Slate

The Supreme Court's Most Important Cases of the New Term

Just how bad will things be for abortion, affirmative action, unions, and voting rights?

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The 2015 term is poised to begin, and the Supreme Court has already agreed to hear 34 of the 70 some cases it will decide this year. The court broke left on some big cases last term, but the theme of this upcoming year at the court may well be: Is the court moving right, or far right, or really, really far right?

In most of the blockbuster cases already granted, we see the return of disputes that the court has either batted away before or moved on incrementally. Issues such as abortion, union fees, affirmative action, and juvenile justice are coming back for another hearing. The question now is whether change happens in big steps or baby steps. Here are some of the cases to watch:

One Person, One Vote?

Evenwel v. Abbott is a seemingly abstract case with awkward racial and political undertones. It involves the so-called one-person, one-vote principle—Chief Justice Earl Warren's signature achievement. (He thought it was his most important contribution to constitutional law.) In a 1964 case called ***Reynolds v. Sims***, the Warren Court held that the 14th Amendment's Equal Protection Clause requires states to apportion both legislative houses on the basis of population. That rule makes sense: Before *Reynolds*, many state legislatures had radical disparities in apportionment, leading to the extreme dilution of some votes. In Connecticut, for example, one House district contained 191 people; another, 81,000. Each district was represented by a single legislator.

The plaintiffs in *Evenwel*—who are represented by the same conservative activists who helped **gut the Voting Rights Act**—want to change the math used to calculate voting equality. They argue Texas must use the number of ***voters*, not *people***, to apportion districts in the state legislature. Under the current system, they allege, city-dwellers' votes count more than rural residents.' Cities may be heavily populated but have a relatively low proportion of people who turn out to vote, who nonetheless elect a significant number of legislators. Sparsely populated counties may have a high proportion of voters but not enough people to elect many

representatives. The *Evenwel* plaintiffs think Texas should be forced to count voters to avoid this disparity and that other states should be permitted to follow the same route.

There are two problems with this theory. The first is that, constitutionally speaking, **it makes little sense**. In two key clauses, the Constitution speaks of people, not just voters—most notably in the **14th Amendment**, which requires congressional apportionment based on "the whole number of persons in each State." The Equal Protection Clause itself also declares that no state may deny any "person" the "equal protection of the laws." Counting only voters would mark a radical departure from the plain constitutional language valuing the equality of *people*—whether or not they've cast a ballot.

The second problem with *Evenwel* is that, at bottom, it is the kind of profoundly political case that Chief Justice John Roberts **obviously hates**. In Texas, Hispanics—many of whom are ineligible to vote—tend to live in urban areas, while rural counties are predominantly white. As **the Cato Institute's brief** puts it, "a relatively small constituency of eligible Hispanic voters" thus have their votes "over-weighted" and "over-valuated." That's a polite way of saying that Hispanics have too much power. Everybody (even Supreme Court justices) knows that Hispanics tend to vote for Democrats, and white Texans tend to vote for Republicans. By counting votes instead of people, Texas would create white, Republican districts and erase Hispanic, Democratic ones.

We know at least three justices are eager to hand the GOP a victory no matter **how weak the merits of the claim**. The big question in *Evenwel*is whether Roberts and Justice Anthony Kennedy will uphold half a century of precedent or join hands with their fellow conservatives to embark on a new, white-empowering constitutional adventure.

Public-Sector Unions

Public-sector unions have been on constitutional life support for years—and this term, the court's conservatives may finally pull the plug. In June, the court **agreed to hear a case** called *Friedrichs v. California Teachers Association,* which deals with "fair share" union fees. Forty years ago, in ***Abood v. Detroit Board of Education***, the Supreme Court **held** that nonunion members couldn't be forced to pay full union dues. That, the court held, would violate their First Amendment rights by compelling them to associate with a union and fund its political activities. However, the justices found that public-sector unions *could* require nonmembers to pay fees associated with nonpolitical union representation, like collective bargaining. If nonunion members could opt out of fair-share fees, the majority noted, they would get all the benefits obtained by a union—while paying none of the costs.

Justice Samuel Alito has clearly wanted to disembowel *Abood* for as long as he's been in the court. He's already written an **opinion**—joined in full by the other four conservatives—that sharply criticizes *Abood*'s basic holding. ("Readers of today's decision will know that Abood does not rank on the majority's top-ten list of favorite precedents," Justice Elena Kagan scolded in dissent.) Alito seems to think that, in the public sector, collective bargaining and political advocacy are too indistinguishable to draw a constitutional line—and that collective bargaining itself may be inherently political. Thus, requiring nonunion members to help fund collective bargaining constitutes compelled political speech in violation of the First Amendment.

Friedrichs gives Alito the opportunity to turn this belief into law by overruling *Abood.* That outcome would likely cripple public-sector unions across the country by denying them fair-share fees from nonmembers. Unions might as well brace for the crash now: The conservatives will almost certainly use this case to **push their deregulatory economic agenda** on the country. In the Roberts Court era, the question isn't whether unions will win or lose. It's whether unions will **take a single punch** or a full-on beating.

Affirmative Action

Back in 2003, the court held in *Grutter v. Bollinger* by a 5–4 margin that colleges and universities could use race as a factor in their admissions policies "to further a compelling interest in obtaining the educational benefits that flow from a diverse student body." Justice Sandra Day O'Connor at the time famously predicted that the need for affirmative action might fade away in 25 years. The current Supreme Court might be on an accelerated schedule.

In June 2013, the court had a chance to do away with affirmative action in higher education once and for all. O'Connor had departed the court, and Samuel Alito, who replaced her, is no fan of racial preferences. The University of Texas has an admissions system under which students who finish in the top 10 percent of their high school classes get automatic admission to any public university and other students are then admitted using a "holistic" review process that may or may not take race into account. Abigail Fisher did not get into the University of Texas at Austin and sued, claiming the admissions **program violated the 14th Amendment**.**Edward Blum** of the Project on Fair Representation—who is also bringing the *Evenwell* challenge—has backed Fisher's challenge since it came to the high court in 2013.

Surprising everyone, in a 7–1 ruling the Supreme Court decided not to overturn the University of Texas' affirmative action program but did find that the program needed to be assessed more rigorously, under a "strict scrutiny" test. The court kicked the whole project back to the 5th U.S. Circuit Court of Appeals to determine if the university's affirmative action program passes this test. The 5th Circuit took another look and upheld the program. Again. "It is equally settled that universities may use race as part of a holistic admissions program where it cannot otherwise achieve diversity," **wrote the 2–1 majority**. The very fact that the court agreed to hear Fisher 2.0 has **supporters of affirmative action worried**. Kennedy has never upheld an affirmative action program. Kagan, who worked on *Fisher* as Solicitor General, is recused.

Abortion

There is not yet an abortion case on the docket for the 2015 term, but buckle in: **There probably will be**. Two cases are currently before the justices, who will decide soon whether to hear the first major reproductive rights case since 2007. *Whole Woman's Health v. Cole* concerns whether almost half of the **abortion clinics in Texas can be shuttered**. The two specific provisions before the justices require that abortion providers have admitting privileges at a local hospital and that abortion facilities be retrofitted as ambulatory surgical centers. The 5thCircuit has blessed both requirements, finding that they do not impose an "**undue burden**" on the women seeking to terminate their pregnancies.

Texas argues that both requirements protect the state's interest in maternal health. Reproductive rights advocates say these laws and other onerous restrictions are aimed only at limiting access to abortion. In a sign that the court is probably ready to weigh in to the fight, following the 5th Circuit decision to let the law go into effect, the Supreme Court voted 5–4 to **stay that ruling until it determined whether to hear the case**. Four justices—Roberts, Antonin Scalia, Clarence Thomas, and Alito—would have let the order proceed.

The court also has before it a request from the state of Mississippi, which is facing similar onerous regulations. In *Currier v. Jackson Women's Health Organization*, the court would agree to review another 5th Circuit ruling (from a different panel) that struck down Mississippi's admitting privileges law. The law, if enforced, would shut down the state's last abortion clinic.

On top of these cases, there is also a growing **likelihood that the court will have to look at** whether **religious nonprofits are burdened even by the accommodation** that allows them to opt out of providing employees with contraception to which they are entitled under the Affordable Care Act. In each of these reproductive rights cases, all eyes will be on Justice Kennedy: If the Kennedy who voted to uphold *Roe v. Wade* in 1992's *Planned Parenthood v. Casey* decision shows up, the right to choose will live another day. If he decides to fret about maternal regrets as he did in 2007's *Gonzales v Carhart*, abortion rights for women in many states will all but evaporate.

Life Sentencing for Juveniles

In 2012, in *Miller v. Alabama*, the court ruled that juveniles found guilty of murder could not be sentenced to a mandatory life sentence without parole. (The decision was 5–4, with Kennedy swinging liberal.) In *Montgomery v. Louisiana*, the issue is simply whether the *Miller* rule must be applied retroactively—that is, to defendants who were sentenced before juvenile mandatory life without parole was invalidated.

That's a surprisingly tricky issue to decide. Under Supreme Court **precedent**, a typical *procedural* rule only applies once the court announces it. A new *substantive* rule, on the other hand, applies retroactively. If *Miller* is merely about the right of juvenile defendants to a fair hearing before getting life without parole, it's a procedural ruling. If *Miller* is about the fundamental cruelness of mandatory life sentences for minors, it's a substantive ruling.

Henry Montgomery, the "juvenile" plaintiff in the case, is 69. The murder he committed took place in 1963, when he was 17. The Louisiana Supreme Court refused to apply the rule against mandatory life without parole to Montgomery's sentence, but many other state supreme courts have **found** that *Miller* does apply retroactively. This term, the Supreme Court will settle the issue—quite possibly along the same 5–4 split as the original decision.

Last term ended with **the justices yelling at each other** about **when**, and **whether**, it's OK for the government to kill people. This term, the justices will debate race, voting, unions, fetuses, and murderers. Forget the GOP presidential debates. **1 First St.** is where the real fun happens.