Mapping a Divided Court

The Senate Republicans’ refusal to consider Supreme Court nominee Merrick Garland has forced the country into a perilous state of legal uncertainty. One of the Supreme Court’s most important duties is to ensure nationwide uniformity and consistency on important questions of federal law, including the meaning and scope of constitutional rights. When circuit courts reach conflicting conclusions about the law—generating a “circuit split”—the Supreme Court is often quick to step in, providing clarity with a definitive interpretation.

But with only eight justices, the Supreme Court can find itself deadlocked in a four-four tie. By rule, a tie vote affirms the lower court that heard the case before it was appealed to the Supreme Court. But unlike a decision where a majority of the voting justices set a binding, nationwide precedent, a tie leaves the disputed legal question unresolved, as if the Court never heard the case at all. That means that people who live in circuits that have yet to decide the issue don’t know what the law is, and elsewhere the same law has different meanings based solely on geography.

This week, we also saw the Court avoid a tie by punt ing on significant legal issues. That happened both in Spokeo v. Robins, a case with enormous implications for consumers’ ability to access courts when their rights are violated, and in Zubik v. Burwell, which involved whether women who work for religious non-profits can obtain insurance coverage for contraception under the Affordable Care Act. In each case, the Court declined to reach the merits—in Spokeo it remanded for further consideration by the lower court, and in Zubik it suggested that the parties work on a compromise solution. But whether the Court formally deadlocks or agrees to decide nothing, the result is the same: A nationwide patchwork of inconsistent and uncertain law, including constitutional rights that wax and wane just by crossing state lines.

But what does that patchwork look like?

The maps below illustrate examples of existing circuit splits in cases currently pending before the Supreme Court, including cases in which the Court has already heard oral argument, and others the Court is set to hear next term. These five cases do not account for all of the pending circuit splits—far from it, including both this and the October 2016 term, there are about 37 cases with circuit splits before the Court right now—nor do they account for cases the Court may decline to hear while it is short staffed. But they do demonstrate the variety and importance of the issues at stake, including reproductive freedom, the death penalty, separation of church and state, class actions and access to courts, and racial bias in the decisions of criminal juries.

Reproductive Justice: Does a state have to show that an abortion regulation will promote women’s health?

In 1992, the Supreme Court held in Planned Parenthood v. Casey that states cannot place an “undue burden” on women’s access to abortion. Since then, the circuit courts have split on how to apply the undue burden test: The Seventh and Ninth Circuits have held that a state cannot merely assert an interest in protecting women’s health when passing laws that restrict abortion access, they must show that the law actually furthers that interest. But the Fifth Circuit does not require—or even permit—inquiry into the actual health effect that an abortion restriction might have; a state could pass a law that would actually make women less safe so long as the state claims to be protecting women.

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2 See Planned Parenthood of Wis., Inc. v. Van Hollen, 738 F.3d 786 (7th Cir. 2013) (questioning the “stated rationale” of protecting women’s health through requiring admitting privileges when admitting privileges are not required for procedures that are as dangerous as abortions and when there has not been any showing that admitting privileges will make women who undergo abortions any safer); Id. at 798. (“The feebler the medical grounds, the likelier the burden, even if slight, to be ‘undue’ in the sense of disproportionate or gratuitous.”); Planned Parenthood Ariz., Inc. v. Humble, 753 F.3d 905, 914-915 (9th Cir. 2014) (holding that the undue burden test requires a court to weigh the “strength of the state’s justification” and noting that Arizona had presented “no evidence whatsoever that the [abortion regulation] furthers any interest in women's health.”)

3 Whole Woman's Health v. Lakey, 769 F.3d 285, 297 (5th Cir. 2014) (“In our circuit, we do not balance the wisdom or effectiveness of a law against the burdens the law imposes.”); Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 748 F.3d 583 (5th Cir. 2014) (rejecting an inquiry into the health effect of the law under the undue burden test and requiring only “rational speculation” that there could be a benefit to health).
On March 2, the Supreme Court heard *Whole Woman’s Health v. Hellerstedt*, a challenge to abortion restrictions that were allegedly passed to promote women’s health, but are in reality a sham designed to close women’s health clinics. The case presents an opportunity for the Court to clarify whether the undue burden analysis requires an inquiry into the health effects of a restriction. But if the Court splits 4-4, circuits covering 12 states will engage in meaningful review of a state’s alleged motives, while the Fifth Circuit, covering Texas, Louisiana, and Mississippi, will allow window-dressings of concern to validate laws that endanger women and strip them of their constitutional rights.

**Fair Courts and Due Process:** Is the decision of a panel of judges or other tribunal rendered invalid by the participation of a biased judge, even if she is not the decisive vote?

At stake in *Williams v. Pennsylvania*, argued on February 29, is not just uniformity in the law, but the life of a man who may be executed if the Court cannot decide the case. The district attorney who prosecuted Terrance Williams and approved seeking the death penalty in his case later ran for the state supreme court—touting his “tough on crime” record and all the defendants for whom he obtained a death sentence, including Williams. The district attorney won the state supreme court seat and then refused to recuse himself when Williams’s case came before the court on collateral review. The state supreme court reinstated Williams’s death sentence, with the prosecutor-turned-justice casting a non-decisive vote in favor of death. The question in the

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6 No. 15-5040, 136 S. Ct. 28 (2015).
Supreme Court is one over which circuit courts have divided: When a biased judge casts a non-decisive vote, is the decision invalidated as a violation of due process?

The Fifth Circuit answered that question in the negative, but six other circuits have disagreed and concluded that the presence of a biased judge or commissioner taints the entire decision-making process. While the Third Circuit is one of those six, Williams is appealing a state court decision to the Supreme Court, and his case has not come before the circuit. In fact, the allegedly biased justice unilaterally denied Williams’s recusal motion without even referring it to the full Pennsylvania Supreme Court.

A 4-4 tie in Williams would mean that Williams’s death sentence stands—not because the Supreme Court decided an issue against him, but because the Supreme Court couldn’t do its job. It would also mean different due process rights in different states. And while both criminal and civil matters would be affected, the stakes are especially high for criminal defendants, for whom the difference between one circuit and another could be the difference between life and death.

Separation of Church and State: Can states be forced to provide support to religious institutions through secular programs?

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7 Bradshaw v. McCotter, 796 F.2d 100 (5th Cir. 1986).
8 See Berkshire Emps. Ass’n v. NLRB, 121 F.2d 235, 239 (3d Cir. 1941); Am. Cyanamid Co. v. FTC, 363 F.2d 757, 767-768 (6th Cir. 1966); Antoniu v. SEC, 877 F.2d 721, 726 (8th Cir. 1989); Stivers v. Pierce, 71 F.3d 732, 746-748 (9th Cir. 1995); Hicks v. Watonga, 942 F.2d 737, 748-749 (10th Cir. 1991); Cinderella Career & Finishing Sch., Inc. v. FTC, 425 F.2d 583, 591-593 (D.C. Cir. 1970).
Next term, the Court will hear *Trinity Lutheran of Columbia, Inc. v. Pauley*. At issue is whether a state must provide support to religious institutions when it establishes secular programs. In this case, Missouri provided grants to help organizations pay for recycled tires used to resurface playgrounds. When a church applied for a grant under the tire recycling program, Missouri denied it, citing a state constitutional prohibition on giving state funds to churches. Both the district court and the Eighth Circuit agreed that Missouri did not have to provide funding to a church through the grant program. Similarly, the First Circuit held that Maine school districts could refuse to subsidize Catholic school tuition, while also providing tuition to secular schools to meet the education needs of particular students.

But the Seventh and Tenth Circuits held that states must include religious institutions when they provide funding for secular purposes. The split reflects confusion over the Supreme Court’s 2004 decision in *Locke v. Davey*, which held that states can exclude religious groups from some state aid programs.

If the Court splits 4-4 in *Trinity Lutheran*, only 20 states will have circuit court guidance on how to apply *Locke*, and faced with a significant risk of litigation, some states may choose not to fund important needs like scholarships or recycling programs at all.

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9 No. 15-577, 136 S. Ct. 891 (2016).
10 Trinity Lutheran Church of Columbia, Inc. v. Pauley, 788 F.3d 779, 782 (8th Cir. 2015).
11 Id. at 788.
12 Eulitt v. Me. Dep’t of Educ., 386 F.3d 344 (1st Cir. 2004).
13 Badger Catholic, Inc. v. Walsh, 620 F.3d 775 (7th Cir. 2010); Colo. Christian Univ. v. Weaver, 534 F.3d 1245 (10th Cir. 2008).
Access to Justice: Do circuit courts have jurisdiction to review a denial of class certification when the named plaintiffs have voluntarily dismissed their claims with prejudice?

Class actions are critical to holding big businesses accountable for wrongdoing. An essential step in pursuing a class action is getting the class certified by a judge. If class certification is denied, that’s often the end of litigation; many classes consist of people who were each harmed in a small way, and generally no individual class member will have an economic incentive to continue the case on her own. Currently, there is a circuit split over what happens when class certification is denied and the named plaintiffs—possibly because they don’t want to continue the litigation as individuals—agree to have their claims dismissed with prejudice.

The Second and Ninth Circuits have held that a circuit court has jurisdiction to review a denial of class certification when the named plaintiffs have essentially given up on their right to pursue their individual claims. But the Third, Fourth, Seventh, Tenth, and Eleventh Circuits have held that circuit courts cannot review a denial of a class certification when there has been a voluntary dismissal with prejudice. The rule established by these circuits prevents many denials of class certifications from ever getting appealed.

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15 Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 903 F.2d 176 (2d Cir. 1990); Baker v. Microsoft Corp., 797 F.3d 607 (9th Cir. 2015).
16 Camesi v. Univ. of Pittsburgh Med. Ctr., 729 F.3d 239 (3d Cir. 2013); Rhodes v. E.I. du Pont de Nemours & Co., 636 F.3d 88 (4th Cir. 2011); Chavez v. Ill. State Police, 251 F.3d 612 (7th Cir. 2001); Bowe v. First of Denver Mortg. Inv’rs, 613 F.2d 798 (10th Cir. 1980); Druhan v. Am. Mut. Life, 166 F.3d 1324 (11th Cir. 1999).
Next term, in Microsoft v. Baker, the Court could resolve this important jurisdictional question. (The parties have already submitted briefs in preparation for oral argument this term, but the Court postponed the argument shortly after Justice Scalia’s death.) But if the Court splits 4-4, the ability to pursue a class action will vary from circuit to circuit. While some circuits will review class certifications in this circumstance, others will deny purported classes a right to appeal and deprive them of their day in court.

Right to an Impartial Jury: Can rules preventing examination of jury deliberations block evidence of racial bias offered to show a violation of one’s Sixth Amendment right to an impartial jury?

The Sixth Amendment guarantees that defendants accused of a crime will be judged by an impartial jury of their peers. Jury selection is the primary tool for removing potential jurors who harbor unlawful biases, including racial bias. But what if racial bias is revealed only later, during jury deliberations? State and federal courts generally prohibit testimony about what happens once the jury goes to deliberate. The circuit courts (and several state supreme courts) have divided over whether such rules apply when they serve to conceal racial bias that prevented a fair trial and violated a defendant’s Sixth Amendment right.

18 Tony Mauro, Supreme Court Delays Microsoft Class Action Arguments Until Next Term, NATIONAL LAW JOURNAL (Mar. 4, 2016), http://www.nationallawjournal.com/id=1202751406169/Supreme-Court-Delays-Microsoft-Class-Action-Arguments-Until-Next-Term#ixzz45eBebDEj.
The Tenth Circuit and the Pennsylvania Supreme Court have said that a juror cannot testify about another juror’s racist comments during deliberations, even when there is a chance the racism prevented a fair trial. But the First and Seventh Circuits (along with the state supreme courts in Rhode Island, Massachusetts, Delaware, Georgia, North Dakota, and South Carolina) have reached the opposite conclusion, holding that the Sixth Amendment guarantee of an impartial jury trumps prohibitions on jury deliberation testimony. Given this divide, people in seven states have a limited right to an impartial jury, people in 11 states can protect their constitutional right with evidence of racism during jury deliberations, and elsewhere the law is uncertain.

The Supreme Court will consider the question next term, but without a majority on the merits, the Sixth Amendment right to an impartial jury could vary from state to state and from circuit to circuit.

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21 United States v. Villar, 586 F.3d 76 (1st Cir. 2009); Shillcutt v. Gagnon, 827 F.2d 1155, 1158-59 (7th Cir. 1987) (finding that “due process” required the court to consider “whether there [was] a substantial probability that the alleged racial slur made a difference in the outcome of the trial”).