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## Tie Votes and the 2016 Supreme Court Vacancy

Justin R. Pidot<sup>†</sup>

On February 13, 2016, Justice Antonin Scalia died, ending his three-decade reign as leader of the conservative wing of the Supreme Court.<sup>1</sup> He was renowned for his unyielding, combative style, often offering withering criticism of those who disagreed with his views.<sup>2</sup> That approach produced mixed results. He was the most-written about Justice in the 21st Century,<sup>3</sup> but his derisive tone limited his effectiveness,<sup>4</sup> preventing him from assembling an enduring or consistent majority in favor of the conservative jurisprudence he championed.<sup>5</sup>

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<sup>†</sup> Associate Professor, University of Denver Sturm College of Law. I would like to thank Alan Chen, Lee Epstein, Nancy Leong, Margaret Kwoka, Alan Morrison, and Adam Steinman for sharing ideas with me that contributed to this essay. I would also like to thank my research assistant Courtney McVean for her help creating the database of cases involving tie votes that serves as the basis for my historical analysis. Copyright © 2016 by Justin R. Pidot.

1. See Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), [http://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html?\\_r=0](http://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html?_r=0).

2. See, e.g., *Stop the Beach Renourishment v. Fla. Dep't of Env'tl. Prot.*, 560 U.S. 702, 723–24 (2013) (“Justice Kennedy’s other point—that we will have to decide when the claim of a judicial taking must be asserted—hardly presents an awe-inspiring prospect. These, and all the other ‘difficulties,’ ‘difficult questions,’ and ‘practical considerations’ that Justice Kennedy worries *may perhaps* stand in the way of recognizing a judicial taking, are either nonexistent or insignificant.”) (citations omitted).

3. Benjamin Morris, *How Scalia Became the Most Influential Conservative Jurist Since the New Deal*, FIVETHIRTYEIGHT (Feb. 14, 2016), <http://fivethirtyeight.com/features/how-scalia-became-the-most-influential-conservative-jurist-since-the-new-deal/>.

4. See, e.g., David G. Savage, *Supreme Court Justice Antonin Scalia Dies at 79; Ardent Conservative Fought Liberalism’s Tide*, L.A. TIMES (Feb. 13, 2016), <http://www.latimes.com/local/lanow/la-me-antonin-scalia-20160213-story.html>.

5. For a discussion of ebb and flow of the conservative jurisprudence Justice Scalia advocated for in two doctrinal settings, constitutional standing

During the Scalia years, an unprecedented proportion of the cases before the Court were decided by a single vote.<sup>6</sup> The public also increasingly viewed the Court as politicized,<sup>7</sup> and in 2015, half of Americans disapproved of the Supreme Court's performance.<sup>8</sup>

With the Court so divided, Justice Scalia's death could herald in an era of deadlock in which the Justices divide evenly in a string of controversial, high-profile cases. Perhaps the Court is heading in that direction. As of now, three cases have involved tie votes, the most in decades. One of those cases, *Friedrichs v. California Teachers Association*,<sup>9</sup> likely constitutes the most high-profile case to involve a tie vote in recent memory.

Other evidence suggests, however, that the Justices may be responding to the specter of tie votes by forging compromise, however temporary, to postpone resolution of the issues that divide them. In at least two instances, the Court appears to have gone to significant lengths to avoid evenly dividing. That pattern, if it holds, reflects the history of tie votes in the Supreme Court. While the prospect of tie votes has caused much hand-ringing, they have been rare and relatively insignificant.

This essay considers both the history of tie votes in the Supreme Court and the current situation facing the Justices. It explains the doctrine attached to tie votes and the reasons they occur, and it provides a preview of an empirical study I performed of all tie votes that occurred between 1925 and 2015, which will be published later this year.<sup>10</sup> This essay also examines the three cases that have involved tie votes that have emerged so far in October Term 2015, and two other cases in

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and regulatory takings, see Justin R. Pidot, *Fees, Expenditures and the Takings Clause*, 41 *ECOLOGY L.Q.* 131, 139–42 (2014); Justin R. Pidot, *The Invisibility of Jurisdictional Procedure and Its Consequences*, 64 *FLA. L. REV.* 1405, 1413–14 (2012).

6. See David Paul Kuhn, *The Incredible Polarization and Politicization of the Supreme Court*, *ATLANTIC* (June 29, 2012), <http://www.theatlantic.com/politics/archive/2012/06/the-incredible-polarization-and-politicization-of-the-supreme-court/259155/>.

7. *Id.*

8. Justin McCarthy, *Disapproval of Supreme Court Edges to New High*, *GALLUP* (Oct. 2, 2015), <http://www.gallup.com/poll/185972/disapproval-supreme-court-edges-new-high.aspx>.

9. 136 S. Ct. 1083 (2016).

10. See Justin R. Pidot, *Tie Votes in the Supreme Court*, 101 *MINN. L. REV.* (forthcoming 2016).

which the Court appears to have implemented strategies to avoid ties.

The Senate appears unlikely to confirm a replacement for Justice Scalia anytime soon.<sup>11</sup> The Justices may, if they so choose, use this prolonged vacancy as an opportunity to explore new methods for resolving cases that evenly divide them. Such methods could address, at least modestly, the public's perception that the Court is intractably polarized.

## I. THE HISTORY OF TIE VOTES

Before turning to the tie votes of the current eight-member Court, this Part provides historical context for tie votes in the Supreme Court. This discussion examines the doctrine and form of the equally divided court, the circumstances that result in ties, and the relative frequency and importance of such decisions. In providing this analysis, I draw upon a dataset of the 164 tie votes that occurred between 1925 and 2015.<sup>12</sup>

### A. THE DOCTRINE AND FORM OF TIE VOTES

The Court has a well-established rule that governs circumstances where the Justices evenly divide, which dates back to the late 18th Century.<sup>13</sup> If the Justices divide evenly, the decision of the lower court is affirmed—either in its entirety or with respect to the issue that divided the Justices—but no Supreme Court precedent is created.<sup>14</sup> The Supreme Court typically announces that it has deadlocked by issuing a per curiam order stating simply “[t]he judgment is affirmed by an

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11. See Harper Neidig, *No Hearing for Obama's Supreme Court Nominee, McConnell Says*, THE HILL (Mar. 16, 2016, 12:04 PM), <http://thehill.com/blogs/blog-briefing-room/news/273230-mcconnell-no-hearing-for-garland>.

12. See Pidot, *supra* note 10.

13. See *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 409 (1792); see also *United States v. Pink*, 315 U.S. 203, 216 (1942).

14. See, e.g., *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 234 n.7 (1987) (“Of course, an affirmance by an equally divided Court is not entitled to precedential weight.”); *Durant v. Essex Co.*, 74 U.S. (7 Wall.) 107, 110 (1868). The rule governing equally divided courts applies only where the Justices are divided evenly on the correct result, rather than divided on the rationale for a result. In the latter case, a majority of the Justices would agree on the appropriate resolution of the case or issue and lower courts would ascertain the rule emerging from the case under the framework established by *Marks v. United States*. 430 U.S. 188, 193 (1977); see also Justin Marceau, *Plurality Decisions: Upward-Flowing Precedent and Acoustic Separation*, 45 CONN. L. REV. 933 (2013) (examining the rule the Court created in *Marks*).

equally divided Court.”<sup>15</sup> Of the 164 tie votes that occurred between 1925 and 2015, 149 were of this form.<sup>16</sup>

The rule governing tie votes arose at a time when parties had a right to appeal cases to the Supreme Court.<sup>17</sup> Because the Court had an obligation to resolve those appeals, the Justices needed a workable rule to address circumstances where they deadlocked. While the Court continues to apply the same rule today, the necessity from which the rule arose has all but disappeared. Since 1925, Congress has consistently reduced the mandatory docket of the Court.<sup>18</sup> Only one of the 164 cases that involved a tie vote since 1925 would arise under the Court’s mandatory docket today.<sup>19</sup> As a result, the Court could deploy—and as I will discuss below perhaps has deployed—alternative procedures to dispose of cases in which the Justices divide evenly. For example, rather than announcing a tie vote, the Court could dismiss the writ of certiorari that gives rise to Supreme Court jurisdiction as improvidently granted, a process typically referred to as a “DIG.”<sup>20</sup> Resolving a case through a DIG would have precisely the same effect as affirming by an equally divided court, but would allow the Justices to act in concert to resolve the case, potentially creating a more cooperative spirit on the Court. A DIG would also dispose of the case without the need for the Court to publicly proclaim that the Justices have deadlocked.

## B. THE CIRCUMSTANCES GIVING RISE TO TIE VOTES

Because an odd number of Justices sit on the Supreme Court, tie votes are relatively rare.<sup>21</sup> They can, however, arise in two situations.

15. See, e.g., *Flores-Villar v. United States*, 131 S. Ct. 2312 (2011).

16. For a detailed examination of other forms in which tie votes can occur, see *Pidot*, *supra* note 10, at Part III.

17. See DORIS MARIE PROVINE, *CASE SELECTION IN THE UNITED STATES SUPREME COURT I* (1980).

18. See Bennett Boskey & Eugene Gressman, *The Supreme Court Bids Farewell to Mandatory Appeals*, 121 FED. RULES DECISIONS 81, 87 (1988).

19. See *Pidot*, *supra* note 10, at Part II.

20. See, e.g., Michael E. Solimine & Rafael Gely, *The Supreme Court and the Sophisticated Use of DIGs*, 18 SUP. CT. ECON. REV. 155, 155 (2010). This acronym is the one commonly used to refer to the court dismissing a writ of certiorari as improvidently granted. See *id.* at 155 n.2.

21. Since the Judiciary Act of 1869, 16 Stat. 44, eight Associate Justices and one Chief Justice have constituted the Supreme Court. See Peter G. Fish, *Justices, Number of*, 550, 550 in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES (Kermit L. Hall, et al. eds., 2d. ed. 2005). Since

First, a Justice may recuse herself because of a conflict of interest. For example, Justice Elena Kagan has recused herself from all cases that came before the U.S. Solicitor General's Office during her tenure as Solicitor General.<sup>22</sup> While that decision has resulted in dozens of recusals across several Supreme Court terms, and therefore dozens of cases decided by eight Justices, only two tie votes have resulted.<sup>23</sup> It may seem surprising that such a large number of recusals by one of the Court's more liberal justices led to so few tie votes, but this is in keeping with history. A study by Ryan Black and Lee Epstein found that between 1986 and 2003, only eleven tie votes occurred due to discretionary recusals.<sup>24</sup>

Notwithstanding the rarity of recusals leading to ties, the prospect of an equally divided Court has led modern Justices to recuse themselves only reluctantly. The Justices released a policy on recusal in 1993 that explained “[e]ven one unnecessary recusal impairs the functioning of the Court. . . . In this Court, where the absence of one Justice cannot be made up by another, needless recusal deprives litigants of the nine Justices to which they are entitled, produces the possibility of an even division on the merits of the case, and has a distorting effect upon the certiorari process . . . .”<sup>25</sup>

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President Franklin Delano Roosevelt's famous “court packing plan,” there has been no serious effort to change the number of Justices on the Supreme Court. See Justin R. Pidot, *Jurisdictional Procedure*, 54 WM. & MARY L. REV. 21–22 (2012).

22. During her first term on the Court, Justice Kagan recused herself in twenty-eight of the seventy-five cases before the Court. Stephen Wermiel, *SCOTUS for Law Students: Justice Kagan's Recusals*, SCOTUSBLOG (Oct. 9, 2012, 9:50 PM), <http://www.scotusblog.com/2012/10/scotus-for-law-students-sponsored-by-bloomberg-law-justice-kagans-recusals/>.

23. See *Flores-Villar v. United States*, 131 S. Ct. 2312 (2011); *Costco Wholesale Corp. v. Omega, S.A.*, 131 S. Ct. 565 (2010).

24. Ryan Black & Lee Epstein, *Recusals and the “Problem” of an Equally Divided Supreme Court*, 7 J. APP. PRAC. & PROCESS 75, 92 (2005).

25. Supreme Court of the United States, Statement of Recusal Policy (Nov. 1, 1993), [http://eppc.org/docLib/20110106\\_RecusalPolicy23.pdf](http://eppc.org/docLib/20110106_RecusalPolicy23.pdf). Chief Justice John Roberts readopted the 1993 policy when he assumed his position on the Court. See Lyle Denniston, *Roberts' Recusal Policy*, SCOTUSBLOG (Sept. 30, 2005, 4:54 PM), <http://www.scotusblog.com/2005/09/roberts-recusal-policy/>. Justices have expressed similar concerns in denying motions to disqualify; *Laird v. Tatum*, 409 U.S. 824, 838 (1972) (Rehnquist, J., denying motion for disqualification); see also *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 541 U.S. 913, 915 (Scalia, J., denying motion for disqualification); Ruth Bader Ginsburg, *An Open Discussion with Justice Ruth Bader Ginsburg*, 36 CONN. L. REV. 1033, 1038–39 (2004) (discussing the Court's policy that a

Second, a vacancy can leave the Court with an even number of Justices. Retirements and resignations do not, however, always create such vacancies. Some Justices, like Justice Sandra Day O'Connor, condition their resignation on the confirmation of a replacement Justice.<sup>26</sup>

The death of a sitting Justice is, of course, certain to result in at least a temporary vacancy. Almost half of individuals that have served as Justices on the Supreme Court (50 of 112 individuals) have died during their service.<sup>27</sup> The frequency of such deaths, however, has, dwindled over time. Only ten Justices have died in office since 1925, and only Chief Justice William Rehnquist and Justice Scalia have died in office since 1970.<sup>28</sup>

The length of vacancies—whether created by retirement or death—has also decreased. During the 19th Century, nine vacancies remained unfilled for more than three-hundred days, and the longest vacancy, which occurred in the 1840s, lasted 841 days.<sup>29</sup> The duration of vacancies has in general become shorter and more consistent. The average duration of the most recent fifteen vacancies was just 55 days.<sup>30</sup> Only the vacancy created by Justice Lewis Powell's retirement lasted for more than 200 days; Justice Anthony Kennedy joined the Court 237 days after Justice Powell retired,<sup>31</sup> but that delay occurred because the Senate failed to confirm then-Judge Robert Bork, requiring two confirmation processes to unfold before a replacement was selected.<sup>32</sup>

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Justice will not recuse themselves from a case in which a law firm the Justice is associated with represents one of the parties).

26. See William Branigan et al., *Supreme Court Justice O'Connor Resigns*, WASH. POST (July 1, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/01/AR2005070100653.html>.

27. See *List of Justices of the Supreme Court of the United States*, WIKIPEDIA, [https://en.wikipedia.org/wiki/List\\_of\\_Justices\\_of\\_the\\_Supreme\\_Court\\_of\\_the\\_United\\_States](https://en.wikipedia.org/wiki/List_of_Justices_of_the_Supreme_Court_of_the_United_States) (last visited July 6, 2016).

28. *Id.*

29. Drew Desilver, *Long Supreme Court Vacancies Used to Be More Common*, PEW RESEARCH CENTER (Feb. 26, 2016), <http://www.pewresearch.org/fact-tank/2016/02/26/long-supreme-court-vacancies-used-to-be-more-common/>.

30. *Id.*

31. *Id.*

32. See Andrew Cohen, *The Sad Legacy of Robert Bork*, ATLANTIC (Dec. 19, 2012), <http://www.theatlantic.com/politics/archive/2012/12/the-sad-legacy-of-robert-bork/266456/>.

## C. THE FREQUENCY AND IMPORTANCE OF TIE VOTES

Between 1925 and 2015, tie votes were rare, occurring an average of less than two times per term. Perhaps because vacancies have become increasingly rare, and Justices have become increasingly reluctant to recuse themselves, this number has dwindled over time. In the twenty-five year period between 1986 and 2010, only twenty-one cases involved a tie vote.<sup>33</sup>

Despite the rarity of tie votes, commentators and even the Justices themselves express concern that tie votes may create confusion and non-uniformity of federal law. While disagreeing with that assessment themselves, Professors Lisa McElroy and Michael Dorf have explained that “it could be argued that even one 4–4 split can be harmful.”<sup>34</sup> In denying a motion seeking his recusal, Justice Rehnquist wrote “affirmance of [conflicting lower court decisions] . . . by an equally divided Court would lay down ‘one rule in Athens, and another in Rome,’ with a vengeance.”<sup>35</sup> Upon his retirement, Justice John Paul Stevens also expressed concern about tie votes, reportedly suggesting that the prospect that a recusal might result in a tie votes was of sufficient moment to justify legislation providing for appointment of a substitute Justice.<sup>36</sup>

Examination of twenty-one cases between 1986 and 2010 suggests that tie votes do not, however, result in a prolonged lack of uniformity in federal law.<sup>37</sup> Some of those cases involved no split of authority among the lower courts and in others either the Supreme Court resolved such a split in relatively short order in a subsequent case or the lower courts themselves reached a consensus. Moreover, the federal judicial system is designed precisely to facilitate non-uniformity, which in essence involves doctrinal experimentation as the judges in different lower courts reach different conclusions.<sup>38</sup> The

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33. See *Pidot*, *supra* note 10, at Part IV.B.

34. Lisa T. McElroy & Michael C. Dorf, *Coming Off the Bench: Legal and Policy Implications of Proposals to Allow Retired Justices to Sit by Designation on the Supreme Court*, 61 DUKE L.J. 81, 95 (2011).

35. *Laird v. Tatum*, 409 U.S. 824, 838 (1972) (Rehnquist, J., denying motion for disqualification).

36. 156 CONG. REC. S7791 (Sept. 29, 2010) (Statement of Senator Patrick Leahy).

37. See *Pidot*, *supra* note 10, at Part IV.B.

38. See, e.g., Ruth Bader Ginsburg, *Remembering Justice White*, 74 U. COLO. L. REV. 1283, 1285 (2003) (describing percolation of issues in lower courts).



Supreme Court also often declines to review cases that involve splits of authority among lower courts, and there is no reason that the often-temporary extension of such non-uniformity caused by tie votes should be particularly troublesome.<sup>39</sup>

#### D. THE DANGER OF TIE VOTES

Data about tie votes reveal that they have been both relatively rare and doctrinally inconsequential. That does not mean, however, they are unimportant.<sup>40</sup>

Tie votes may threaten the public's perception of the Supreme Court, particularly at the present moment when the public already views the Court as highly politicized. An order affirming by equal division equates to an admission that the Justices have failed to fulfill their obligation to resolve a case before them and they have done so because they have been unable to compromise.

Additionally, cognitive psychology suggests that tie votes may create at least some risk that Justices will become entrenched in their views, prejudging future cases that present the same issue. This effect, sometimes referred to as the lock-in effect, occurs when individuals become increasingly committed to a position or viewpoint after resources have been expended based on their expression of that position or viewpoint.<sup>41</sup> The lock-in effect is by no means absolute, but on the margins it may skew the decisions of Justices after a tie vote has occurred.

Finally, in rare circumstances a tie vote in the Supreme Court may effectively resolve a legal issue for the nation. This can occur when federal law contains an exclusive review provision, vesting only one lower court with jurisdiction over a particular issue.<sup>42</sup> Because a tie vote will affirm that decision, it will leave in place binding authority in the only court in the country that can consider the issue. For example, a deadlocked Supreme Court decision in the challenge to the Clean Power Plan would effectively make the eventual D.C. Circuit's decision binding nationwide because the Plan cannot be challenged in any other lower court.<sup>43</sup> The same result would

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39. See Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567 (2008).

40. See Pidot, *supra* note 10, at Part V.

41. See, e.g., Kevin J. Lynch, *The Lock-In Effect of Preliminary Injunctions*, 66 FLA. L. REV. 779, 783–84 (2014).

42. See, e.g., 42 U.S.C. § 7607(b).

43. See *West Virginia v. EPA*, 136 S. Ct. 1000 (2016).

occur if the Supreme Court divided evenly in a case where a lower court issued a nationwide injunction. For example, a deadlock in *United States v. Texas* would resolve the legality of the Obama Administration's policy to defer deportation for certain individuals violating federal immigration law for the nation because the lower court enjoined implementation of that policy everywhere in the Country.<sup>44</sup>

## II. TIE VOTES DURING THE SCALIA VACANCY

The Supreme Court is in the midst of what could be a prolonged period in which it will be made up of only eight Justices. This comes at a time when the Court has been as polarized as at any point in modern history. While tie votes have been of little historical moment, current conditions could lay the groundwork for an anomalous period in which a significant number of important and high-profile cases equally divide the Justices. Such a result could significantly magnify the dangers posed by tie votes, particularly to the perceived legitimacy of the Supreme Court.

The Court's October Term 2015 opinions that have post-dated Justice Scalia's death suggest, however, that the Court may be actively seeking to avoid resolving cases by equal division. While three decisions have involved tie votes, the most in any term in recent decades, in two other cases the Court has deployed delaying tactics to postpone resolution of contentious legal issues. While the Court does not appear to have DIGged any cases because of the prospect of a tie vote, the strategies it has used have produced similar results.

### A. TIE VOTES AFTER JUSTICE SCALIA

So far, the Court has equally divided in three cases in the wake of Justice Scalia's death. While that number exceeds the number of ties in any year since 1989, it does not dramatically depart from historical trends.<sup>45</sup> Strikingly, however, one of the cases in which the Court evenly divided was among the most-

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44. *Texas v. United States*, 787 F.3d 733 (5th Cir. 2015), *cert. granted*, 136 S. Ct. 906 (2016). [Editor's note: for further analysis on the recent outcome of this case, please see the *Epilogue* section below.]

45. For example, two cases involved tie votes in 2011: *American Electric Power, Inc. v. Connecticut*, 131 S. Ct. 2527 (2011) and *Flores-Villar v. United States*, 131 S. Ct. 2312 (2011).

watched cases of the term, something which does depart from historical trends.

*Friedrichs v. California Teachers Association* may be the highest-profile tie vote in recent history.<sup>46</sup> The case involved the ability of public-sector unions to collect a fee to pay for collective-bargaining activities from employees that declined to join the union,<sup>47</sup> a practice the Supreme Court had approved of in the 1977 decision *Abood v. Detroit Board of Education*.<sup>48</sup> Prior to *Friedrichs*, two recent decisions undermined *Abood*, each of which made it more difficult for public-sector unions to collect fees from non-union members.<sup>49</sup> Conservatives hoped that the Court would find an opportunity in *Friedrichs* to reverse *Abood* entirely.<sup>50</sup> The questions Justice Scalia asked at the oral argument suggest that, had he lived, conservatives may well have secured the victory for which they hoped.<sup>51</sup> In the wake of Justice Scalia's death, however, the *Friedrichs* case ended with a tie vote.

A second case, *Hawkins v. Community Bank of Raymore*, was resolved in its entirety by a tie vote. The case involved a Federal Reserve regulation interpreting a provision of the Equal Credit Opportunity Act ("ECOA") that prohibits discrimination against people seeking loans on the basis of marital status.<sup>52</sup> The regulation interprets that prohibition as making it illegal for lenders to require a spouse to guarantee a loan taken out by the other spouse.<sup>53</sup> Despite the regulation, the banks involved in the case required the husbands of Valarie

46. See, e.g., Josh Gerstein, *5 Cases to Watch as Supreme Court Term Begins*, POLITICO (Oct. 4, 2015), <http://www.politico.com/story/2015/10/supreme-court-abortion-obamacare-214400>.

47. See *Friedrichs v. Cal. Teachers Ass'n*, 2013 WL 9825479, at \*1–2 (Dec. 5 2013, C.D.Cal.), *summarily aff'd* 2014 WL 10076847 (Nov. 18, 2014, 9th Cir.).

48. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

49. See *Harris v. Quinn*, 134 S. Ct. 2618 (2014); *Knox v. Service Employees Int'l Union, Local 1000*, 132 S. Ct. 227 (2012).

50. See, e.g., James Sherk, *Supreme Court Case May Bring Workplace Freedom to Government Employees*, NATIONAL REVIEW (Jan. 5, 2016), <http://www.nationalreview.com/corner/429250/government-employee-unions-supreme-court-case-friedrichs-v-california-teachers>.

51. See Charlotte Garden, *What Will Become of Public-Sector Unions Now?*, ATLANTIC (Feb. 16, 2016), <http://www.theatlantic.com/business/archive/2016/02/scalia-friedrichs/462936/>.

52. See *Hawkins v. Community Bank of Raymore*, 761 F.3d 937, 940 (8th Cir. 2014).

53. *Id.*

Hawkins and Janice Patterson to guarantee loans issued to their wives.<sup>54</sup> Both the district court and court of appeals held that the Federal Reserve's regulation improperly interpreted the ECOA, and that therefore the guarantees offered by the husbands were enforceable.<sup>55</sup> While commentators at the oral argument believed the Justices were likely to agree with the lower courts and find the regulation invalid,<sup>56</sup> the Court ended up dividing equally.<sup>57</sup>

Finally, *Franchise Tax Board of California v. Hyatt* involved a tie vote on a significant preliminary issue in the case, although the Justices were ultimately able to dispose of it on a secondary issue of little importance.<sup>58</sup> The case involved a Nevada taxpayer suing the Franchise Tax Board of California in a Nevada court.<sup>59</sup> In a 1979 decision, the Supreme Court had held that state sovereign immunity did not bar one state from being sued in the courts of another state,<sup>60</sup> and in *Franchise Tax Board*, California asked the Supreme Court to overrule that decision.<sup>61</sup> At argument, it appeared likely that a majority of the Justices, including Justice Scalia, were poised to grant California's request.<sup>62</sup> Instead, the Court divided equally on that question. Six Justices then held that the Nevada court had erred by awarding damages against California that were greater than the court could have awarded against Nevada itself, a decision of little lasting importance.<sup>63</sup>

#### B. TIE VOTE AVOIDANCE AFTER JUSTICE SCALIA

In at least two cases, the Court appeared to have deployed a delaying tactic to avoid a tie vote. While the Court has yet to

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54. *Id.* at 939.

55. *Id.* at 941.

56. See, e.g., Ronald Mann, *Argument Analysis: Justices Dubious of Longstanding Protections for Spouses Forced to Guarantee Each Other's Debts*, SCOTUSBLOG (Oct. 6, 2015, 9:21 AM), <http://www.scotusblog.com/2015/10/argument-analysis-justices-dubious-of-longstanding-protections-for-spouses-forced-to-guarantee-each-others-debts/>.

57. *Hawkins v. Community Bank of Raymore*, 136 S. Ct. 1072 (2016).

58. 136 S. Ct. 1277 (2016).

59. *Id.* at 1279–80.

60. *Nevada v. Hall*, 440 U.S. 410 (1979).

61. 136 S. Ct. at 1279.

62. Lyle Denniston, *Argument Analysis: Seeking Two-Century-Old Guidance*, SCOTUSBLOG (Dec. 7, 2015, 3:33 PM), <http://www.scotusblog.com/2015/12/argument-analysis-seeking-two-century-old-guidance/>.

63. *Id.* at 1281–82.

DIG a case because the Justices are poised to evenly divide, the strategies they have deployed have had the similar effect of delaying resolution of a legal issue that appeared to divide the Justices, but without requiring the Court to issue an order affirming by equal division.

In *Zubik v. Burwell*, the Court managed to avoid a tie vote in another of the most-watched cases of the term.<sup>64</sup> The case, which involved seven separate lower court decisions, involved a challenge to the Affordable Care Act (the “ACA”).<sup>65</sup> Specifically, religious organizations argued that the provisions of the ACA that enabled them to opt out of providing contraceptive coverage to their employees violated their religious freedom.<sup>66</sup> Argument in the case occurred after Justice Scalia’s death, and the Court appeared headed toward a tie vote.<sup>67</sup> The Court then issued an order requesting additional briefing on potential alternative means of accommodating the religious views of the plaintiffs.<sup>68</sup> After supplemental briefs had been filed, the Court issued a per curiam order declining to address the merits. Rather, the Court remanded to the lower courts to consider the alternatives that the parties had discussed. In so doing, the Court stated that it “express[ed] no view on the merits of the cases.”<sup>69</sup> In other words, rather than dividing equally and reinforcing perceptions of the politicization and polarization of the Court, the Justices issued a unanimous order delaying their consideration of the merits of challenges to the opt-out provisions.

The Court deployed a similar strategy in *Spokeo, Inc. v. Robins*.<sup>70</sup> The case presented the Court with an opportunity to clarify the type of injury necessary for a plaintiff to have standing to sue in federal court when Congress creates

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64. See Jennifer Haberkorn, *Supreme Court Asks for Obamacare Birth Control Compromise*, POLITICO (May 16, 2016), <http://www.politico.com/story/2016/05/supreme-court-demands-compromise-on-obamacare-contraception-rule-223214>.

65. See Lyle Denniston, *The Legal Fate of Obamacare: Round 4*, SCOTUSBLOG (Dec. 11, 2015, 6:07 PM), <http://www.scotusblog.com/2015/12/the-legal-fate-of-obamacare-round-4/>.

66. No. 14-1418 (May 16, 2016).

67. Lyle Denniston, *Argument Analysis: On New Health Care Case, a Single Word May Tell It All*, SCOTUSBLOG (Mar. 23, 2016, 3:49 PM), <http://www.scotusblog.com/2016/03/argument-analysis-on-new-health-care-case-a-single-word-may-tell-it-all/>.

68. See Order, *Zubik*, No. 14-1418 (March 29, 2016).

69. *Zubik*, No. 14-1418, slip op. at 4 (May 16, 2016).

70. No. 13-1339 slip op. (May 16, 2016).

statutory rights.<sup>71</sup> A decision in the case requiring proof of concrete actual injury to a plaintiff invoking a statutory right had the potential to foreclose many class-action lawsuits and substantially limit Congress's ability to create statutory rights.<sup>72</sup> The Court again declined to address that contentious legal issue and, instead, six Justices joined an opinion finding that the lower courts analysis was "incomplete" and, therefore, a remand was appropriate for the lower court to reconsider the standing issue.<sup>73</sup> In other words, in *Spokeo* a majority of the Justices again chose to pursue a strategy that avoided a decision affirming by equal division and instead chose to postpone consideration of a contentious legal issue.

### CONCLUSION

Justice Scalia exerted considerable influence on American law during his time on the Court. He also left behind an eight-member Court viewed by the public as polarized and politicized. Undoubtedly, the living Justices remain deeply divided. They, however, may be finding common ground. The specter of evenly dividing in high-profile cases at a time when large segments of the public have come to view the Court as a political, rather than legal, institution, may be encouraging the Justices to find new, better ways to proceed. Two cases decided this year seem to provide fodder for optimism, as the Court has issued orders postponing the resolution of controversial issues without reaching a deadlock. History suggests that the cases resolved by tie votes remain unimportant and uncommon. With sufficient will and creativity, the Court can continue that tradition.

### EPILOGUE

As this essay goes live, my optimism about compromise on the Court has soured considerably. On June 23, 2016, the Court announced that it had deadlocked in *United States v. Texas* and *Dollar General Corporation v. Mississippi Band of Choctaw*

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71. See *Robins v. Spokeo, Inc.*, 742 F.3d 409, 413–14 (9th Cir. 2014).

72. See Mark Joseph Stern, *SCOTUS Misses an Opportunity to Gut Class Actions and Consumer Privacy Laws*, SLATE (May 16, 2015, 12:56 PM), [http://www.slate.com/blogs/the\\_slatest/2016/05/16/spokeo\\_v\\_robins\\_spares\\_class\\_actions\\_and\\_consumer\\_privacy.html](http://www.slate.com/blogs/the_slatest/2016/05/16/spokeo_v_robins_spares_class_actions_and_consumer_privacy.html).

73. *Spokeo, Inc. v. Robins*, No. 13-1339, slip op. at 2 (May 16, 2016).

*Indians*.<sup>74</sup> The significance of these tie votes is more than numeric, although five tie votes in what amounts to about three-quarters of a Supreme Court term is a striking number,<sup>75</sup> and the term is not yet over. The tie vote in *United States v. Texas* is particularly striking to me. The case involves a signature initiative of the Obama Administration and affects the lives of millions of people living in the United States. And as I discussed in my Essay, the lower court also issued a nation-wide injunction that purports to bind the federal government throughout the country, rather than an order limited to the states within the jurisdiction of the Fifth Circuit. The decision does involve only a preliminary injunction, and as a result the case may ultimately return to the Supreme Court for a resolution of the merits of the case, hopefully after a ninth Justice has been appointed. Nonetheless, a deadlock that affects so many people related to an issue as highly contentious as immigration law may have long-lasting reverberations. This is particularly true because, when coupled with the tie vote in *Friedrichs*, the Court has now failed to resolve two of the biggest cases on its docket. As a result, I suspect that the public will, at least for a while, no longer view tie votes as anomalous. I also suspect these decisions—or really, lack of decisions—will significantly increase the erosion of public trust in the institution of the Supreme Court.

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74. *United States v. Texas*, No. 15-674, slip op. at 1 (June 23, 2016) (per curiam); *Dollar General Corp. v. Miss. Band of Choctaw Indians*, No. 13-1496, slip op. at 1 (June 23, 2016).

75. See *Statistics*, SCOTUSBLOG, <http://www.scotusblog.com/statistics/> (last visited July 6, 2016).