consequences would stretch far beyond the millions of women who could lose ACA-covered access to contraception to the dependents of these employees.

Since *Hobby Lobby*, businesses and individuals opposed to marriage equality have also asserted religious freedom to justify discriminating against LGBT individuals and others whose lives they find objectionable.⁴⁷ The Center for American Progress argues that "overly broad religious exemptions that impose costs on third parties ... are false protectors of religious liberty and cause significant harm."⁴⁸

Eight out of the nine circuit courts that have considered these lawsuits rejected the claim that merely signing the accommodation form violates an employer's religious freedom.⁴⁹ But until there is a definitive word from the Supreme Court, nothing is certain. The rights of employees of religious institutions hang in the balance of an eight-member Supreme Court.

1.5 million high school graduates of color each year

The issue of affirmative action is back before the Supreme Court this term in a case that could affect the millions of students of color who will graduate high school in the coming years. The Western Interstate Commission for Higher Education estimates that a little more than 3 million students will graduate high school annually for the next several years, starting in 2019.⁵⁰ The commission also estimates that 45 percent of these graduates, around 1.5 million individuals, will be students of color.⁵¹

Although the 14th Amendment was passed to protect the rights of African Americans after the end of slavery, the plaintiffs in *Fisher v. University of Texas at Austin* argue that affirmative action violates white students' rights to equal protection under the 14th Amendment.⁵² The Court sent *Fisher* back to the 5th Circuit in 2013 and ordered it to examine the program under "strict scrutiny," the toughest standard for constitutional analysis.⁵³

The Court's conservative justices generally argue that the Constitution prohibits any race-based government decisions, even those made to ensure educational diversity or help students of color. Justice Clarence Thomas has even compared the arguments in favor of affirmative action to historical arguments for slavery and racial segregation.⁵⁴ In 2007, Chief Justice Roberts said, "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race."⁵⁵ In that case, the Court struck down school busing plans in two school districts that were de facto segregated but had not engaged in official Jim Crow-style segregation.⁵⁶

Affirmative action helps level the playing field for students from historically marginalized communities, and in doing so, it ensures that the American dream of upward mobility is available to all.⁵⁷ Other college admissions policies, such as those for legacy admissions, are less likely to benefit nonwhite students.⁵⁸

Black and Latino students are less likely to attend good high schools because of the severe inequities in school funding,⁵⁹ and states that have banned affirmative action in college admissions have seen a dramatic decrease in college enrollment by students of color. The University of California, Berkeley experienced a 61 percent drop in admissions of black, Latino, and Native American students after the state banned affirmative action, and the University of California, Los Angeles saw a 36 percent decline.⁶⁰ Within three years of Michigan's affirmative action ban in 2008, only 5 percent of first-year students at the University of Michigan were black, even though black students made up nearly one-fifth of the state's college-age population.⁶¹

The Court will decide *Fisher* without Justice Elena Kagan, who recused herself because she helped defend the affirmative action program while working for the U.S. Department of Justice.⁶² If the vacant seat remains unfilled, a seven-member Court could decide the case or delay a resolution of the case yet again. Renowned American legal scholar Garrett Epps wrote that Justice Anthony Kennedy “does not like affirmative action and has never voted to affirm it. On the other hand, he has a horror of the kind of bright-line opinion outlawing affirmative action the conservatives would favor.”⁶³

3 million voters in North Carolina and Virginia

The Supreme Court is reviewing lower-court rulings that redistricting maps in Virginia and North Carolina illegally packed black voters into certain legislative districts.⁶⁴ In 2008, both Virginia and North Carolina voted for President Barack Obama thanks in part to record turnout by black voters.⁶⁵ Since then, legislators in both states have passed laws that would disenfranchise and silence black voters.⁶⁶ Reva McNair, a black voter in North Carolina, said that “instead of encouraging people to work together across traditional social divides, the [redistricting] maps segregate voters by race when they wind through communities.”⁶⁷

When politicians in these two states drew the now-challenged maps after the 2010 census, they used the Voting Rights Act, or VRA, as an excuse to pack black voters into certain districts. At the time, the VRA required states with a history of voting discrimination to ensure that voters of color can elect their “candidates of choice.”⁶⁸ Virginia politicians claim that this required them to increase the percentage of black voters in a congressional district to 55 percent,⁶⁹ and North Carolina’s legislature sought two districts with more than 50 percent black voters.⁷⁰

But the Supreme Court said last year that the VRA does not require “a particular numerical minority percentage.”⁷¹ Legislators must begin by asking how to maintain political influence for voters of color. Otherwise, a racial gerrymander might “harm the very minority voters that ... the Voting Rights Act sought to help.”⁷² The Virginia NAACP pointed out that black voters have always been able to elect their candidate of choice in the district at issue.⁷³

After the Supreme Court ruling, Virginia moved more than 1 million voters into districts that were not drawn according to race.⁷⁴ Legislators in North Carolina composed a new map that reassigns 2 million voters based on past voting history instead of race.⁷⁵

The new maps could again be reviewed by the Supreme Court this term,⁷⁶ and the fate of these voters could rest in the hands of a short-staffed Court. With key elections happening this year, millions of voters are waiting for the Court to decide whether states can segregate them by race.

75 million children and millions of unauthorized immigrants

Evenwel v. Abbott, another redistricting case, could have a nationwide impact on how people count for purposes of political representation in state governments.⁷⁷ The plaintiffs argue the Constitution requires that representatives be apportioned based on the number of eligible voters instead of total population—a radical change in how legislative districts are drawn.⁷⁸

A ruling for the plaintiffs would mean that legislators only represent actual voters instead of everyone in their district. Large segments of the population would become “invisible or irrelevant to our system of representative democracy,” the Obama administration argued.⁷⁹ Seventy-five million children would no longer be represented in state legislatures, which would lead to “less access to critical resources, including quality education, health care, and services supporting children living at or below the poverty line,” according to a brief from the Children’s Defense Fund and others.⁸⁰

This change would have a disproportionate impact on communities of color, particularly Latino and Asian communities, in which more than half of the population is not eligible to vote, according to the Pew Research Center.⁸¹ An estimated 11 million unauthorized immigrants would no longer be represented in state government.⁸² Although these people cannot vote, they deserve to be represented in America’s democracy.

For decades, states have apportioned representatives by dividing total population by the number of seats to obtain roughly equal population across districts, according to the Court’s “one person, one vote” rule. Thus, a lower court said the plaintiffs were “relying upon a theory never before accepted by the Supreme Court or any circuit court.”⁸³ But if the Court cannot make a definitive decision, the future of “one person, one vote” will remain uncertain.

More than 7 million public employees

In *Friedrichs v. California Teachers Association*, so-called right-to-work activists are attempting to harm public-sector unions—which have strengthened the economy for everyone and helped build the middle class⁸⁴—by directly threatening the economic security of more than 7 million public-sector workers and their families.⁸⁵ This effort is part of a larger strategy to systematically limit the rights of workers and the unions that represent them.⁸⁶

Because unions are required to bargain on behalf of all employees—even those who opt out of membership—they are allowed to collect “fair share” fees from nonunion workers that go solely toward the costs of bargaining.⁸⁷ Conservative activists are challenging these fees as unconstitutional, and a win for them would incentivize so-called free riders who benefit from union representation without contributing to the costs of bargaining.⁸⁸

A Center for American Progress report assessed the impact of the decades-long decline in union membership and found that “the decline in union coverage accounts for 35 percent of the falling share of middle-class workers.”⁸⁹ Another report found that the children of union members have better health, earn more money, and obtain more education than the children of nonunion parents.⁹⁰

If an eight-member Court is unable to issue a final ruling, the economic security of millions of workers and their families will remain in jeopardy.

Conclusion

Millions of Americans are waiting for the Supreme Court to settle important constitutional questions that will directly affect their families. Some of these questions could be decided by the Court this year—but only if the Senate does its job.

The refusal of obstructionist senators to carry out their constitutional duty to consider Supreme Court nominees is unprecedented. The Senate has never denied a hearing for a Supreme Court nominee.⁹¹

If Senate Republicans follow through with their threats of obstruction, it would damage the Court and its ability to answer the country’s most pressing constitutional questions. But it would be even more damaging for the millions of Americans whose lives and livelihoods sit in legal limbo, dependent on an eight-member Supreme Court that may be deadlocked and unable to set precedent.

The framers of the Constitution intended the federal judiciary to be a stable body that ensures the rule of law by setting precedent that creates consistency and predictability across the country. They could not have imagined that so many senators would put partisan priorities above their responsibility to govern by holding the Supreme Court hostage. Millions of Americans are waiting for justice—and waiting for the Senate to do its job.

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