

WOMEN'S RIGHTS AT STAKE: WHY JUDICIAL NOMINATIONS MATTER TO WOMEN

Federal Courts Decide Legal Rights and Principles of Critical Importance to Women.

Over the last four decades, the federal courts have given life and meaning to legal rights for women, including:

- *Right to Privacy*: The constitutional right to privacy protects many aspects of Americans' daily lives, including decisions involving whether to bear children, the ability to keep medical records private, living with extended family members, and having consensual adult sexual relations.
- *Equal Protection*: The Equal Protection Clause of the Fourteenth Amendment to the Constitution provides that "no state shall ... deny to any person within its jurisdiction the equal protection of the laws." Since 1973, the Supreme Court has held that laws or government policies that discriminate on the basis of sex cannot be upheld unless they can withstand heightened judicial scrutiny. This means that a law that discriminates on the basis of sex is only permissible if it is based on an exceedingly persuasive justification and is substantially related to an important state interest.
- *Antidiscrimination Protections*: Congress has passed a number of laws that protect against sex discrimination, including at work and at school. These include Title IX, the landmark law that bars sex discrimination in educational institutions and programs that receive federal funds, and Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of sex, race, national origin, or religion. Other laws protect against discrimination on the basis of age or disability in the workplace. The courts' interpretation and enforcement of these laws have been critical in breaking down barriers for women and girls in many facets of life. And the Supreme Court has upheld affirmative action in our nation's educational institutions and workplaces, principally under the Fourteenth Amendment to the Constitution and under Title VII. Affirmative action programs have played a key role in opening up opportunities for women and minorities in employment, education, and other arenas.
- *Health and Safety*: Federal courts have repeatedly affirmed Congress's power to pass laws under the Commerce Clause and the Fourteenth Amendment (and other constitutional provisions) to protect public health, safety, and welfare in a wide range of areas, including family leave, clean air and water, and safe access to health care clinics – and, most recently, health care reform.
- *The ability to enforce individual rights in court*. An important federal civil rights law, Section 1983 (42 U.S.C. § 1983), provides individuals with the ability to enforce their federal rights – including constitutional rights -- in court. This law allows individuals who believe that state and local governments violated their federally-protected rights to sue to protect their rights.

Not Just the Supreme Court: Federal District Courts and Courts of Appeal Impact Women's Lives.

The Supreme Court has the final say in interpreting the Constitution and federal statutes. But the lower federal courts (the Courts of Appeals and the District Courts) also have an enormous effect on the lives of women, and of all Americans.

- The vast majority of cases in the federal system are never reviewed by another court. The Supreme Court decides fewer than 90 cases each year, while the Courts of Appeal receive over 60,000 new filings and federal District Courts receive over 320,000 new filings each year. The lower federal courts are thus the final decision-makers in most cases.
- Federal appeals are decided by three-judge panels. Appellate court decisions are rarely reviewed, either by the full court (in an *en banc* decision) or by the Supreme Court, so panels of the federal Courts of Appeal decide what the law is for the people in their region (or circuit) in many cases.
 - In many areas, the Supreme Court's decisions leave wide latitude for lower court judges to interpret and shape the law. For example, in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the Supreme Court ruled that states may impose restrictions on abortion as long as they do not place an "undue burden" on a woman who seeks to terminate her pregnancy, but gave little guidance on when a burden is "undue." By the time the Supreme Court first reviewed any lower court's application of the "undue burden" standard eight years later, countless women had irrevocably lost their right to choose because of erroneous lower court rulings.
 - Some Court of Appeals judges have gone so far as to disregard precedents of the Supreme Court altogether in their decisions. Unless and until the Supreme Court grants review, erroneous lower court decisions stand, and bind all the courts in that jurisdiction. For example, the Fifth Circuit ruled in 1996, contrary to Supreme Court precedent, that affirmative action in higher education programs was illegal. But the Supreme Court did not review the Fifth Circuit's decision. When the issue finally came before the Supreme Court seven years later, the Court found that affirmative action *was* permissible under certain circumstances.
- District Court judges (the trial courts in the federal system), though subject to review by the Courts of Appeals, also exercise significant power. Most decisions by District Courts are never appealed. Even when cases are appealed, District Courts make factual determinations that are given great deference by the reviewing courts, direct the flow of evidence, and, in taking the first crack at applying the law in a dispute, frame the issues at stake.

Judicial Nominations Are a Woman's Issue.

Many of the key legal protections upon which women have relied for many years are gravely at risk – hanging in the balance of power on the federal courts. As a result, it matters deeply to women that highly qualified individuals who are committed to upholding legal protections for women and all

Americans are confirmed to lifetime seats on the federal courts, that women are fairly represented on the bench, and that judicial vacancies are filled so that all Americans can have their day in court.

It is of critical importance that judicial nominees possess honesty, integrity, character, temperament, intellect, and demonstrate lack of bias in applying the law. Furthermore, increasing the diversity of the federal bench so that it more closely reflects America and an increasingly diverse legal profession is an important consideration. In addition, it is imperative that judges nominated to fill vacancies on the federal courts – not only the Supreme Court, but the lower courts as well – understand the impact of the law on the lives of women and girls, and share a commitment to realize the intended purpose and effect of the laws of the land.

Finally, judicial vacancies also matter to women. Because of the efforts of a determined minority in the Senate over the past two years, nearly one in ten judicial seats is currently vacant. When courts are understaffed, women in need of the law's protections can have their day in court put on indefinite hold.

Because federal courts give life and meaning to hard-won legal protections for women, nominations to lifetime seats on those federal courts are important to women.