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Article

Tie Votes in the Supreme Court

Justin Pidot[†]

INTRODUCTION

What should the Supreme Court do with a tie vote? Since at least 1792, the Court has followed the rule that where the Justices are evenly divided, the lower court's decision is affirmed, and the Supreme Court's order has no precedential effect.¹ Such cases are unusual but hardly scarce. Since 1866, an odd number of Justices have composed the Supreme Court, and when an odd number of individuals vote, that vote typically doesn't result in a tie.² Yet due to death, retirement, or recusal, there have been 164 tie votes in the Supreme Court between 1925 and 2015.³ These ties have largely, but not entirely, gone unnoticed, in part because few of them involved particularly contentious cases in the eye of the public.⁴

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

2. Peter G. Fish, *Justices, Number of*, in *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 550, 550 (Kermit L. Hall ed., 2d ed. 2005). The Judiciary Act of 1869 established the current nine-member Supreme Court. Judiciary Act of 1869, ch. 22, 16 Stat. 44.

3. This number is derived from an original data set of Supreme Court cases created for this Article. That data set is described below. See *infra* Part II.

4. *But see* Thomas E. Baker, *Why We Call the Supreme Court "Supreme,"* 4 GREEN BAG 2d 129, 129 (2001) (criticizing the Supreme Court's failure to decide a case that "raised an arcane but important issue of civil procedure").

October Term 2015 may thrust Supreme Court ties into the limelight.⁵ The death of Justice Antonin Scalia on February 13, 2016, and the likelihood that his seat will not be filled until after the presidential election,⁶ raises the specter that the Court could be entering a period in which an unprecedented number of high-profile cases end in four Justices voting one way and four Justices voting the other way.⁷ These include high-profile and contentious cases about public sector unions,⁸ the meaning of one person, one vote,⁹ the Obama administration's policy of deferring deportation for certain immigrants without legal status,¹⁰ and accommodations for religious organizations that object to the contraceptive mandate of Obamacare.¹¹ Unlike the circumstances of the past, should these cases result in tie votes, the media, politicians from all parties, and the public will be paying close attention.¹²

5. See Erwin Chemerinsky, *New Term's Most Important Cases—So Far*, A.B.A. J. (Oct. 8, 2015), http://www.abajournal.com/news/article/chemerinsky_a_new_term.

6. See Harper Neidig, *McConnell: Don't Replace Scalia Until After Election*, THE HILL (Feb. 13, 2016), <http://www.thehill.com/homenews/senate/269389-mcconnell-dont-replace-scalia-until-after-election>.

7. As this Article was being edited, the Supreme Court's October Term 2015 drew to a close. I discuss the five tie votes that occurred during this period in an epilogue that follows the conclusion. All told, these decisions generally fall in line with the empirical results I report. Tie votes did, however, occur in very high-profile cases, underscoring the risk this procedural mechanism poses to the Court's perceived legitimacy. In other cases, the Justices did act with creativity to avoid a deadlock, although they did not exercise the procedure advocated for in this Article.

8. *Friedrichs v. Cal. Teachers Ass'n*, No. 13-57095, 2014 WL 10076847 (9th Cir. Nov. 18, 2014), *cert. granted*, 135 S. Ct. 2933 (June 30, 2015) (No. 14-915).

9. *Evenwel v. Perry*, 2014 WL 5780507 (W.D. Tex. Nov. 5, 2014), *cert. granted sub nom.*, *Evenwel v. Abbott*, 135 S. Ct. 2349 (May 26, 2015) (No. 14-940).

10. *United States v. Texas*, 809 F.3d 134 (5th Cir. 2015), *cert. granted*, 136 S. Ct. 906 (Jan. 19, 2016) (No. 15-674).

11. *Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs.*, 778 F.3d 422 (3rd Cir. 2015), *cert. granted sub nom.*, *Zubik v. Burwell*, 136 S. Ct. 444 (Nov. 6, 2015) (No. 14-1418).

12. The death of Justice Antonin Scalia has likely ended the potential for a tie vote in *Fisher v. University of Texas at Austin*, 758 F.3d 633 (5th Cir. 2014), *cert. granted*, 135 S. Ct. 2888 (June 29, 2015) (No. 14-981), the Court's most recent foray into affirmative action in higher education. Justice Elena Kagan recused herself from that case because the United States filed an amicus brief in its early iteration while she served as solicitor general. See Adam Liptak, *Supreme Court Justices' Comments Don't Bode Well for Affirmative Action*, N.Y. TIMES (Dec. 9, 2015), http://www.nytimes.com/2015/12/10/us/politics/supreme-court-to-revisit-case-that-may-alter-affirmative-action.html?_

The potential for a string of high-profile ties comes at a bad time for the Supreme Court. On October 2, 2015, a Gallup poll reported that the Court's disapproval rating had reached fifty percent for the first time in decades.¹³ This waning popularity may have a variety of sources. The public's increasing skepticism comes in the wake of a number of high-profile opinions that have divided the country—*Citizens United v. Federal Election Commission*¹⁴ and *Obergefell v. Hodges*¹⁵ being two of the most prominent. As Eric Posner has described it, "The court has never been more aggressive about resolving the country's political debates. And yet it is ideologically polarized and more unpopular than it has been in quite a while."¹⁶ Moreover, the frequency of polarizing decisions that involve five-to-four votes along predictable ideological lines may contribute to the public perception that the Supreme Court has become a political insti-

r=1. With only seven Justices remaining on the case, a tie vote appears unlikely unless an additional unforeseen circumstance transpires.

13. 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>.

14. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010). In *Citizens United*, the Court struck down campaign finance limits for corporations, a decision that has sparked considerable backlash among progressives, see, e.g., Mimi Marziani, *Growing Backlash Against 'Citizens United,'* NAT'L L.J. (Jan. 23, 2012), <http://www.nationallawjournal.com/id=1202539063421/Growing-backlash-against-Citizens-United>, even prompting Professor Larry Lessig to briefly run for President for the sole purpose of reforming the campaign finance system. Philip Rucker, *Lawrence Lessig Wants To Run for President – in a Most Unconventional Way*, WASH. POST. (Aug. 11, 2015), <http://www.washingtonpost.com/news/post-politics/wp/2015/08/11/lawrence-lessig-wants-to-run-for-president-in-a-most-unconventional-way>. Lessig ended his candidacy a few months later when he was not allowed to participate in the Democratic debates. David Weigel, *Larry Lessig Ends Presidential Campaign, Citing Unfair Debate Rules*, WASH. POST. (Nov. 2, 2015), <http://www.washingtonpost.com/news/post-politics/wp/2015/11/02/larry-lessig-ends-presidential-campaign-citing-unfair-debate-rules>.

15. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). In *Obergefell*, the Supreme Court recognized that same sex couples have a fundamental right to marry. Some states have considered outright refusing to comply with the decision. A bill introduced in the Tennessee legislature would have declared the opinion "void and of no effect," although the bill was killed in a legislative committee. Richard Locker, *Bill To Ban Same-Sex Marriage in Tennessee Dies in House Subcommittee*, MEMPHIS COM. APPEAL (Jan. 20, 2016), <http://www.commercialappeal.com/news/government/state/bill-purporting-to-ban-same-sex-marriage-in-tennessee-fails-in-house-subcommittee-29c7779e-5f66-1172-365978971.html>.

16. Eric Posner, *The Supreme Court's Loss of Prestige*, SLATE (Oct. 7, 2015), http://www.slate.com/articles/news_and_politics/view_from_chicago/2015/10/the_supreme_court_is_losing_public_approval_and_prestige.html.

tution rather than a legal institution.¹⁷ Chief Justice John Roberts has identified a related, but distinct, culprit, arguing that the public's negative perception of the Court is collateral damage to an increasingly divisive and polarized political war between Republicans and Democrats.¹⁸ Whatever the cause, should the Court be unable to resolve some of the important and high-profile cases on its docket, that failure will surely further dampen public confidence in the institution.

The Supreme Court may have few tools at its disposal to address this crisis in confidence. The Court as an institution can't change the fact that the Justices disagree sharply; and because they decide cases of importance, those disagreements will become grist for political candidates and parties. There may, however, be modest reforms that the Court can undertake to enhance its legitimacy, and the Court has shown its willingness to make such adjustments. For example, a recent article by Richard Lazarus revealed the Supreme Court's practice of revising decisions after their release without notice to the parties or the public, a practice of secrecy that made "it hard for anyone to determine when changes are made."¹⁹ In response, the Supreme Court implemented a new, more transparent policy.²⁰

As this Article will discuss, tie votes are an area in which modest reform could increase the public's confidence in the Court. Scholars, lawmakers, and even two Justices have expressed concern about the potential for ongoing confusion in

17. A survey carried out by the Pew Research Center found that seventy percent of Americans believe that Justices "are often influenced by their own political views." *Negative Views of Supreme Court at Record High, Driven by Republican Dissatisfaction*, PEW RESEARCH CTR. (July 29, 2015), <http://www.people-press.org/2015/07/29/negative-views-of-supreme-court-at-record-high-driven-by-republican-dissatisfaction>. Over the last decade, the Court has decided five-to-four votes along ideological lines almost seventy percent of the time. See Kedar Bhatia, *Final Stat Pack for October Term 2014*, SCOTUSBLOG, 22–25 (June 30, 2015, 11:23 AM), http://sblog.s3.amazonaws.com/wp-content/uploads/2015/07/SB_5-4cases_OT14.pdf.

18. Robert Barnes, *The Political Wars Damage Public Perception of Supreme Court, Chief Justice Roberts Says*, WASH. POST (Feb. 4, 2016), http://www.washingtonpost.com/politics/courts_law/the-political-wars-damage-public-perception-of-supreme-court-chief-justice-roberts-says/2016/02/04/80e718b6-cb0c-11e5-a7b2-5a2f824b02c9_story.html.

19. Richard J. Lazarus, *The (Non)Finality of Supreme Court Opinions*, 128 HARV. L. REV. 540, 608 (2014).

20. See Adam Liptak, *Supreme Court Plans To Highlight Revisions in Its Opinions*, N.Y. TIMES (Oct. 5, 2015), <http://www.nytimes.com/2015/10/06/us/politics/supreme-court-to-highlight-revisions-in-its-opinions.html>.

the lower courts when the Supreme Court becomes deadlocked, and some have suggested that a tie-breaker substitute Justice should be appointed to ensure that every case has a definitive and precedential outcome.²¹ In explaining his decision not to recuse himself in *Laird v. Tatum*, then-Justice William Rehnquist explained that where the courts of appeals had arrived at different conclusions about the resolution of a legal issue, “affirmance of each of such conflicting results by an equally divided Court would lay down ‘one rule in Athens, and another rule in Rome’ with a vengeance.”²² Upon his retirement, Justice John Paul Stevens also worried about tie votes and their effect on the development of the law, reportedly suggesting that a law be enacted allowing a retired Justice to rejoin the Supreme Court where necessary to prevent an affirmance by equal division.²³ Shortly thereafter, Senator Patrick Leahy, the chairman of the Senate Judiciary Committee, introduced just such legislation²⁴ although it has never been enacted.

Tie votes, then, could cause mischief by leaving legal issues undecided, although as the original empirical data presented in this Article demonstrate, such mischief appears to be minimal.²⁵ Tie votes also pose a threat to the Court’s legitimacy. Tie votes are, in effect, an admission that the Justices have failed to fulfill their constitutionally assigned job responsibilities because they could find no manner of resolving a case that was acceptable to a majority of them. Tie votes also have the unseemly effect, at least in some cases, of recording the views of the Justices on a particular matter without resolving that matter or creating guidance for the lower courts.²⁶ The public bristles when Supreme Court Justices make statements that ap-

21. See, e.g., William L. Reynolds & Gordon G. Young, *Equal Division in the Supreme Court: History, Problems, and Proposals*, 62 N.C. L. REV. 29, 38–41 (1983).

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

23. 156 CONG. REC. S7793 (daily ed. Sept. 29, 2010) (statement of Sen. Leahy).

24. S. 3871, 111th Cong. (2010).

25. See *infra* Part IV.A.

26. This practice resembles an advisory opinion, which, since the early days of the republic, the Court has held is outside its jurisdiction. See Justin Pidot, *Jurisdictional Procedure*, 54 WM. & MARY L. REV. 1, 13 (2012) [hereinafter Pidot, *Jurisdictional Procedure*].

pear to prejudice cases,²⁷ and the affirmance by an equally divided court can have that effect. Finally, by casting a vote in a case that results in a tie, individual Justices may bind themselves to a position, affecting their judgment in a subsequent case raising the same issue.²⁸ All of these problems counsel against the practice of affirming by an equally divided Court.

This Article provides the first systematic empirical study of cases that resulted in a tie vote, considering every such case—164 in total—between 1925 and 2015. Those data permit examination of two issues. First, is the practice of affirming by equal division necessary because it occurs in cases where the Supreme Court exercises mandatory jurisdiction? Second, does the Court's failure to resolve the legal issues presented in cases where it affirms by equal division create prolonged and severe confusion in lower courts?

The data presented in this Article indicate a negative answer to both of those questions. The vast majority of ties have occurred in cases that would arise under the Court's discretionary certiorari jurisdiction today, and the failure of the Court to issue precedential decisions in such cases is relatively inconsequential.

Based on those considerations, and a variety of concerns about the institutional legitimacy of the Supreme Court, the Court could and should do away with its practice of affirming by an equally divided Court almost entirely. Instead, this Article calls on the Justices to utilize an alternative procedure: where the Court has granted a writ of certiorari, the vehicle by which virtually all modern cases join the Court's docket, the court can subsequently terminate cases where the Justices head for a deadlock by dismissing the writ as improvidently granted, a procedure commonly referred to as the DIG.²⁹

27. For example, some called for Justice Ruth Bader Ginsburg to recuse herself in the *Obergefell* case because of public comments she had made that appeared to favor same sex marriage. Cheryl Wetzstein, *Justice Ginsburg Asked To Recuse Herself in Supreme Court Gay Marriage Case*, WASH. TIMES (Feb. 13, 2015), <http://www.washingtontimes.com/news/2015/feb/13/justice-ginsburg-asked-to-recuse-herself-in-suprem>.

28. See *infra* Part IV.B.

29. See Michael E. Solimine & Rafael Gely, *The Supreme Court and the Sophisticated Use of DIGs*, 18 SUP. CT. ECON. REV. 155, 155 (2010) [hereinafter Solimine & Gely, *Sophisticated Use of DIGs*]; Richard L. Revesz & Pamela S. Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. PA. L. REV. 1067, 1082 (1988).

To establish that the DIG is preferable to the affirmance by equal division, this Article proceeds in five parts. Part I provides an overview of the Supreme Court's procedure for affirming by equal division and DIGing. This background contextualizes both procedures and sets the stage for the analysis that follows.

Part II provides an empirical analysis of the 164 affirmances by equal division issued between 1925 and 2015. The data set begins in 1925 because in that year Congress significantly adjusted the Supreme Court's jurisdiction, shifting categories of cases from the Court's mandatory appellate jurisdiction to its certiorari jurisdiction.³⁰ The data reported in Part II reveal that virtually every case—all but one—in which the Court has affirmed by equal division would today arise under a writ of certiorari. As a result, the Court could, if it so choose, almost always DIG cases where a tie vote occurred.

Part III develops a typology of the orders the Court has issued affirming by equal division. The majority of these orders reveal nothing about the breakdown of the votes of the Justices or the basis for disagreement although these orders do reveal the identity of any Justice recused from the case. This is not, however, always the situation. Part III identifies other forms by which the Court has affirmed by equal division, some of which prove troubling because they involve public statements by Justices about their views of legal issues even though the Court issues no precedential decision in the case.

Part IV provides a close examination of twenty-five years of tie votes to ascertain whether the Court's failure to definitively resolve the issues in those cases resulted in a persistent and significant split of authority among the lower courts. The data suggest that most tie votes are relatively inconsequential because the issues involved either return to the Supreme Court in relatively short order or there was no split of authority to begin with.

Part V identifies problems with orders that affirm by equal division that could be ameliorated by use of the DIG. The current practice threatens public perceptions of the Court's legitimacy and may lead Justices to prejudge future cases. Because

30. See Judiciary Act of 1925, ch. 229, 43 Stat. 936. Prior to the 1925 Judiciary Act, the ratio of cases arising under the Supreme Court's mandatory jurisdiction and discretionary jurisdiction was approximately four to one; after the Act the ratio reversed. See Bennett Boskey & Eugene Gressman, *The Supreme Court Bids Farewell to Mandatory Appeals*, 121 F.R.D. 81, 87 (1988).

the DIG would avoid these costs, the Justices should embrace that procedure as the means of resolving cases where they deadlock.

I. SUPREME COURT PROCEDURES AND THE EQUALLY DIVIDED COURT

This Article suggests that the Supreme Court abandon one procedure for dealing with tie votes—affirming by an equally divided court—in favor of another—the DIG. This Part provides a brief overview of both procedural mechanisms.

A. AFFIRMANCE BY EQUAL DIVISION

The Supreme Court has long applied the rule that where the Justices reach a tie vote on the judgment in a case, the lower court's opinion is affirmed.³¹ Such a decision binds the parties, but has no precedential value.³²

The Court first dealt with a tie vote in 1792. The Supreme Court's participation in *Hayburn's Case*, a famous case in which a lower federal court first found a congressional statute unconstitutional, was limited to equally dividing on a question of procedure.³³ The case involved the Invalid Pensions Act of 1792, which required federal circuit courts to determine pen-

31. See *Durant v. Essex Co.*, 74 U.S. (7 Wall.) 107, 110 (1868).

32. *Id.*; see also *Arkansas 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."); *United States v. Pink*, 315 U.S. 203, 216 (1941) (explaining that an affirmance by equal division is binding on the parties to that litigation but no one else). In *United States v. Hatter*, the Court suggested that an affirmance by equal division might not always bind the parties, 532 U.S. 557, 565–68 (2001). The Court explained that its prior decision applying law of the case doctrine to an affirmance by equal division involved "a case . . . in which [the] Court had heard oral argument and apparently considered the merits prior to concluding that affirmance by an equally divided Court was appropriate." *Id.* at 566. The Court saw this as important because "[t]he law of the case doctrine presumes a hearing on the merits," thereby suggesting that a decision by equal affirmance issued prior to such a hearing on the merits would not have any preclusive effect. *Id.* at 558.

33. *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792). For an early account of *Hayburn's Case*, see generally Max Farrand, *The First Hayburn Case, 1792*, 13 AM. HIST. REV. 281 (1908). Maeva Marcus and Robert Teir have argued that *Hayburn's Case* is widely misunderstood as a case involving separation of powers, when in truth the case involves an assessment of whether the president vested the attorney general with authority to proceed in court. Maeva Marcus & Robert Teir, *Hayburn's Case: A Misinterpretation of Precedent*, 1988 WIS. L. REV. 527, 542–46 (1988).

sions for disabled revolutionary war veterans.³⁴ The federal circuit courts—staffed in part by Supreme Court Justices riding circuit—balked, concluding that Congress lacked the constitutional power to require federal judges to engage in non-judicial activity.³⁵ The first United States Attorney General, Edmund Randolph, filed a petition for mandamus asking the Supreme Court to direct the circuit courts to carry out the duties assigned to them by the Act.³⁶ In so doing, Attorney General Randolph did not purport to represent any particular veteran who had been denied a pension but rather filed a motion to proceed *ex officio*, in other words, by virtue of his inherent authority as the Attorney General.³⁷ The Supreme Court's involvement began and ended with its resolution—or really, non-resolution—of this motion. As the Court explained, “THE COURT being divided in opinion on that question, the motion, made *ex officio*, was not allowed.”³⁸ Before the Attorney General could secure a decision on a modified petition brought on behalf of William Hayburn, Congress amended the law.³⁹

The tie vote in *Hayburn's Case* didn't result in the affirmance of a lower court decision but rather denial of the Attorney General's motion. The principle embodied in the case, however, applies to situations where the Supreme Court reviews the decision of a lower court. Under the principle in *Hayburn's Case*, the Court views itself as being unable to take affirmative action—including reversing the decision of a lower court—in the absence of a majority vote of the Justices.⁴⁰ The Court has used this rule to affirm a decision of a lower court more than 180 times in total.⁴¹ The procedure has been utilized in cases involving slavery,⁴² presidential elections,⁴³ violations of anti-trust laws,⁴⁴ and criminal convictions.⁴⁵ The Court generally is-

34. *Hayburn's Case*, 2 U.S. at 409.

35. *See id.* at n.† (describing decisions by circuit courts for the districts of New York, which sat Chief Justice John Jay and Justice William Cushing; Pennsylvania, which sat Justices James Wilson and John Blair Jr.; and North Carolina, which sat Justice James Iredell).

36. *Id.* at 409.

37. *Id.*; *see also Ex Officio*, BLACK'S LAW DICTIONARY (10th ed. 2014).

38. *Hayburn's Case*, 2 U.S. at 409.

39. *Id.* at 409–10.

40. *See Durant v. Essex Co.*, 74 U.S. (7 Wall.) 107, 111 (1868).

41. Data on file with author.

42. *See The Antelope*, 23 U.S. (10 Wheat.) 66 (1825).

43. *See Common Cause v. Schmitt*, 455 U.S. 129 (1982) (*per curiam*).

44. *See, e.g., United States v. Penn-Olin Chem. Co.*, 389 U.S. 308 (1967)

sues its order “without much discussion,” as the Court once described its analysis of the legal issue presented in *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825), the first instance in which the Court affirmed a lower court decision by a tie vote.⁴⁶ Typically, the Court also avoids identifying who among the Justices cast which votes, because this cloak of anonymity “may well enable the next case presenting [a legal issue] to be approached with less commitment.”⁴⁷ At times, however, the Court has diverged from this practice and identified precisely how the votes broke down in a particular case.⁴⁸ At other times, particular Justices have written at length about their views of the lower court’s opinion notwithstanding the fact that a tie vote has disabled the Supreme Court from resolving the case.⁴⁹

The practice of affirming by equal division has caused concern among the Justices and scholars. Such decisions cause “embarrassment” for the Supreme Court,⁵⁰ which is forced to publicly admit that disagreement among its members has caused it to fail to fulfill its constitutional role.⁵¹ Such dispositions are also inefficient, wasting resources of the Court itself and the advocates before it.⁵² And such decisions leave unsettled the legal issues presented, legal issues likely of high importance or else they would never have reached the Supreme Court in the first place.⁵³ Professor Caprice Roberts worries also that the possibility of affirmance by equal division may subconsciously affect Justices’ decisions about recusal, causing them to participate in cases where they should properly disqualify themselves in order to avoid tie votes.⁵⁴

(per curiam); *United States v. Cotton Valley Operators Comm.*, 339 U.S. 940 (1950) (per curiam).

45. *See, e.g.*, *Biggers v. Tennessee*, 390 U.S. 404 (1968) (per curiam); *United States v. Am. Freightways Co.*, 352 U.S. 1020 (1957) (per curiam).

46. *Neil v. Biggers*, 409 U.S. 188, 192 (1972).

47. *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 264 (1960) (Brennan, J., concurring).

48. *See Am. Elec. Power v. Connecticut*, 131 S. Ct. 2527, 2535 (2011).

49. *See Standard Indus., Inc. v. Tigrett Indus., Inc.*, 397 U.S. 586 (1970) (Black, J., dissenting) (per curiam).

50. Ryan Black & Lee Epstein, *Recusals and the “Problem” of an Equally Divided Supreme Court*, 7 J. APP. PRAC. & PROCESS 75, 82–83 (2005).

51. Caprice L. Roberts, *The Fox Guarding the Henhouse?: Recusal and the Procedural Void in the Court of Last Resort*, 57 RUTGERS L. REV. 107, 174 (2004).

52. *See Black & Epstein, supra* note 50, at 83.

53. *Id.* at 82–83.

54. *See Roberts, supra* note 51.

Because of these concerns, proposals for reform have occasionally arisen over the years. William Reynolds and Gordon Young suggested that a tie vote, in some instances, should result in reversal of the lower court's decision, rather than an affirmance.⁵⁵ In their view, the Court should demarcate the territory of such reversals based on policy presumptions—including what they identify as a presumption of constitutionality and the presumption favoring criminal defendants.⁵⁶ In other words, where a lower court holds a statute unconstitutional or affirms the conviction of a criminal defendant, a tie vote would reverse that judgment.⁵⁷

Thomas E. Baker, frustrated by the Court's affirmance by equal division in *Free v. Abbott Laboratories, Inc.*, a case involving aggregation of claims and federal subject matter jurisdiction, proposes a simpler solution.⁵⁸ He notes that over the Court's history, "some Justices not infrequently sublimated their judicial egos, suppressed their individual voices, and voted against themselves, so to speak, in particular cases, out of respect for the Court as an institution."⁵⁹ The Justices should apply similar self-restraint where the Court heads for a tie, because "[i]t is usually more important that a rule of law be settled, than that it be settled right."⁶⁰ Thus, in such circumstance, Baker would have one or more Justices switch their votes to produce a majority decision.⁶¹

Edward Hartnett has raised objections to the proposals of Reynolds and Young and Baker.⁶² He argues that a search for principles delineating those tie votes that should result in affirmances and those that should result in reversals would inject unnecessary confusion into the Court's procedures, and the

55. Reynolds & Young, *supra* note 21, at 29.

56. *Id.* at 48–52.

57. *Id.* at 48–53. The authors acknowledge that these presumptions may sometimes conflict, and they urge the Justices to develop principled approaches to such circumstances. "Far more important than the analysis of particular categories of cases is the general conclusion that the Court should be aware of the possibility of identifying policies that by broad consensus of the Justices could be used to dispose of equal divisions in principled ways." *Id.* at 53.

58. Baker, *supra* note 4, at 129–30 (criticizing *Free v. Abbott Laboratories, Inc.*, 529 U.S. 333 (2000) (per curiam)).

59. *Id.* at 136.

60. *Id.* at 129 (quoting *DiSanto v. Pennsylvania*, 273 U.S. 34, 42 (1927) (Brandeis, J., dissenting)).

61. *Id.* at 130.

62. Edward A. Hartnett, *Ties in the Supreme Court of the United States*, 44 WM. & MARY L. REV. 643, 660–61 (2002).

Justices could also split evenly on how to apply such principles in any particular case.⁶³ Hartnett also objects to the “folly” of vote switching as advocated for by Baker because where there are equal votes with regard to the judgment in a case, there is no principled means to determine which side should give way to the other.⁶⁴ “Far better,” he concludes, “to adhere to the longstanding practice of affirmance by an equally divided Court and to wait for another case to present the issue for resolution.”⁶⁵

Chief Justice William Rehnquist and Justice John Paul Stevens suggested another approach that would eliminate tie votes where a Justice has recused herself, thereby resulting in an even number of Justices participating in a case.⁶⁶ They urged Congress to pass a law allowing the Supreme Court to appoint retired Justices whenever one of the active Justices recuses herself, thereby returning to an odd number of participating Justices.⁶⁷ Such a rule would follow the practice of some state supreme courts, which allow for the assignment of substitute Justices.⁶⁸ Senator Patrick Leahy, chairman of the Senate Judiciary Committee, followed the suggestion, introducing a bill to allow the Court, by majority vote, to designate a retired Justice to participate in a case where one of the active Justices is recused.⁶⁹ The bill would have no effect on situations where the membership of the Court was depleted by death or retirement, leaving an even number of Justices to consider a case.⁷⁰

Because Senator Leahy’s legislation dealt only with recusals, a number of scholars have similarly considered whether creating a special rule for recusals is either necessary or wise. Professors Lisa McElroy and Michael Dorf have pro-

63. *Id.* at 660–61.

64. *Id.* at 667–68.

65. *Id.* at 669.

66. See 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, 83 n.7 (2011).

67. *Id.* at 81.

68. In California, for example, the chief justice may reassign a lower court judge to serve on the California Supreme Court in the event of a recusal. See CAL. CONST. art. VI, § 6(e); Stephen R. Barnett & Daniel L. Rubinfeld, *The Assignment of Temporary Justices in the California Supreme Court*, 17 PAC. L.J. 1045, 1045–46 (1986); Steven Lubet, *Disqualification of Supreme Court Justices: The Certiorari Conundrum*, 80 MINN. L. REV. 657, 673–74 n.78 (1996).

69. See S. 3871, 111th Cong. (2010).

70. *Id.*

vided an extensive critique of this proposal.⁷¹ Much like Caprice Roberts, they worry that such a procedure may skew recusal decisions: Justices may experience subconscious pressure not to recuse themselves if they believe a substitute Justice is unlikely to share their views on the outcome of a case.⁷² This is because in the absence of a substitute, a recusal cannot cause a majority decision that runs counter to the recused Justice's views. If that Justice would have provided the decisive vote, the remaining Justices would split evenly and create no Supreme Court precedent.⁷³ Since the Justices themselves decide whether to recuse, a decision that is unreviewable, skewing that decision could undermine the integrity and appearance of integrity of the Court by causing Justices to participate in cases in which they have an identifiable interest.⁷⁴ McElroy and Dorf also raise concerns about the constitutionality of authorizing substitute Justices, although they conclude that it would likely survive constitutional muster.⁷⁵

Finally, Ryan Black and Professor Lee Epstein critique on empirical grounds the need for a solution to the perceived problem of recusals resulting in tie votes.⁷⁶ Relying on a data set containing Supreme Court decisions between 1946 and 2003, they reveal that the recusal of a Justice leads to an affirmance by equal division in only a miniscule number of cases.⁷⁷ Their data set contains 599 occasions where a Justice recused herself, although the data set does not contain any circumstances where tie votes resulted from anything other than a recusal.⁷⁸ The data indicate that on only forty-nine occasions has a recusal resulted in an equally divided court.⁷⁹ Black and Epstein argue that the "problem" with recusals is therefore more perceived than real, and they wonder whether "near-heroic" steps are necessary to address a circumstance that manifests so rarely.⁸⁰

71. McElroy & Dorf, *supra* note 66.

72. *Id.* at 99–100.

73. *Id.* at 100.

74. *Id.* at 99.

75. *Id.* at 104.

76. See Black & Epstein, *supra* note 50, at 80–81.

77. *Id.* at 85.

78. *Id.* at 80.

79. *Id.*

80. *Id.* at 85.

The analysis of tie votes provided in this Article relies on a data set of tie votes different than the one analyzed by Black and Epstein. While they focused their analysis on tie votes resulting from discretionary recusals,⁸¹ this Article examines tie votes generally. It does so based on a data set of 164 cases that involved tie votes between 1925, when Congress passed the Judiciary Act of 1925, and the end of October term 2014.⁸² That data set was assembled through a search of Westlaw's Supreme Court database. The search terms used to identify the initial set of possible cases resulting in tie votes were "affirmed" /10 "equally divided." In a few instances, the Court issued multiple orders affirming the same lower court's decision by an equally divided court—with each order resolving different petitions for certiorari.⁸³ Where multiple orders arose out of a single lower court decision, this was counted as a single case.

The initial search of that database returned 335 results. Each result was examined. Orders affirming by equal division and opinions in which one or more issues were affirmed by equal division were added to the data set. Additionally, any order identified in an opinion as an instance of affirming by an equally divided court was cross-referenced against the data set to ensure its inclusion. Any case identified in an opinion as having involved a tie vote, but not otherwise captured in the search, was added to the data set. Cases were included only if the court equally divided on the judgment, not where fractured opinions evenly divided as to the reason for a judgment.⁸⁴

81. *Id.* at 80.

82. The Judiciary Act of 1925 did not, of course, apply to cases already on the Supreme Court's docket as an appellate matter at the time the Act came into effect. None of the 164 cases in my sample consisted of such residual appeals. The Court affirmed by equal division one case in 1927, *Chesapeake & Ohio Ry. Co. v. Leitch*, 275 U.S. 507 (1927) (per curiam), but that case came to the Court through the certiorari process. The Court next affirmed by equal division in the 1930 case *Nashville, Chattanooga & St. Louis Ry. v. Morgan*, 280 U.S. 534 (1930) (per curiam). That case did arise under the Court's appellate jurisdiction, but under a provision that remained in effect after the Judiciary Act of 1925.

83. *See, e.g.,* *Stemmer v. New York*, 336 U.S. 963 (1949) (per curiam); *Krakower v. New York*, 336 U.S. 963 (1949) (per curiam).

84. *See* *Nichols v. United States*, 511 U.S. 738, 750 (1994) ("On the question addressed by the other eight Justices, then, the *Baldasar* [*v. Illinois*, 446 U.S. 222 (1980)] Court was in equipoise, leaving a decision in the same posture as an affirmance by an equally divided Court"); *Pennsylvania v. Union Gas Co.* 491 U.S. 1, 29 (1989) (Scalia, J., concurring in part and dissenting in part) (citing *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468 (1987)), *overruled by* *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 66

The 164 cases identified using this methodology are an exceedingly small percentage of the cases decided by the Supreme Court (less than one percent), which has decided over 15,000 cases during that period.⁸⁵ As the table and chart summarizing the data set indicate, the prevalence of tie votes has varied to some degree over time. In general, since 1989, there have been relatively few tie votes as compared to the prior six decades.

Table 1: Number of Tie Votes During Five-Year Periods

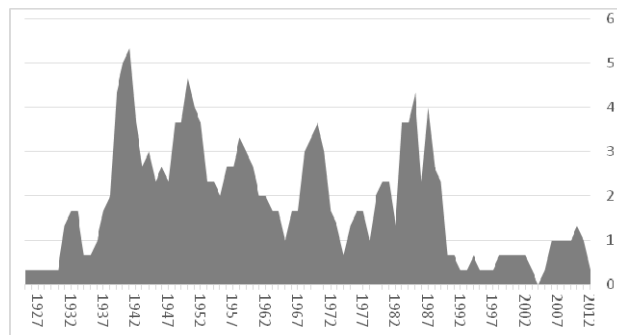
Years	Ties
2010–2014	4
2005–2009	3
2000–2004	3
1995–1999	2
1990–1994	3
1985–1989	21
1980–1984	9
1975–1979	7
1970–1974	14
1965–1969	7
1960–1964	12
1955–1959	13

(1996) (“Eight Members of the Court addressed the question of whether to overrule *Hans* only two Terms ago—but inconclusively, since they were evenly divided.”). These cases present difficult problems of identifying controlling legal rules as discussed in *Marks v. United States*, 430 U.S. 188, 193 (1977), and its progeny, but are different than circumstances where the court equally divides as to the judgment. See Justin Marceau, *Plurality Decisions: Upward-Flowing Precedent and Acoustic Separation*, 45 CONN. L. REV. 933 (2013). The data set did not include motions and orders terminating cases that were resolved by an equally divided court. See, e.g., *Bell v. Lynaugh*, 484 U.S. 891 (1987) (denying stay of execution by equally divided court); *St. Louis Bd. of Educ. v. Caldwell*, 429 U.S. 1086 (1977) (denying application to recall and stay mandate by equally divided court).

85. This data was compiled from the Federal Judicial Center’s data on Supreme Court disposition, which reports that there were 15,768 full and per curium opinions from 1932 to 2013. See *Supreme Court of the United States: Method of Disposition, 1970–2014*, FED. JUD. CTR., http://www.fjc.gov/history/caseload.nsf/page/caseloads_Sup_Ct_Methods_of_Disposition_2 (last visited Oct. 14, 2016); *Supreme Court of the United States: Method of Disposition, 1932–1969*, FED. JUD. CTR., http://www.fjc.gov/history/caseload.nsf/page/caseloads_Sup_Ct_method_of_disposition (last visited Oct. 14, 2016).

1950–1954	19
1945–1949	13
1940–1944	21
1935–1939	6
1930–1934	6
1925–1929	1
Total	164

Figure 1: Three-Year Running Average of Tie Votes



B. DISMISSAL AS IMPROVIDENTLY GRANTED

Like the affirmance by equal division, the DIG has a long history. A DIG occurs where the Supreme Court decides that it erred in granting certiorari and enters an order dismissing the writ of certiorari, thereby terminating the case in the Supreme Court.⁸⁶ Like the affirmance by equal division, the DIG typically occurs late in a case's life.⁸⁷ Also like the affirmance by equal division (or a denial of a petition for certiorari) the DIG has no precedential value.⁸⁸

86. See Michael E. Solimine & Rafael Gely, *The Supreme Court and the DIG: An Empirical and Institutional Analysis*, 2005 WIS. L. REV. 1421, 1421 (2005) [hereinafter Solimine & Gely, *The Supreme Court and the DIG*].

87. An affirmance by equal division occurs after all briefing and oral argument have concluded and in only a few cases has the Court used a DIG prior to oral argument. See *id.* at 1427–28.

88. See, e.g., *Parker v. Ellis*, 362 U.S. 574, 576 (1960) (“It is precisely because a denial of a petition for certiorari without more has no significance as a ruling that an explicit statement of the reason for a denial means what it says.”).

The Court first used the DIG soon after Congress vested it with its certiorari jurisdiction in the Court of Appeals Act of 1891.⁸⁹ While it's unclear precisely which cases were involved, during debate over the Judiciary Act of 1925, Justices Willis Van Devanter and James McReynolds testified that the Court sometimes dismissed the writ of certiorari as improvidently granted.⁹⁰ In its 1955 order DIGing the case of *Rice v. Sioux City Memorial Park Cemetery, Inc.*, the Court stated that it had used the procedure more than sixty times.⁹¹

The Supreme Court is notoriously opaque with its internal procedures and has provided scant public information about the DIG. A study conducted by Professors Michael Solimine and Rafael Gely provides some illumination of the procedure.⁹² They identified 155 times when the Court DIGed a case between 1954 and 2005.⁹³ Of those 155 DIGs, only twelve occurred before oral argument.⁹⁴ A super-majority vote of six Justices is typically, although not always, required to DIG a case.⁹⁵ This super-majority requirement can be viewed as a necessary corollary to the "Rule of Four," which requires the support of only four Justices to grant certiorari.⁹⁶ The idea is that if four Justices can grant certiorari, it would make no sense for five Justices to be able to dismiss the writ.⁹⁷ This requirement has not, however, always been respected. In fourteen of the 155 DIGs examined by Solimine and Gely, the Court issued a DIG by a

89. Court of Appeals Act of 1891, ch. 517, § 5, 26 Stat. 826, 828.

90. See James F. Blumstein, *The Supreme Court's Jurisdiction—Reform Proposals, Discretionary Review, and Writ Dismissals*, 26 VAND. L. REV. 895, 924 (1973).

91. *Rice v. Sioux City Mem'l Park Cemetery, Inc.*, 349 U.S. 70, 78 (1955).

92. See Solimine & Gely, *The Supreme Court and the DIG*, *supra* note 86, at 1425.

93. See *id.* at 1434.

94. See *id.*

95. Solimine & Gely, *Sophisticated Use of DIGs*, *supra* note 29, at 158.

96. See *id.* at 158. In *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 521, 560 (1957) (Harlan, J., concurring in one case and dissenting in three), Justice John Harlan expressed support for a rule that only a super-majority vote could DIG a case. In explaining his reasons for not supporting dismissal in four cases arising in 1957, Justice Harlan explains that while he did not support the grant of certiorari, "I cannot reconcile voting to dismiss the writs as 'improvidently granted' with the Court's 'rule of four.'" *Id.* at 559. Justice Harlan's position on how many votes were required to DIG a case was not consistent across his career. See Revesz & Karlan, *supra* note 29, at 1091–92. In *Triangle Improvement Council v. Ritchie*, 402 U.S. 497, 497 (1971) (per curiam), Justice Harlan defended a five-Justice simple majority DIGing a case.

97. See Solimine & Gely, *Sophisticated Use of DIGs*, *supra* note 29, at 158.

vote of five to four.⁹⁸ The Court also generally relies on the DIG only where it can entirely dismiss a case. In fifteen instances, however, the Court used the DIG to dispose of only a portion of a case for which certiorari had been granted.⁹⁹

The Supreme Court has invoked numerous reasons for using a DIG. The most influential treatise on Supreme Court practice examines the reasons that the Court issues a DIG, noting that the explanations that the Court sometimes provides “emphasize that the ‘certworthiness’ of a case must be evident to the Court not only at the initial screening stage but in all subsequent phases of a proceeding.”¹⁰⁰ After canvassing the cases, the treatise identifies at least seventeen reasons that the Court may DIG a case, including “[a]n apparent conflict of decisions may disappear upon closer analysis,” “[a]n important issue may be found not to be presented by the record,” and “[a] hitherto unsuspected jurisdictional defect may become apparent.”¹⁰¹ All seventeen reasons generally amount to a recognition by the Court of some changed circumstance, even if the changed circumstance relates simply to the Court’s understanding of the case.¹⁰²

II. SOURCES OF JURISDICTION AND THE EQUALLY DIVIDED COURT

This Article’s proposal—that the Supreme Court DIG rather than affirm by an equally divided court—can only occur for those cases that arrive at the Supreme Court on a writ of certiorari. Where a case arises under the Court’s mandatory appellate jurisdiction, the Court cannot DIG because there is no writ of certiorari to dismiss. The few cases that arise under the Court’s original jurisdiction pose an even thornier problem because the Court can neither DIG—because again there is no writ of certiorari to dismiss—nor affirm by an equally divided

98. *Id.* at 167.

99. Solimine & Gely, *The Supreme Court and the DIG*, *supra* note 86, at 1434.

100. STEPHEN M. SHAPIRO ET AL., *SUPREME COURT PRACTICE* 360 (10th ed. 2013). The Shapiro treatise, formerly known as Stern and Gressman, deserves particular attention because in interviews, Supreme Court Justices refer “frequently” to it “and in a way that almost seemed as if it were an official publication of the Court.” See H.W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* 23 (1991).

101. SHAPIRO ET AL., *supra* note 100, at 360–62.

102. Solimine & Gely, *The Supreme Court and the DIG*, *supra* note 86, at 1450.

court—because there is no lower court decision to affirm.¹⁰³ While mandatory appeals and original jurisdiction cases occur, as this Part will explain, very few have resulted in tie votes. As a result, in the lion’s share of cases, the DIG is an available option to the Court when the Justices divide evenly.

A. SHIFTS IN JURISDICTION

Prior to 1925, the Court’s docket was dominated by cases over which it had mandatory jurisdiction, most frequently cases where parties could exercise an appeal as of right.¹⁰⁴ The rule that an equally divided court affirms the lower court decision without creating binding precedent grew out of that historical era and resolved an obvious problem confronting the Court. Where the Supreme Court has mandatory jurisdiction, it must somehow resolve the case before it. The Court developed a few rules that enabled it to affirmatively decline to exercise jurisdiction over cases that otherwise fell within its mandatory jurisdiction, such as the rule that the Court may dismiss an appeal for want of a substantial federal question.¹⁰⁵ Such a dismissal, however, is predicated on a determination about the substance of the case coming before the Court, and did not provide the Justices with broad discretion to decline to hear cases where they divided on the appropriate outcome.

The shift to a discretionary docket relying on the petition for certiorari as the primary vehicle by which cases arise in the Supreme Court began in earnest with the Judiciary Act of 1925,¹⁰⁶ and today the vast majority of cases come to the Supreme Court upon a writ of certiorari.¹⁰⁷ Only a few cases arise under the Court’s original jurisdiction, which generally involve suits between states over territorial disputes and rarely constitute “cases of more than passing interest.”¹⁰⁸ Congress has also

103. See Michael Coenen, Comment, *Original Jurisdiction Deadlocks*, 118 YALE L.J. 1003, 1003–04 (2009).

104. See DORIS MARIE PROVINE, CASE SELECTION IN THE UNITED STATES SUPREME COURT 1 (1980).

105. See PERRY, *supra* note 100.

106. See PROVINE, *supra* note 104.

107. See *The Statistics*, 126 HARV. L. REV. 388, 395 (2012); Boskey & Gressman, *supra* note 30, at 89–90; see also Tara Leigh Grove, *The Exceptions Clause as a Structural Safeguard*, 113 COLUM. L. REV. 929 (2013) (providing a history on the expansion of the Supreme Court’s discretionary appellate jurisdiction).

108. James E. Pfander, *Rethinking the Supreme Court’s Original Jurisdiction in State-Party Cases*, 82 CAL. L. REV. 555, 557 (1994); see also 28 U.S.C.

largely done away with the mandatory appellate jurisdiction of the Supreme Court, leaving only a few statutory provisions under which a party has a right to an appeal in the Supreme Court following a trial overseen by a three-judge district court.¹⁰⁹

B. INSIGNIFICANCE OF MANDATORY JURISDICTION IN TIE VOTES

The Court could not use a DIG to dispose of a case that falls within the Court's limited remaining mandatory jurisdiction. This Section assesses the extent to which such cases result in tie votes based on the data set of 164 ties that arose between 1925 and 2014 and finds that the number of ties that would arise under the Court's mandatory jurisdiction today—exactly one—is a miniscule number.

Of the cases in the data set, thirty-three arose under a statute that at the time of the case provided the Court with mandatory appellate jurisdiction (twenty percent) and 122 arose under a statute that at the time of the case provided the Court with discretionary certiorari jurisdiction (eighty percent). No cases in the data set arose under the Court's original jurisdiction—although, as will be discussed below,¹¹⁰ one tie vote occurred regarding an issue within the Court's original jurisdiction, but that order was not captured in the data set because the Court did not state that the Justices had evenly divided and no subsequent decision referred to the order as involving an equally divided court.¹¹¹ I then examined the thirty-three cases that arose as an appeal to determine if that case would still be treated as an appeal under the current law governing the Supreme Court's jurisdiction.¹¹²

Analysis of the thirty-three tie votes that arose under the Court's mandatory jurisdiction reveals that all but one of these cases would be treated as petitions for certiorari today.¹¹³ That

§ 1251(a) (2012) (providing for exclusive jurisdiction in the Supreme Court over “all controversies between two or more states”).

109. See *The Statistics*, *supra* note 107; Boskey & Gressman, *supra* note 30, at 89–90; see also Grove, *supra* note 107.

110. See *infra* notes 146–54 and accompanying text.

111. See *In re Isserman*, 345 U.S. 286 (1953).

112. This analysis was conducted in two ways: first, by examining the statutory provision cited by the Court as the basis for jurisdiction and determining whether that provision had been amended to eliminate mandatory appellate jurisdiction, and, second, by referring to scholarly discussion of the Court's shifting jurisdiction. See, e.g., Boskey & Gressman, *supra* note 30, at 89–90.

113. The one case is *Common Cause v. Schmitt*, 455 U.S. 129 (1982) (per

means that less than one percent of affirmances by equal division that occurred between 1925 and 2015 would fall within the Supreme Court's mandatory jurisdiction today.

Ten of the cases that arose as appeals were appeals from state supreme court decisions.¹¹⁴ Such appeals were authorized under 28 U.S.C. § 1257 and its predecessors, in circumstances where a state supreme court either upheld a state statute against a challenge alleging that it was invalid as a matter of federal law or invalidated a federal statute or treaty.¹¹⁵ The cases in this category are dispersed throughout the period examined. Two orders affirming by equal division were issued in the 1930s, two orders were issued in the 1940s, two orders were issued in the 1960s, three orders were issued in the 1970s, and one order was issued in 1991.¹¹⁶ Congress removed this aspect of the Court's mandatory appellate jurisdiction in the 1988 Supreme Court Case Selection Act.¹¹⁷ Today, all ten cases would arise only on writs of certiorari.

Four cases arose as appeals from decisions by federal courts of appeals.¹¹⁸ Prior to the Supreme Court Case Selection Act,¹¹⁹ the Court exercised appellate jurisdiction over decisions by federal courts of appeals that either held a state statute invalid as contrary to federal law or held a federal statute uncon-

curiam); *see also* Probable Jurisdiction Noted, *Common Cause v. Schmitt*, 450 U.S. 908 (1981).

114. *Ford Motor Credit Co. v. Dep't of Revenue*, 500 U.S. 172 (1991) (per curiam); *Radich v. New York*, 401 U.S. 531 (1971) (per curiam); *Grove Press Inc. v. Md. State Bd. of Censors*, 401 U.S. 480 (1971) (per curiam); *In re Spencer*, 397 U.S. 817 (1970) (per curiam); *Slagle v. Ohio*, 366 U.S. 259 (1961) (per curiam); *Ohio ex rel. Eaton v. Price*, 364 U.S. 263 (1960) (per curiam); *Doubleday & Co. v. New York*, 335 U.S. 848 (1948) (per curiam); *N.Y., Chi. & St. Louis R.R. Co. v. Frank*, 313 U.S. 538 (1941) (per curiam); *W.H.H. Chamberlin, Inc. v. Andrews*, 299 U.S. 515 (1936) (per curiam); *Nashville, Chattanooga & St. Louis Ry. v. Morgan*, 280 U.S. 534 (1930) (per curiam).

115. 28 U.S.C. § 1257(1)–(3) (1982) (authorizing the Court to assert certiorari jurisdiction in other circumstances, including where state or federal law was held constitutional).

116. That 1991 case is *Ford Motor Credit Co. v. Dep't of Revenue*, 500 U.S. 172 (1991) (per curiam). *See* Brief for Appellant, *Ford Motor Credit Co. v. Dep't of Revenue*, 500 U.S. 172 (1991) (No. 88-1847), 1990 W.L. 10022479.

117. Pub. L. 100-352 (1988); *see also* 28 U.S.C. § 1257 (1988).

118. *Hartigan v. Zbaraz*, 484 U.S. 171 (1987) (per curiam); *Pension Ben. Guar. Corp. v. Yahn & McDonnell, Inc.*, 481 U.S. 735 (1987) (per curiam); *Cory v. W. Oil & Gas Ass'n*, 471 U.S. 81 (1985) (per curiam); *Bd. of Educ. of Okla. City v. Nat'l Gay Task Force*, 470 U.S. 903 (1985) (per curiam).

119. Pub. L. 100-352 (1988).

stitutional so long as the federal government was a party.¹²⁰ Two cases arose under each of those provisions. The Supreme Court issued all four orders affirming by equal division during the 1980s. Each of those cases would arise under the certiorari jurisdiction today.

One case, resolved in 1957, involved a district court decision in a criminal case.¹²¹ The United States sought to prosecute a partnership that allegedly knew it violated regulations addressing the safe transportation of explosives.¹²² The district court dismissed the information, ruling that partnerships were not subject to criminal liability under the regulations.¹²³ The United States appealed under a provision vesting the Supreme Court with appellate jurisdiction over certain appeals by the United States in criminal cases.¹²⁴ Congress eliminated this aspect of the Supreme Court's appellate jurisdiction in 1971 and a case such as this one would now arise under the Court's certiorari jurisdiction.¹²⁵

The remaining eighteen appeals arose out of federal district court panels in circumstances in which Congress authorized a direct appeal to the Supreme Court. The largest number, nine in total, dealt with cases brought under the Sherman Antitrust Act.¹²⁶ Under the 1903 Expediting Act, appeal from such decision lay exclusively in the Supreme Court.¹²⁷ Congress amended the Expediting Act in 1974, removing most of the Supreme Court's appellate jurisdiction in this context.¹²⁸ Even in

120. 28 U.S.C. §§ 1252, 1254(2) (1987).

121. *See* United States v. Am. Freightways Co., 352 U.S. 1020 (1957) (per curiam); Brief of Petitioner-Appellant at 2, United States v. Am. Freightways Co., 352 U.S. 1020 (1957) (No. 265), 1956 WL 89193 (Statement as to Jurisdiction).

122. *See* Brief of Petitioner-Appellant at *2, United States v. Am. Freightways Co., 352 U.S. 1020 (1957) (No. 265), 1956 WL 89193 (Statement as to Jurisdiction).

123. *Id.* at *1.

124. 18 U.S.C. § 3731 (1970).

125. *See* 18 U.S.C. § 3731 (1976).

126. United States v. First Nat'l Bancorporation, Inc., 410 U.S. 577 (1973) (per curiam); United States v. Pennolin Co., 389 U.S. 308 (1967) (per curiam); United States v. Huck Mfg. Co., 382 U.S. 197 (1965) (per curiam); Holophane Co. v. United States, 352 U.S. 903 (1956) (per curiam); United States v. Cotton Valley Operators Comm., 339 U.S. 940 (1950) (per curiam); United States v. Pullman Co., 330 U.S. 806 (1947); Otis & Co. v. United States, 330 U.S. 806 (1947); Chesapeake & Ohio R.R. Co. v. United States, 330 U.S. 806 (1947); Glore, Forgan & Co. v. United States, 330 U.S. 806 (1947) (per curiam).

127. The Expediting Act, 15 U.S.C. § 28 (1903), 32 Stat. 823 (1903).

128. Pub. L. 93-528 (1974); *see also* Boskey & Gressman, *supra* note 30, at

those cases that still fall under the direct review provisions of that Act, the Supreme Court has discretion as to whether to accept the appeal,¹²⁹ and no appeal to the Supreme Court under the Sherman Act has resulted in equal division since 1973.¹³⁰ The Sherman Act cases are well distributed across time. One case occurred in the 1970s, two in the 1960s, two in the 1950s, and four in the 1940s.

Three more of the appeals involved cases in which a three-judge district court panel enjoined enforcement of federal or state law as contrary to the Constitution.¹³¹ One of these orders was issued in the 1950s, one in the 1940s, and one in the 1930s.¹³² Congress eliminated this aspect of the Court's appellate jurisdiction in 1976.¹³³ Another three of the appeals involved cases where an injunction was sought against an order of the Interstate Commerce Commission.¹³⁴ Two of these orders were issued in the 1970s and one in the 1960s.¹³⁵ Congress eliminated this aspect of the Supreme Court's appellate jurisdiction in 1975¹³⁶ and abolished the Interstate Commerce Commission in 1995.¹³⁷ And finally, two of the appeals, both resolved in 1952, involved a suit seeking to enjoin orders of the United States Maritime Commission.¹³⁸ These appeals were resolved shortly before the Commission was abolished.¹³⁹

89–90.

129. 15 U.S.C. § 29(b) (2012).

130. The Supreme Court has not heard a case on direct review under the Expediting Act since the 1983 case *Maryland v. United States*, 460 U.S. 1001 (1983), and that case resulted in a summary affirmance without opinion.

131. 28 U.S.C. §§ 2281, 2282 (1970), *repealed by* Act of Aug. 12, 1976, 90 Stat. 1119 (1976); *Osman v. Douds*, 339 U.S. 846 (1950) (per curiam); *Reitz v. Mealey*, 313 U.S. 542 (per curiam), *reh'g granted*, *Reitz v. Mealey*, 313 U.S. 597 (1941); *R.R. Comm'n of Cal. v. Pac. Gas & Elec. Co.*, 301 U.S. 669 (1937) (per curiam).

132. *See supra* note 131 and accompanying text.

133. Act of Aug. 12, 1976, Pub. L. No. 94-381, 90 Stat. 1119 (1976).

134. *Ala. Power Co. v. United States*, 400 U.S. 73 (1970) (per curiam); *Atlanta City Elec. Co. v. United States*, 400 U.S. 73 (1970) (per curiam); *Balt. & Ohio R.R. Co. v. Bos. & Me. R.R.*, 373 U.S. 372 (1963) (per curiam).

135. *See supra* note 134 and accompanying text.

136. Pub. L. No. 93-584 (1975); *see also* Boskey & Gressman, *supra* note 30, at 89–90.

137. ICC Termination Act of 1995, Pub. L. 104-88 (1995).

138. *Fed. Mar. Bd. v. United States*, 342 U.S. 950 (1952) (per curiam); *A/S J. Ludwig Mowinckels Rederi v. Isbrandtsen Co.*, 342 U.S. 950 (1952) (per curiam).

139. *See* Reorganization Plan No. 21 of 1950, 3 C.F.R. 173, 176 (1950), *reprinted in* 5 U.S.C. app. § 306 at 114 (2000).

This leaves just one appeal affirmed by an equally divided court during this time period that would today arise under the Supreme Court's mandatory appellate jurisdiction. In 1980, the Supreme Court affirmed by equal division a three-judge district court decision involving public funding during the presidential election of 1980.¹⁴⁰ The Federal Elections Commission and a public interest group sued supporters of then-candidate Ronald Reagan seeking to enjoin certain expenditures proposed by those supporters as contrary to the Presidential Election Campaign Fund Act.¹⁴¹ A three-judge district court held that the Act did not bar the expenditures¹⁴² and the Federal Election Commission took a direct appeal to the U.S. Supreme Court under 28 U.S.C. § 1253, which authorizes direct appeals from decisions of three-judge district courts.¹⁴³ The Supreme Court affirmed by equal division.¹⁴⁴ Challenges involving the Presidential Election Campaign Act remain among the few types of claims that are still adjudicated by a three-judge district court panel, and the Supreme Court retains mandatory appellate jurisdiction over these decisions.¹⁴⁵

As mentioned above, the literature discussing the affirmation by equal division identifies one example between 1925 and 2015 as involving a tie vote in a matter arising under the Supreme Court's original jurisdiction. The case *In re Isserman* was not captured in my data set because the Court did not acknowledge the tie vote in its opinion.¹⁴⁶ Tie votes in original jurisdiction matters prove difficult because there is no lower court decision that can be affirmed. Instead, a matter presents itself to the Supreme Court in the first instance. *In re Isserman* involved a proceeding of disbarment.¹⁴⁷ Abraham Isserman was

140. *Common Cause v. Schmitt*, 512 F. Supp. 489 (D.D.C. 1980).

141. *Id.* at 490.

142. *Id.* at 503.

143. Probable Jurisdiction Noted, *Common Cause v. Schmitt*, 450 U.S. 908 (1981) (No. 80-847).

144. *Common Cause v. Schmitt*, 455 U.S. 129 (1982) (per curiam).

145. See 28 U.S.C. § 1253 (2012); Boskey & Gressman, *supra* note 30, at 97.

146. *In re Isserman*, 345 U.S. 286 (1953); see also Hartnett, *supra* note 62, at 657–58. In 1870, the Supreme Court also faced a tie vote in a matter arising under its original jurisdiction in a boundary dispute case. *Coenen*, *supra* note 103, at 1004 (citing *Virginia v. West Virginia*, 78 U.S. (11 Wall.) 39 (1870)). While the Court has not developed a clear rule to govern such situations, the logic it has applied to tie votes in other contexts—that the Court lacks power to act in the absence of a majority vote—would suggest that the state filing the original action would by necessity lose. See Hartnett, *supra* note 62, at 657–58.

147. 345 U.S. 286 (1953).

convicted of contempt for his conduct as an attorney representing defendants accused of conspiring to organize the communist party in the United States.¹⁴⁸ As a result of the contempt conviction, the Supreme Court of New Jersey disbarred Isserman,¹⁴⁹ and the Court of Appeals of New York suspended his bar license for two years.¹⁵⁰ Pursuant to its rules at the time, the Supreme Court issued Isserman an order to show cause as to why he should not be disbarred.¹⁵¹ The Justices divided four to four and Chief Justice Fred Vinson explained, “Our rule puts the burden upon respondent to show good cause why he should not be disbarred.”¹⁵² Because Isserman did not receive the support of a majority of the Justices, the Court issued an order disbaring him.¹⁵³ Apparently troubled by this outcome, the Court then modified its rules, requiring a majority vote to disbar an attorney, and granted Isserman’s petition for rehearing, reinstating his license.¹⁵⁴

In re Isserman, and potential ties in other original jurisdiction cases, pose a difficult problem for the Court because, unlike cases arising either under the Court’s limited mandatory appellate jurisdiction or under its certiorari jurisdiction, no lower court ruling can resolve the matter. As a result, the Court can neither affirm by equal division nor DIG. The logic of the Court’s jurisprudence on the effect of tie votes—which suggests that the Court lacks power to issue affirmative orders in the absence of a majority vote—would suggest that the party bringing a matter within the original jurisdiction would necessarily lose.¹⁵⁵

III. TYPOLOGY OF THE EQUALLY DIVIDED COURTS

Using the empirical data set discussed in Part II, this Part develops a typology of affirmances by equal division. The most common form of these dispositions is also the least trouble-

148. See *Dennis v. United States*, 341 U.S. 494 (1951) (underlying criminal case); *United States v. Sacher*, 182 F.2d 416 (2d Cir. 1950) (contempt proceeding).

149. *In re Isserman*, 345 U.S. at 289–90.

150. *Id.* at 289.

151. *Id.*

152. *Id.*

153. *Id.* at 290.

154. *In re Isserman*, 348 U.S. 1 (1954) (per curiam).

155. *But see* Coenen, *supra* note 103, at 1005–07 (identifying strategies for addressing tie votes in original jurisdiction matters).

some. As will be discussed, the Supreme Court usually issues an order affirming the lower court decision without discussion and absent any identification of which Justices voted which way. But this is not always the case.

A. AFFIRMANCE WITHOUT EXPLANATION OR IDENTIFICATION

The most common form of the affirmance by equal division is both unattributed and non-explanatory, with the order indicating only the Justice recused. Of course, if the Supreme Court is experiencing a vacancy, and this is the cause of the equal division, no such comment is made. This is the form of 140 of the 164 cases in the data set.

Flores-Villar v. United States is a good example. In that case, the Court's order reads in its entirety: "PER CURIAM. The judgment is affirmed by an equally divided Court. Justice KAGAN took no part in the consideration or decision of this case."¹⁵⁶

B. AFFIRMANCE AS PART OF A LARGER OPINION

In fourteen cases, the Supreme Court notes its affirmance by equal division as part of a larger opinion resolving the merits of a case.¹⁵⁷ In some of these cases, the Supreme Court reveals more about the views of the Justices on the issue not decided, than in cases where the entire case is resolved by an equally divided court.¹⁵⁸

A good example is *Exxon Shipping Co. v. Baker*.¹⁵⁹ The case involved a \$4.5 billion punitive damage award against Exxon

156. *Flores-Villar v. United States*, 131 S. Ct. 2312, 2313 (2011) (per curiam). Justice Elena Kagan recused herself because her office dealt with the case when she was the solicitor general. See Stephen Kanter, *Brevity Is the Soul of Wit: Nguyen Is Dead*, 16 LEWIS & CLARK L. REV. 1305, 1314 (2012).

157. *Credit Suisse Securities (U.S.A.), L.L.C. v. Simmonds*, 132 S. Ct. 1414 (2012); *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011); *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008); *United States v. Zolin*, 491 U.S. 554 (1989); *Honig v. Doe*, 484 U.S. 305 (1988); *Marino v. Ortiz*, 484 U.S. 301 (1988) (per curiam); *Carpenter v. United States*, 484 U.S. 19 (1987); *Slagle v. Ohio*, 366 U.S. 259 (1961); *Int'l Typographical Union v. NLRB*, 365 U.S. 705 (1961); *Nelson v. County of Los Angeles*, 362 U.S. 1 (1960); *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960); *Raley v. Ohio*, 360 U.S. 423 (1959); *Holophane Co. v. United States*, 352 U.S. 903 (1956) (summarily affirming in part and affirming by an equally divided court) (per curiam); *Douglas v. Comm'r*, 322 U.S. 275 (1944).

158. See, e.g., *Am. Elec. Power*, 131 S. Ct. at 2535; *Exxon Shipping Co.*, 554 U.S. at 482–84.

159. 554 U.S. 471.

related to the Exxon Valdez oil spill in Alaska.¹⁶⁰ The Court considered three issues: (1) could Exxon be liable for punitive damages for the reckless conduct of managers within its employ; (2) did the Clean Water Act's provision of civil penalties preempt common law punitive damages; and (3) did maritime law limit punitive damages to the amount awarded as compensatory damages.¹⁶¹ The Court divided evenly on the first question.¹⁶²

The *Exxon* decision is also notable because the opinion includes a detailed discussion of the competing legal theories related to question of vicarious liability—the question upon which the Court evenly divided.¹⁶³ It provides a detailed examination of two nineteenth century cases that support the proposition that punitive damages were unavailable, and then examines principles contained in the Restatement (Second) of Torts, that suggested an alternative outcome.¹⁶⁴ Only then does the Court announce that it is evenly divided.¹⁶⁵ While the opinion makes no reference to the views of any particular Justice, the discussion of the opposing legal principles at stake provides significant information about how the opposing Justices viewed the issue.¹⁶⁶

The Court is, at times, however, explicit about the views of particular Justices. In *Raley v. Ohio*, the Court considered four contempt convictions arising out of Ohio's commission on "Un-American Activities."¹⁶⁷ The defendants had been summoned before the Commission to answer questions about their involvement with the communist party, and all four had objected to the questions by invoking the Fifth Amendment's protection against self-incrimination.¹⁶⁸ They were then convicted for contempt because, so the state court found, a state statute provided them with immunity for answers given to the Commission.¹⁶⁹

160. *In re Exxon Valdez*, 490 F.3d 1066, 1073 (9th Cir. 2007) (per curiam), *rev'd in part by*, 554 U.S. 471 (2008).

161. *Exxon Shipping Co.*, 554 U.S. at 475–76.

162. *Id.* at 476.

163. *Id.* at 482–84.

164. *Id.*

165. *Id.* at 484.

166. *Id.* at 482–84.

167. *Raley v. Ohio*, 360 U.S. 423, 424 (1959).

168. *Id.* at 424.

169. *Id.* at 424–26.

The Supreme Court reversed the conviction of three of the defendants because the Commission had not explicitly overruled their objections.¹⁷⁰ The Court then affirmed the conviction of the fourth defendant by a tie vote.¹⁷¹ The majority opinion, authored by Justice William Brennan, addresses the issue, saying “[t]o four of us, the matter is plain” that the prosecution of the fourth defendant violated the due process clause.¹⁷² The Opinion provides a full analysis of the legal issue presented and the views of Justice Brennan and the three Justices that joined that portion of his opinion.¹⁷³ Justice Tom Clark, joined by Justices Felix Frankfurter, John Harlan, and Charles Whitaker, writes separately to express the view that the conviction should be sustained.¹⁷⁴ Justice Clark’s opinion specifically addresses the issue that divided the Court and explains his view that the state supreme court decision should be affirmed with respect to the fourth defendant.¹⁷⁵

Moreover, affirmance by equal division can sometimes resolve necessary threshold issues. While in eight of the cases in this category, the Court affirms by equal division with respect to an issue independent of the others in the case, in one case the procedure is used to affirm a lower court’s resolution of a jurisdictional issue. In *American Electric Power Co. v. Connecticut*,¹⁷⁶ the Court considered suits brought by states and private parties against large power utilities, including those owned by a federal agency, alleging that the utilities’ emissions of carbon dioxide constituted a public nuisance under federal common law.¹⁷⁷ The district court dismissed the complaint invoking the political question doctrine.¹⁷⁸ The Second Circuit reversed, holding that the political question doctrine did not bar the suit and further deciding that the state and private plaintiffs had standing, that the federal common law of public nuisance applied,

170. *Id.* at 437–39.

171. *Id.* at 442.

172. *Id.* at 440–42.

173. *Id.* The majority opinion ends by expressing the majority’s “regret that our Brethren remain unpersuaded on this score.” *Id.* at 442.

174. *Id.* at 442–45 (Clark, J., writing separately).

175. *Id.* at 445 (“We would therefore affirm as to Stern.”).

176. *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011).

177. *Id.* at 2532.

178. *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 274 (S.D.N.Y. 2005).

and that the Clean Air Act did not displace federal common law.¹⁷⁹

The Supreme Court unanimously reversed, holding that any federal common law claim had been displaced by the Clean Air Act.¹⁸⁰ To reach that question, however, the Court needed to first decide whether the plaintiffs had standing to bring suit, and thus, whether the Court had the constitutional power to adjudicate the case.¹⁸¹ Rather than resolving that issue for itself, the Court announced that it was evenly divided, and that therefore it affirmed the lower court's opinion that jurisdiction existed.¹⁸² Thus, affirmance by equal division in this case operated to allow a precedential decision on the merits that otherwise would not have been possible.

Moreover, like the decision in *Raley*, the *American Electric Power* decision also discloses how the Justices voted on the question upon which the Court divided: "Four members of the Court," we are told, "would hold that at least some plaintiffs have Article III standing" ¹⁸³ The other four, "adhering to a dissenting opinion in *Massachusetts v. EPA*, or regarding that decision as distinguishable, would hold that none of the plaintiffs have Article III standing."¹⁸⁴ Discerning how the votes broke down on the jurisdictional question is, then, simply a matter of a moment's legal research to identify those Justices that dissented in *Massachusetts v. EPA*.¹⁸⁵

The cases discussed here indicate that in the subset of tie votes that occur in multi-issue cases, the Justices appear more

179. *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 392 (2d Cir. 2009).

180. *Am. Elec. Power*, 131 S. Ct. at 2537–40.

181. *Id.* at 420; see also *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 324 (2008) (reiterating the Supreme Court's obligation to determine jurisdiction before deciding other issues); Pidot, *Jurisdictional Procedure*, *supra* note 26, at 30–36 (discussing how jurisdictional procedure serves as a self-imposed limit of the judiciary's constitutional power); Justin Pidot, *The Invisibility of Jurisdictional Procedure and Its Consequences*, 64 FLA. L. REV. 1405 (2012) [hereinafter Pidot, *Invisibility*].

182. *Am. Elec. Power*, 131 S. Ct. at 2535.

183. *Id.*

184. *Id.* (citation omitted).

185. In *Douglas v. Commissioner of Internal Revenue*, the Court also tips the hands of some of the Justices, reporting that the "members of this Court who join in the dissent do not reach" the question upon which the Court evenly divided "but their position on other issues results in their voting for a reversal of the entire judgment of the Circuit Court of Appeals. Two other members of this Court are of the view that . . . the judgment of the Circuit Court of Appeals should be reversed" on the particular issue. 322 U.S. 275, 287 (1944).

apt to elaborate on the issue that divided the Court. This elaboration may reveal the preferences of individual Justices, but even where it does not, the Court provides significant guidance about the manner in which different Justices viewed the contested issue.

C. SEPARATE OPINIONS RELATED TO AFFIRMANCE

In three cases that involve only the resolution of a single issue by an equally divided Court, one or more Justices join a dissent revealing their views about an issue that divided the Court. While these cases are rare, they illustrate that the current approach to tie votes can lead Justices to disclose their views about unresolved issues.

In *Standard Industries, Inc. v. Tigrett Industries*,¹⁸⁶ the Court considered a case in which a patent holder sued a patent licensee for damages.¹⁸⁷ The lower court found for the plaintiff,¹⁸⁸ and the Supreme Court affirmed by equal division.¹⁸⁹ Justice Hugo Black, joined by Justice William Douglas, dissented, explaining that the Court should have considered the validity of the patent because the Court had decided another case after the lower court's decision that should have been viewed as controlling.¹⁹⁰

Similarly, in *Biggers v. Tennessee*,¹⁹¹ the Court considered a criminal defendant's constitutional challenge to the procedure that the police used to secure eyewitness identification.¹⁹² The Court affirmed by equal division,¹⁹³ but Justice William Douglas wrote a four-page dissent explaining his view that the identification was unconstitutional and that the conviction should have been reversed.¹⁹⁴

Finally, in *Ohio ex rel. Eaton v. Price*,¹⁹⁵ the Court affirmed by equal division the denial of a habeas petition.¹⁹⁶ Justice Wil-

186. 397 U.S. 586 (1970) (per curiam).

187. *Id.* at 586 (Black J., dissenting).

188. *Tigrett Indus., Inc. v. Standard Indus., Inc.*, 411 F.2d 1218, 1220 (6th Cir. 1969).

189. *Standard Indus.*, 397 U.S. at 586.

190. *Id.* at 587–88 (Black, J. dissenting).

191. 390 U.S. 404 (1968) (per curiam).

192. *See Biggers v. State*, 411 S.W.2d 696, 696–97 (Tenn. 1967).

193. *Biggers*, 390 U.S. at 404.

194. *Id.* at 404–09 (Douglas, J., dissenting).

195. 364 U.S. 263 (1960) (per curiam).

196. *Id.* at 263; *see also State ex rel. Eaton v. Price*, 151 N.E. 523 (Ohio

liam Brennan, joined by three other Justices, dissented, expressing the view that the convicted individual's dwelling had been unconstitutionally searched.¹⁹⁷ The dissent, which runs twelve pages, notes that where there is a tie vote, "the usual practice is not to express any opinion, for such an expression is unnecessary where nothing is settled."¹⁹⁸ Justice Brennan justifies his departure from this practice because "even before the cause was argued, four Justices made public record of their votes to affirm the judgment," and, therefore, how the Justices voted was a matter of public record.¹⁹⁹

In each of these cases, the vote of one or more of the Justices is made plain, despite the Court's affirmance by an equally divided court. Indeed, more than just the vote, but the reasoning and underlying rationales are laid out in striking detail.

D. MISCELLANEOUS

The Supreme Court has affirmed by equal division in a few other circumstances that fit none of the categories identified. In *California v. Pinkus*, for example, the Court appears to have granted a petition for certiorari and affirmed by an equally divided court all in the same order and absent briefing on the merits or oral argument.²⁰⁰ The practice of granting a petition for certiorari based on a vote of four Justices makes this result possible, but it seems strange that the Court would undertake such action, particularly because it suggests that the factions of Justices in the case were so entrenched that the case's resolution was foreordained.²⁰¹ In *Kissinger v. Halperin*, the Court issued an order DIGing the case with respect to one of the petitioners and affirming by equal division with respect to three others.²⁰² In *Dow Chemical Co. v. Stephenson*, the Court grants, vacates, and remands the case with respect to two petitioners

1958).

197. *Ohio ex rel. Eaton*, 364 U.S. at 263–76 (Brennan, J., dissenting).

198. *Id.* at 264.

199. *Id.* The views of the Justices voting to affirm dismissal of the habeas petition had been expressed in opinions related to the Court noting probable jurisdiction in the case. See *Ohio ex rel. Eaton*, 360 U.S. 246 (1959) (per curiam).

200. *Pinkus v. Pitchess*, 429 F.2d 416 (9th Cir. 1970), cert. granted sub nom., *California v. Pinkus*, 400 U.S. 922 (Nov. 23, 1970) (No. 503).

201. That the Ninth Circuit's decision below is a terse per curiam decision makes this odder still. See *Pinkus*, 429 F.2d 416 (9th Cir. 1970).

202. 452 U.S. 713 (1981) (per curiam).

and affirms by equal division with respect to four petitioners.²⁰³ Finally, in two cases, one Justice votes to DIG the case and thereafter declines to participate in adjudicating the merits.²⁰⁴ The remaining Justices split evenly and thereby affirm by an equally divided court.

IV. THE EPHEMERAL IMPORTANCE OF THE EQUALLY DIVIDED COURT

As this Article has detailed, the Supreme Court has affirmed by equal division relatively rarely, and in a variety of manners. This Part turns to the question of whether these cases are odd curiosities or significant problems. If they are significant problems, then perhaps Congress should devise a system by which a substitute Justice can break ties. This Part begins by examining the cost of such a procedure, in particular, explaining the manner by which appointment of a substitute Justice could undermine the long-term stability of federal law. This Part then continues by examining twenty-five years of tie votes to explain that, perhaps counterintuitively, affirmances by equally divided Courts have little lasting importance in terms of uniformity among the lower courts. As a result, neither Congress nor the Court should devise a means of creating precedential decisions in circumstances where the Justices deadlock.

A. STABILITY AND UNIFORMITY

A primary concern expressed with tie votes is that they may perpetuate a lack of uniformity among the lower courts. Where the lower courts are divided, definitive resolution by the Supreme Court advances values of doctrinal uniformity and avoids forum shopping and its attendant inefficiency and unfairness.²⁰⁵ In the words of then Justice William Rehnquist, failing to resolve such a split would “lay down ‘one rule in Athens, and another rule in Rome’ with a vengeance.”²⁰⁶ Or, as Justice

203. *Dow Chem. Co. v. Stephenson*, 539 U.S. 111 (2003) (per curiam).

204. *United States v. Jordan*, 342 U.S. 911 (1952) (per curiam); *Parker v. Illinois*, 334 U.S. 816 (1948) (per curiam).

205. See Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1684 (1990). But see Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333 (2006) (arguing that forum shopping is wrongly criticized as unfair when it is actually a lawful, authorized strategy).

206. *Laird v. Tatum*, 409 U.S. 824, 838 (1972) (memorandum of Rehnquist, J.).

Louis Brandeis explained, “It is usually more important that a rule of law be settled, than that it be settled right.”²⁰⁷

A high percentage of the Supreme Court’s docket involves legal issues about which the lower courts are divided.²⁰⁸ As previously discussed, scholars, lawmakers, and even Justices have expressed concern that tie votes lead to a lack of legal uniformity, and therefore, a system should be developed to allow for a substitute Justice.²⁰⁹ However, such a system should only be created if the benefits obtained by appointing a substitute Justice would outweigh the costs. Others have detailed the strategic problems presented by any system for appointing a substitute Justice, both in terms of the behavior of Justices and litigants before the Supreme Court.²¹⁰ I will not repeat the well-stated concerns about strategic behavior here, but suffice it to say that Professors Lisa McElroy and Michael Dorf have demonstrated that they are legion.²¹¹

In addition, appointing a substitute Justice would undermine the stability of federal law over time. That is because a recused Justice may disagree with the views of her replacement and, if that alternate view is held with sufficient intensity, she may join a majority of the Court to vote to reverse the decision in a subsequent case. On the other hand, in those circumstances where a case before the Supreme Court involves no disagreement amongst the lower court, appointing a tie-breaking Justice would threaten doctrinal stability while advancing no countervailing uniformity value.

To make this trade-off concrete, consider two cases that were affirmed by equal division. In *Free v. Abbott Laboratories*,²¹² four circuits had weighed in on the civil procedure issue presented. The Third Circuit, Fifth Circuit, and Seventh Circuit had adopted one legal rule²¹³ and the Tenth Circuit another.

207. *Di Santo v. Pennsylvania*, 273 U.S. 34, 42 (1927) (Brandeis, J., dissenting).

208. See Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1569, 1632 (2008) (citing to research conducted by Professor David Straus that found an average of seventy percent of certiorari grants from 2004–2006 involved questions over which lower courts differed).

209. See *supra* notes 21–24 and accompanying text.

210. See McElroy & Dorf, *supra* note 66, at 99–101.

211. See *id.*

212. 529 U.S. 333 (2000) (per curiam).

213. *Meritcare Inc. v. St. Paul Mercury Ins.*, 166 F.3d 214 (3d Cir. 1999); *Stromberg Metal Works, Inc. v. Press Mech., Inc.*, 77 F.3d 928 (7th Cir. 1996); *In re Abbott Labs.*, 51 F.3d 524 (5th Cir. 1995).

er. Had a substitute Justice been appointed, the Supreme Court would have eliminated this split in authority, furthering the value of uniformity. If the recused Justice disagreed with that decision, doctrinal stability would be reduced because the Court might reverse itself in short order, but nonetheless, the same rule would be applied across the legal system. The same is not true for *Wyoming v. United States*.²¹⁴ That case involved a 1908 doctrine governing water adjudications that had been applied uniformly by the lower courts for decades.²¹⁵ A decision by the Court reversing the lower court's application of that long-standing legal rule would have provided no benefit in terms of uniformity, and again, stability values would have been undermined.

The Supreme Court, then, enhances long-term legal stability by declining to resolve a legal issue upon which the Justice evenly split. At times, this enhanced legal stability may come at the expense of uniformity among the circuit courts. Courts may already overvalue uniformity,²¹⁶ and in any case, increasing uniformity in the short-term may not be worth the cost of creating long-term instability.

B. SHORT-TERM IMPACT

How often do tie votes result in a persistent lack of uniformity among lower courts? As the data provided in Part II demonstrates, tie votes have been rare circumstances, averaging fewer than two occurrences per year. It is possible, however, that a significant number of high-profile cases could result in tie votes during October Term 2015, due to the death of Justice Antonin Scalia. The Supreme Court may avoid such a circumstance, however. Despite concern that the confirmation of Justice Elena Kagan to the Court could result in a glut of tie votes—she recused herself in roughly one third of the Court's docket during October Term 2010 due to her prior service as

214. 492 U.S. 406 (1989) (per curiam).

215. *In re Rights to Use Water in the Big Horn River Sys.*, 753 P.2d 76, 101 (Wyo. 1988); see also David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1639–41 (1996) (discussing the factual details of *Wyoming v. United States* and the controlling doctrine created by *Winters v. United States*, 207 U.S. 564 (1908)).

216. See Frost, *supra* note 208, at 1579–1604 (arguing that eradicating nonuniformity is often given too much priority to the detriment of other values).

the Solicitor General of the United States—on only two occasions did her recusal lead to a tie.²¹⁷

The historic rarity of tie votes does not itself definitively demonstrate that they are unimportant. As Professors McElroy and Dorf suggest, “[I]t could be argued that even one 4-4 split can be harmful” because it involves the Court failing to resolve a case involving issues of sufficient importance to cause the Justices to have granted certiorari.²¹⁸ They suggest, and I agree, however, that issues of such importance will presumably be presented to the Court again in short order. Indeed, as Professor H.W. Perry has noted, “Virtually any issue the Court might wish to resolve is offered to it”²¹⁹ among the thousands of requests for certiorari it receives each year.²²⁰ This is likely particularly true in the types of cases where standardization of the law is of particular concern. While the Supreme Court’s criteria for granting certiorari may sometimes seem opaque, cases where the lower courts are in conflict are clearly at the top of the agenda.²²¹ Justice Ruth Bader Ginsburg has, for example, explained that about seventy percent of grants of certiorari during October Term 1993 involved “splits of authority among either federal courts of appeals or state courts of final instance.”²²² One might expect that splits of authority also dominate the menu of cases from which the Supreme Court chooses.

Persistent divisions among the courts of appeals on questions of federal law is, of course, one facet of vesting the Supreme Court with discretion over its docket, rather than requiring it to decide cases involving splits of authority. At times, the Court will choose to overlook cases presenting issues of serious concern to the legal profession. How long the Supreme Court allows disagreement in the lower courts to fester is a function, in part, of the personalities of the Justices themselves and their

217. See *Flores-Villar v. United States*, 564 U.S. 210 (2011) (per curiam); *Costco Wholesale Corp. v. Omega, S.A.*, 562 U.S. 40 (2010) (per curiam).

218. McElroy & Dorf, *supra* note 66, at 95.

219. PERRY, *supra* note 100, at 11.

220. See, e.g., *The Statistics*, *supra* note 107.

221. See SUP. CT. R. 10(a) (listing “a United States court of appeals has entered a decision in conflict with another United States court of appeals” as a compelling reason to grant certiorari); SHAPIRO ET AL., *supra* note 100, at 225; see also Frost, *supra* note 208, at 1568–69.

222. Ruth Bader Ginsburg, Address at the 71st Annual American Law Institute Meeting (May 19, 1994), in AM. L. INST. ANN. MEETING SPEECHES 1994 at 45, 57.

view of the relative importance of particular legal issues. Justice Byron White, for example, held an “unswerving view that the Court ought not let circuit splits linger, that it should say what the federal law is sooner rather than later.”²²³ Other Justices, however, may prefer to let issues “percolate” in the lower courts to give the Supreme Court the benefit of lengthy deliberation over an issue.²²⁴

An examination of twenty-five years of cases involving tie votes (1986–2010) reveal that these cases have had minimal costs in terms of uniformity in the federal courts.²²⁵ There are twenty-one cases during this period that arose on a petition for certiorari.²²⁶ These cases fell into three categories.

First, in sixteen cases, the tie vote had little impact on uniformity among the lower courts. That occurred for several reasons.

In six of these sixteen cases, a tie vote occurred in a context where there existed no significant split of authority in the lower courts.²²⁷ *Wyoming v. United States* falls into this category. It appears that the Supreme Court granted certiorari with the intent of modifying a long-established rule for allocating water rights to Indian tribes.²²⁸ The papers of Justice Thurgood Mar-

223. Ruth Bader Ginsburg, *Remembering Justice White*, 74 U. COLO. L. REV. 1283, 1285 (2003).

224. See Marceau, *supra* note 84, at 975.

225. I selected this twenty-five year time period to provide an adequate number of cases to analyze. I did not analyze the three affirmances by an equally divided Court that occurred after 2010 because I wanted to ensure that the Court had adequate time to return to the issue.

226. I am excluding the three cases that arose as appeals because each of them would not be treated as appeals today and, thus, they are poor comparators for an analysis of the effect of the Court's current practice of affirming by equal division.

227. See *Mich. Citizens for an Indep. Press v. Thornburgh*, 493 U.S. 38 (1989) (per curiam); *Wyoming v. United States*, 492 U.S. 406 (1989) (per curiam); *California v. United States*, 490 U.S. 920 (1989) (per curiam); *Trans World Airlines, Inc. v. Indep. Fed'n of Flight Attendants*, 485 U.S. 175 (1988) (per curiam); *Honig v. Doe*, 484 U.S. 305, 329 (1988) (affirming by equal division only the question of the district court's power to order direct services); *Reagan v. Abourezk*, 484 U.S. 1 (1987) (per curiam); see also Brief for Petitioner, *Honig v. Doe*, 484 U.S. 305 (1988) (No. 86-728), 1987 W.L. 881257 (failing to identify any split of authority with regards to the question of district court authority). The *TWA* case involves what might have been a split over the interpretation of a labor contract with the Ninth Circuit's decision in *International Ass'n of Machinists & Aerospace Workers v. Reeve Aleutian Airways, Inc.*, 469 F.2d 990 (9th Cir. 1972). The *IAM* case has been relied upon by no court since the *TWA* case was decided.

228. *Wyoming v. United States*, 492 U.S. 406 (1989) (per curiam); see also

shall, released upon his death, include a draft opinion written by Justice Sandra Day O'Connor, who eventually recused herself, to this effect.²²⁹ The tie vote in *Wyoming*, then, had no consequences in terms of uniformity in the federal courts because lower courts simply continued to follow the preexisting rule.²³⁰

Michigan Citizens for an Independent Press v. Thornburgh similarly involved no split in authority on the application of the Newspaper Preservation Act, and the Act has been the subject of little subsequent litigation.²³¹ The same is true of the issue involving the Quiet Title Action presented in *California v. United States*.²³² Subsequent to the Court's affirmance by equal division in that case, federal appellate courts have generally adopted the approach taken by the lower court.²³³ So, too, have lower courts consistently considered government claims for consular nonreviewability following the Court's affirmance by equal division in *Reagan v. Abourezk*.²³⁴

In one case, a court of appeals reversed its earlier position following an affirmance by equal division, eliminating disagreement among the lower courts without the need for Supreme Court involvement.²³⁵ In *United States v. Zolin*, the Supreme Court granted certiorari to resolve a disagreement between the Fifth Circuit and Ninth Circuit about the district court's power to place limits on a summons issued by the IRS.²³⁶ In *United States v. Jose*, the Ninth Circuit overruled its opinion

Getches, *supra* note 215, at 1640–42.

229. Getches, *supra* note 215, at 1641 n.327.

230. See, e.g., Sidney P. Ottem, *The General Adjudication of the Yakima River: Tributaries for the Twenty-First Century and a Changing Climate*, 23 J. ENVTL. & LITIG. 275, 306 (2008).

231. *Mich. Citizens for an Indep. Press v. Thornburgh*, 493 U.S. 38 (1989) (per curiam); see also *Petition for Writ of Certiorari, Mich. Citizens for an Indep. Press v. Thornburgh*, 493 U.S. 38 (1989) (No. 88-1640), 1989 WL 1174066.

232. *California v. United States*, 490 U.S. 920 (1989) (per curiam).

233. See *Shawnee Trail Conservancy v. U.S. Dep't of Agric.*, 222 F.3d 383, 387 (7th Cir. 2000) ("Although no other court has considered the issue presented to us in as direct a fashion as the [court of appeals in *California v. United States*], several courts have indicated that the . . . broad reading of the exclusivity of the QTA is correct.").

234. *Reagan v. Abourezk*, 484 U.S. 1 (1987) (per curiam); see also *Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 124–25 (2d Cir. 2009).

235. *United States v. Zolin*, 491 U.S. 554 (1989).

236. See *id.* at 557. Compare *United States v. Zolin*, 809 F.2d 1411, 1416 (9th Cir. 1987), with *United States v. Barrett*, 837 F.2d 1341, 1350 (5th Cir. 1988) (per curiam).

in *United States v. Zolin*, bringing itself into alignment with the Fifth Circuit and eliminating the split authority.²³⁷

In nine cases, the legal issue presented in a case where the Court affirmed by equal division was definitively resolved in a subsequent Supreme Court case, eliminating the split of authority.²³⁸ In *Free v. Abbott Laboratories*,²³⁹ for example, the Court had numerous opportunities to consider the issue at stake, which involved the ability of class action plaintiffs to aggregate their claims to meet the amount-in-controversy requirement for purposes of diversity jurisdiction.²⁴⁰ In the months that immediately followed the Court's decision (or non-decision), the Second Circuit and the Eighth Circuit resolved cases addressing the same issue, but in neither case did the losing party file a petition for certiorari.²⁴¹ In 2001, the Ninth Cir-

237. 131 F.3d 1325, 1329 (9th Cir. 1997).

238. *Costco Wholesale Corp. v. Omega, S.A.*, 562 U.S. 40 (2010) (per curiam), revisited by *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2013); *Bd. of Educ. of City Sch. Dist. of N.Y. v. Tom F.*, 552 U.S. 1 (2007) (per curiam), revisited by *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009); *Free v. Abbott Labs., Inc.* 529 U.S. 333 (2000) (per curiam), revisited by *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005); *Morgan Stanley & Co. v. Pac. Mut. Life Ins.*, 511 U.S. 658 (1994) (per curiam), revisited by *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995); *United States v. France*, 498 U.S. 335 (1991) (per curiam), revisited by *Peretz v. United States*, 501 U.S. 923 (1991); *Marino v. Ortiz*, 484 U.S. 301 (1988) (per curiam), revisited by *Martin v. Wilks*, 490 U.S. 755 (1989), superseded by statute, Civil Rights Act of 1991, Pub. L. No. 102-166, § 108, 105 Stat. 1071, 1076-77, as recognized in *Briscoe v. City of New Haven*, 654 F.3d 200, 204 (2d Cir. 2011); *Tompkins v. Texas*, 486 U.S. 1053 (1988), question addressed in *Hopkins v. Reeves*, 524 U.S. 88 (1998) and *Purkett v. Elem*, 514 U.S. 765 (1995); *Carpenter v. United States*, 484 U.S. 19 (1987), revisited by *United States v. O'Hagan*, 521 U.S. 642 (1997), as recognized by *SEC v. Rocklage*, 470 F.3d 1, 9 (1st Cir. 2006); *Pension Benefit Guar. Corp. v. Yahn & McDonnell, Inc.*, 481 U.S. 735 (1987), revisited by *Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602 (1993). The Court granted certiorari in *Tompkins* to address two issues, one related to whether the Constitution required a lesser-included-offense instruction in a capital case, which was addressed in *Hopkins*. See *Petition for Writ of Certiorari, Tompkins v. Texas*, 486 U.S. 1053 (1988) (No. 87-6405), 1988 WL 1094066; see also *Tompkins*, 486 U.S. 1053 (limiting grant of certiorari); *Hopkins*, 524 U.S. 88. The second question involved the standard to be applied to review of peremptory challenges under *Batson v. Kentucky*, 476 U.S. 79 (1986), an issue that the Court addressed in *Purkett*. See *Purkett*, 514 U.S. 765.

239. *Free*, 529 U.S. 333.

240. See *Free v. Abbott Labs., Inc.*, 176 F.3d 298 (5th Cir. 1999); *Baker*, *supra* note 4.

241. *Mehlenbacher v. Akzo Nobel Salt, Inc.*, 216 F.3d 291 (2d Cir. 2000); *Trimble v. Asarco, Inc.*, 232 F.3d 946 (8th Cir. 2000).

cuit addressed the issue in *Gibson v. Chrysler Corp.*,²⁴² and the Court denied certiorari.²⁴³ Within a year, the Fourth Circuit addressed the issue in *Rosmer v. Pfizer, Inc.* A petition for certiorari was filed, but the parties subsequently asked the Court to dismiss the petition, which it did.²⁴⁴ In 2004, the Sixth Circuit addressed the issue in *Olden v. LaFarge Corp.*, and the Supreme Court denied certiorari.²⁴⁵ That same year, the First and Eleventh Circuits addressed the issue in *Rosario Ortega v. Star-Kist Foods, Inc.* and *Allapattah Services, Inc. v. Exxon Corp.*²⁴⁶ The Court granted certiorari in both cases and resolved the issue.²⁴⁷ So, the affirmance by equal division in *Free* delayed resolution of the legal issue at stake, but only by four years.

The four-year delay following *Free* is the third-longest lag time between an affirmance by equal division and a subsequent case resolving the issue. Following *Carpenter v. United States*,²⁴⁸ the Supreme Court waited ten years to revisit the degree of connection required for someone to be liable for insider trading under a misappropriation of information theory.²⁴⁹ Nine years following *Tompkins v. Texas*,²⁵⁰ the Supreme Court finally ruled on the application of the Due Process Clause to jury instructions on lesser-included offenses in the context of capital prosecutions²⁵¹ (although the Court had earlier resolved a second question presented in *Tompkins* related to claims that a prosecutor used peremptory strikes in a racially discriminatory manner).²⁵²

242. *Gibson v. Chrysler Corp.*, 261 F.3d 927 (9th Cir. 2001).

243. *Gibson v. DaimlerChrysler Corp.*, 261 F.3d 927 (9th Cir. 2001), *cert. denied*, 534 U.S. 1104 (2002).

244. See Docket, *Rosmer v. Pfizer, Inc.*, No. 01-1390 (2002).

245. *Olden v. LaFarge Corp.*, 383 F.3d 495 (6th Cir. 2004), *cert. denied*, 545 U.S. 1152 (2005).

246. *Rosario Ortega v. Star-Kist Foods, Inc.*, 370 F.3d 124 (1st Cir. 2004), *cert. granted*, 543 U.S. 924 (2004); *Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248 (11th Cir. 2003), *cert. granted*, 543 U.S. 924 (2004).

247. See *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005).

248. *Carpenter v. United States*, 484 U.S. 19 (1987).

249. *United States v. O'Hagan*, 521 U.S. 642 (1997); see also *SEC v. Rocklage*, 470 F.3d 1, 9 (1st Cir. 2006) (discussing *O'Hagan*).

250. *Tompkins v. Texas*, 490 U.S. 754 (1989) (per curiam). The Supreme Court also granted certiorari to consider allegations of racially-motivated peremptory strikes, but that issue does not appear to be the result of a conflict of authority.

251. See *Hopkins v. Reeves*, 524 U.S. 88 (1998). The Supreme Court reached the same conclusion as did the lower court in *Tompkins*. See *Tompkins v. State*, 774 S.W.2d 195 (Tex. Crim. App. 1987) (en banc).

252. See *Purkett v. Elem*, 514 U.S. 765 (1995) (per curiam).

On the other hand, in several situations, the Court speedily returned to an issue presented in a case resulting in a tie vote. The Court revisited the issue in *United States v. France* within a mere five months.²⁵³ The time lag was about a year for *Morgan Stanley & Co. v. Pacific Mutual Life Insurance*,²⁵⁴ about two years for *Board of Education of City School District of City of New York v. Tom F.*,²⁵⁵ and about three years for *Costco Wholesale Corp. v. Omega, S.A.*²⁵⁶ While such delays may be regrettable, they hardly rise to the level of a constitutional crisis. Indeed, splits of authority often persist within the courts of appeals for many years.²⁵⁷

One final case falls into the category of situations in which an equally divided court did not substantially undermine doctrinal uniformity. Following the tie vote in *Borden Ranch Partnership v. U.S. Army Corps of Engineers*,²⁵⁸ the executive branch amended its regulations defining a key phrase in the Clean Water Act, addressing the issue presented in that case.²⁵⁹

In a second class of cases, the issue that divided the Supreme Court Justices appears to have been relatively inconsequential in practice. *California Public Employees' Retirement System v. Felzen* is a good example.²⁶⁰ The courts of appeals disagree on whether a non-named shareholder must intervene to appeal a judgment in a shareholder derivative action. In *Felzen v. Andreas*, the Seventh Circuit resolved that issue by requiring a shareholder who is not a named party to file a motion for in-

253. *United States v. France*, 498 U.S. 335 (1991) (per curiam); see also *Peretz v. United States*, 501 U.S. 923 (1991).

254. *Morgan Stanley & Co. v. Pac. Mut. Life Ins.*, 511 U.S. 658 (1994) (per curiam); see also *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995).

255. *Bd. of Educ. of City Sch. Dist. of N.Y. v. Tom F.*, 552 U.S. 1 (2007) (per curiam); see also *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009).

256. *Costco Wholesale Corp. v. Omega, S.A.*, 562 U.S. 40 (2010) (per curiam); see also *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2013).

257. See, e.g., *Frost*, *supra* note 208, at 1612 ("As a practical matter, the federal courts are simply not capable of standardizing all federal law.").

258. 537 U.S. 99 (2002) (per curiam).

259. In *Borden Ranch*, 537 U.S. 99, the Supreme Court granted certiorari to decide whether a practice of tilling agricultural land called "deep ripping" involved a discharge of pollutants pursuant to the Clean Water Act. See *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 261 F.3d 810 (9th Cir. 2001), *cert. granted*, 536 U.S. 903 (2002). Subsequently, the U.S. Army Corps of Engineers promulgated a regulation to address that question. See 33 C.F.R. § 323.2(d) (2015).

260. *Cal. Pub. Emps.' Ret. Sys. v. Felzen*, 525 U.S. 315 (1999) (per curiam).

tervention before filing an appeal.²⁶¹ All other circuits to have considered this issue have disagreed and permitted shareholders that are not named plaintiffs to appeal.²⁶² The Seventh Circuit has acknowledged that it may need to reconsider its rule in light of a Supreme Court decision in the related context of class action litigation.²⁶³ But this disagreement is unlikely to shape litigation decisions because it does not affect the rights of the parties to the litigation and, moreover, the Seventh Circuit requires a mere formality because it has instructed district court judges to freely grant intervention to objecting shareholders.²⁶⁴ Moreover, the Seventh Circuit has not had a case that cleanly presented the issue again, perhaps because non-named shareholders with adequate resources to appeal a judgment also have resources to intervene, rendering the split in authority without substantial practical import. In *Exxon Shipping Co. v. Baker*, the Supreme Court affirmed by equal division on the question of whether punitive damages are available under maritime law against a ship owner for the recklessness of a shipmaster.²⁶⁵ This issue is relatively idiosyncratic and the Court has not been presented with another opportunity to consider it.

There are three cases affirmed by equal division where a persistent circuit split appears to remain important. In *Lotus Development Corporation v. Borland International, Inc.*, the Court granted certiorari to consider the application of copyright law to the menu structure of a software program.²⁶⁶ The courts have yet to settle on an approach to applying copyright law to software. A leading treatise on the subject explained that this area of law involves “inherent contradictions” and, thus, “it is not surprising that courts have struggled without a great deal

261. *Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998).

262. *See Rosenbaum v. MacAllister*, 64 F.3d 1439, 1442–43 (10th Cir. 1995); *Zucker v. Westinghouse Elec. Corp.*, 265 F.3d 171, 175 (3d Cir. 2001); *Powers v. Eichen*, 229 F.3d 1249, 1255–56 (9th Cir. 2000); *Kaplan v. Rand*, 192 F.3d 60, 67–68 (2d Cir. 1999); *cf. In re UnitedHealth Group Inc. Shareholder Derivative Action*, 631 F.3d 913 (8th Cir. 2011) (declining to decide whether unnamed shareholder must intervene to appeal because shareholder failed to timely object to settlement).

263. *See Robert F. Booth Trust v. Crowley*, 687 F.3d 314, 319 (7th Cir. 2012) (citing *Devlin v. Scardelletti*, 536 U.S. 1 (2002)).

264. *See Crawford v. Equifax Payment Serv., Inc.*, 201 F.3d 877, 881 (7th Cir. 2000).

265. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 471 (2008).

266. *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 516 U.S. 233 (1996), *reh'g denied*, 516 U.S. 1167 (1996).

of success to reconcile the irreconcilable.²⁶⁷ Despite multiple opportunities to return to the subject, the Supreme Court has chosen to leave the lower courts to muddle their way through,²⁶⁸ perhaps hoping that Congress will resolve the issue.²⁶⁹ Similarly, the Supreme Court left undisturbed a split in the lower courts with its 2008 affirmance by equal division in *Warner-Lambert Co. v. Kent*.²⁷⁰ That case involved the issue of whether the federal Food, Drug and Cosmetics Act preempted a fraud provision of Michigan law.²⁷¹ In reaching its decision, the Second Circuit explicitly disagreed with a Sixth Circuit decision deciding precisely the same question.²⁷² In 2012, the Fifth Circuit addressed a provision of Texas law similar to that addressed in *Warner-Lambert*, but no petition for certiorari was filed.²⁷³ These cases do not, however, suggest that the case in which the Supreme Court evenly divided was itself of particular doctrinal significance. Rather, the Supreme Court has been provided opportunities to resolve the issues presented, but to date has declined to do so. That is, of course, the fate of many issues that divide the lower courts. The Supreme Court has a limited docket, and by necessity, it does not resolve every disagreement between the lower courts. Finally, the courts of appeal continue to be in some disagreement about the available scope of a non-settling class member's collateral challenge to a settlement as violating due process in the wake of *Dow Chemical Co. v. Stephenson*,²⁷⁴ although the disagreement appears to

267. WILLIAM F. PATRY, 2 PATRY ON COPYRIGHT § 3:70 (2013).

268. See *Oracle Am., Inc. v. Google Inc.*, 750 F.3d 1339 (2014), *cert. denied* 135 S. Ct. 2887 (2015); *Dun & Bradstreet Software Servs., Inc. v. Grace Consulting, Inc.*, 307 F.3d 197 (3d Cir. 2002), *cert. denied* 538 U.S. 1032 (2003); *Softel, Inc. v. Dragon Med. & Sci. Commc'ns, Inc.*, 118 F.3d 955 (2d Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998).

269. See, e.g., *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 49 F.3d 807, 822 (1st Cir. 1995) (Boudin, J., concurring) (“[T]he majority’s result persuades me and its formulation is as good, if not better, than any other that occurs to me now as within the reach of courts. Some solutions . . . are not options at all for courts but might be for Congress.”).

270. 552 U.S. 440 (2008) (per curiam).

271. See *Desiano v. Warner-Lambert & Co.*, 467 F.3d 85 (2d Cir. 2006), *aff'd by an equally divided court*, 552 U.S. 440 (2008).

272. *Id.* at 90–93 (discussing *Garcia v. Wyeth-Ayerst Labs.*, 385 F.3d 961 (6th Cir. 2004)).

273. *Lofton v. McNeil Consumer & Specialty Pharm.*, 672 F.3d 372 (5th Cir. 2012).

274. *Dow Chem. Co. v. Stephenson*, 539 U.S. 111 (2003) (per curiam).

be one of the degree of review, rather than whether review is available at all.²⁷⁵

An analysis of tie votes over the last twenty-five years reveals few circumstances in which splits of authority have not subsequently been corrected. Those that linger, like *Lotus Development* and *Warner-Lambert* linger in part because of decisions by the Supreme Court not to grant certiorari in subsequent cases and in part because some issues arise rarely. Dramatically changing the functioning of the Supreme Court to allow substitute Justices to cast tie breaking votes does not seem justified to correct these occasional lingering splits of relatively low importance.

V. THE END OF THE EQUALLY DIVIDED COURT

Where a case arises on a writ of certiorari, the Supreme Court should end its practice of affirming by an equally divided court and instead utilize a DIG to dispose of such cases. As Part III demonstrated, if history is indicative, this will resolve virtually every case in which a tie vote occurs. Moreover, as Part IV demonstrated, disposing of such cases is unlikely to create a significant long-term uniformity problem.

But why should the Court abandon its centuries' old practice and substitute one procedural disposition for another? This Part identifies costs imposed by affirming by equal division that could be ameliorated, at least in part, by deploying a DIG.

A. PREJUDGMENT IN FUTURE CASES

The affirmance by equal division makes no law, but may threaten to bias the Justices in future cases. A fundamental tenant of the American judicial system is that judges should approach each case without predetermining its result.²⁷⁶ This tenant is reflected in existing norms about when a judge should recuse herself,²⁷⁷ and in the reluctance of judges and Justices to firm offer opinions about contested legal issues during confir-

275. See, e.g., *Gooch v. Life Inv'rs Ins. Co.*, 672 F.3d 402, 421–22 (6th Cir. 2012) (holding that an individual asserting the capacity to represent the interests of a class is properly situated to challenge a settlement that would bar the class' certification).

276. See, e.g., *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 883 (2009) (“If the judge discovers that some personal bias or improper consideration seems to be the actuating cause of the decision . . . the judge may think it necessary to consider withdrawing from the case.”).

277. *Id.*

mation hearings.²⁷⁸ The Supreme Court has linked concerns about prejudice to psychology, explaining that due process rules related to recusals relate to “a realistic appraisal of psychological tendencies and human weakness.”²⁷⁹

Taking cognitive psychology seriously suggests that affirming by an equally divided court is a bad practice, particularly since it is unnecessary. Cognitive psychology reveals that the inner workings of the human brain can distort thinking. These cognitive biases result in irrational decision-making, sometimes referred to as bounded rationality.²⁸⁰ Legal scholars have detected these cognitive phenomena in judges; because, as Chris Guthrie, Jeffrey Rachlinski, and Andrew Wistrich, among the foremost scholars of judicial psychology, explain: “Judges, it seems, are human.”²⁸¹

Several cognitive tendencies may come into play with regard to affirmances by equal division. First among them is the cognition of confirmation bias, which leads individuals to discount disconfirming evidence encountered after that individual has made up her mind.²⁸² In other words, confirmation bias causes people to tend to become close-minded and ignore new information once they have committed themselves to a particular position. This tendency has been detected biologically. So, for example, MRI brain scans demonstrate that political partisans exposed to negative information about their party tend to discount that information.²⁸³ Creating structures minimizing confirmation bias is difficult, because the process of making a decision is internal to the individual. But casting a final vote in favor of a position would seem to create the groundwork for confirmation bias.

278. See, e.g., Elena Kagan, *Confirmation Messes, Old and New*, 62 U. CHI. L. REV. 919, 925–28 (1995).

279. *Caperton*, 556 U.S. at 883–84 (quoting *Winthrow v. Larkin*, 421 U.S. 35, 47 (1975)).

280. See John Conlisk, *Why Bounded Rationality?*, 34 J. ECON. LITERATURE 669, 669–70 (1996); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1477–78 (1998); see also Justin Pidot, *Deconstructing Disaster*, 2013 B.Y.U. L. REV. 213, 235–42 (2013).

281. Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 778 (2000).

282. See Marsha Berzon, *Dissent, “Dissentals,” and Decision Making*, 100 CAL. L. REV. 1479, 1482–83 (2012).

283. See Drew Westen et al., *Neural Bases of Motivated Reasoning: An fMRI Study of Emotional Constraints on Political Judgment in the 2004 U.S. Presidential Election*, 18 J. COGNITIVE NEUROSCIENCE 1947 (2006).

Cognitive dissonance may also operate to entrench the views of a Justice in the wake of an affirmance by equal division.²⁸⁴ Cognitive dissonance is among the best-established cognitive biases and describes the psychological discomfort that arises when an individual holds two contradictory or inconsistent ideas.²⁸⁵ Cognitive dissonance can operate to make it more difficult for an individual to change her mind, particularly where resources have already been based on an earlier view.²⁸⁶ That is because adopting a new view may require acknowledgment, at least internally, that that earlier commitment of resources was unwise or wasteful, and that acknowledgement is dissonant with most individuals' positive self-concept.²⁸⁷ This does not, of course, mean that people never change their mind. Rather, so long as the psychological cost of ignoring new information and maintaining a stable view are greater than the cognitive benefits, the viewpoint will remain stable.²⁸⁸

A related phenomenon described in the economics literature as "escalating commitment" may also be at play.²⁸⁹ Escalating commitment, referred to evocatively by Professor Kevin Lynch in the context of legal studies as the "lock-in effect," refers to the tendency of individuals to exhibit an increasing dedication to a previously adopted position that had real consequences in the face of mounting disconfirming evidence.²⁹⁰

284. See generally LEON FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* 50–52 (1957) (analyzing empirical data regarding the role of cognitive dissonance in decision-making).

285. See Nancy Leong, *The Saucier Qualified Immunity Experiment*, 36 PEPP. L. REV. 667, 702–03 (2009).

286. See Benjamin Gilad et al., *Cognitive Dissonance and Utility Maximization*, 8 J. ECON. BEHAV. & ORG. 61, 67 (1987) ("Under cognitive dissonance, commitments already made are harder to reverse than they were to make.").

287. See, e.g., CAROL TAVRIS & ELLIOT ARONSON, *MISTAKES WERE MADE (BUT NOT BY ME): WHY WE JUSTIFY FOOLISH BELIEFS, BAD DECISIONS, AND HURTFUL ACTS* 13–14 (2007).

288. Discounting dissonant information can be predicted by models of utility maximization. As Benjamin Gilad and his colleagues explained, "It is easy to see that a [utility-]maximizing individual should . . . balance the expected cost of continuing to block dissonant information . . . with the expected benefits in terms of self-image . . . associated with not admitting that the original commitment was wrong." Gilad et al., *supra* note 286.

289. See, e.g., Barry M. Staw, *Knee-Deep in the Big Muddy: A Study of Escalating Commitment to a Chosen Course of Action*, 16 ORG. BEHAV. & HUM. PERFORMANCE 27, 27 (1976); see also Gilad et al., *supra* note 286, at 68 (explaining that cognitive dissonance "is the essence of the 'escalating commitment' paradigm . . . in which subjects were found to escalate investment and become locked into a losing course of action as a result of the need to justify.").

290. Kevin J. Lynch, *The Lock-In Effect of Preliminary Injunctions*, 66 FLA.

Experimental work has found evidence of the lock-in effect in a range of situations, including investment, hiring, and policy choices.²⁹¹ The explanation of the effect is multifaceted, but involves both external and internal self-justification: On the one hand, people convince themselves of their own rationality when they act consistently.²⁹² On the other hand, consistent action “attempt[s] to demonstrate rationality to others or to prove to others that a costly error was really the correct decision over a longer term perspective.”²⁹³

Professor Kevin Lynch has hypothesized that the lock-in effect may influence the view of a judge on the merits of a case after that judge rules on a motion for a preliminary injunction.²⁹⁴ Professor Shay Lavie has found evidence of the “lock-in” effect in an empirical study of appellate court decisions.²⁹⁵ The upshot of the lock-in effect is straightforward, a decision with tangible consequences exerts a psychological influence on future decisions, even if the decision-maker is presented with new evidence or new circumstances supporting a change of course.

Justice William Brennan’s dissenting opinion in *Ohio v. Price*, a case in which the court affirmed by equal division, suggests that the Justices themselves are attentive to the potential risk of the lock-in effect once they have publicly cast votes.²⁹⁶ Writing for himself and three other Justices, Justice Brennan explains that the “practice of not expressing opinions upon an equal division has the salutary force of preventing the identification of the Justices holding the differing views as to the issue, and this may well enable the next case presenting it to be ap-

L. REV. 779, 783–84 (2014); see also Staw, *supra* note 289.

291. See Brian C. Gunia et al., *Vicarious Entrapment: Your Sunk Costs, My Escalation of Commitment*, 45 J. EXPERIMENTAL SOC. PSYCHOL. 1238 (2009) (discussing the lock-in effect in investment and hiring situations); Barry M. Staw & Jerry Ross, *Commitment to a Policy Decision: A Multi-Theoretical Perspective*, 23 ADMIN. SCI. Q. 40, 40 (1978).

292. See Staw & Ross, *supra* note 291, at 45–46.

293. See Staw, *supra* note 289, at 42.

294. See, e.g., Lynch, *supra* note 290, at 804–09.

295. Shay Lavie, *Are Judges Tied to the Past? Evidence from Jurisdiction Cases*, 43 HOFSTRA L. REV. 337, 339 (2014). Notably, Lavie finds that judicial behavior may even be influenced by decisions by other judges that result in a commitment of judicial resources, finding that appellate courts are less likely to reverse district court decisions on jurisdictional issues if the district court has held a trial. *Id.*

296. *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 264 (1960) (per curiam) (Brennan, J., dissenting).

proached with less commitment.”²⁹⁷ A similar view was expressed in the dissent of a Judge James Ervin III in *United States v. Hamrick*, where he explained:

[I]t has been the practice of the Supreme Court in every instance [of a tie] that my research has disclosed to go no further than to state that the Court was equally divided This practice comports with the view . . . that when a court is unable to obtain a majority of judges voting for the same result, the better course is not to speak at all, for it cannot fulfill its responsibility to provide guidance to lower courts.²⁹⁸

These cognitive effects—confirmation bias, cognitive dissonance, and the lock-in effect, are not, of course, absolute. People do, after all, change their minds. Affirming by equal division may needlessly trigger these effects, however, because the vote of each Justice on the merits of the case has a practical consequence on that case’s outcome. In other words, casting votes in cases that result in ties, like in all cases, has consequences. These cognitive biases are likely to be strongest when Justices publicly disclose their votes. As Part II demonstrates, this occurs rarely. Even votes hidden from the public eye may, however, exert psychological influence because the Justices have gone on the record with each other. On the other hand, consensus that a DIG is the appropriate resolution of a case where a tie vote emerges may reduce these cognitive pressures and lead to fairer treatment of future cases.

B. LEGITIMACY OF THE COURT

Affirming by equal division may also threaten to further undermine the perceived legitimacy of the Supreme Court at a time when the public support for the institution is already at record lows.²⁹⁹ This danger presents itself in three ways: First, tie votes further a narrative about the Court as inappropriately political. Second, they may cause a public perception of prejudgment (in addition to risking actual prejudgment). Third, they encourage unseemly gamesmanship.

The legitimacy of American courts arises in part from their history of good service and in part from a cultural mythology. Despite evidence to the contrary, Americans have traditionally viewed judges as impartial and objective, applying law rather

297. *Id.*

298. *United States v. Hamrick*, 43 F.3d 877, 892 n.1 (4th Cir. 1995) (Ervin, J., dissenting).

299. *See* McCarthy, *supra* note 13.

than making policy,³⁰⁰ although that view is changing.³⁰¹ We expect judges to think first and foremost about things that are larger than themselves—for example, justice, law, and their institutional credibility.³⁰²

In contrast, the Court looks petty, rather than august, when the Justices deadlock and thereby release an order affirming by equal division. Disagreement, in such circumstances, thwarts the Court's institutional role, to decide the cases that come before it. It causes legal observers to shake their collective heads, as Thomas Baker did following *Free v. Abbott Laboratories*. Baker argued that “the Justices should have suppressed their individuality and independence for the sake of the federal court system at large.”³⁰³ Martha Davis expressed similar, thinly veiled contempt for the Court's affirmance by equal division in *Flores-Villar v. United States*, stating: “With this anonymous 4-4 split, in which none of the Justices revealed their individual votes and the entire opinion consisted of a single sentence, the lower court's opinion was summarily affirmed and the discriminatory law was upheld.”³⁰⁴

Where individual Justices reveal their votes when the court affirms by equal division, this threatens to further undermine the Court's legitimacy by suggesting that the Justices have prejudged a future case presenting the same issue. The practices of Justices typically avoid such expressions of view.³⁰⁵ For example, Justices routinely refuse to publicly express views about unresolved legal questions.³⁰⁶ This predilection is dis-

300. JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 10 (2002).

301. See Jamie Fuller, *Have American Politics Killed the Impartial Supreme Court?*, WASH. POST (May 8, 2014), <https://www.washingtonpost.com/news/the-fix/wp/2014/05/08/have-american-politics-killed-the-impartial-supreme-court>.

302. See, e.g., Kim McLane Wardlaw, *Umpires, Empathy, and Activism: Lessons from Judge Cardozo*, 85 NOTRE DAME L. REV. 1629, 1633 (2010) (describing Judge Cardozo's view of judges); see also Don Walton, *Chief Justice Roberts Decries Efforts To Politicize Supreme Court*, LINCOLN J. STAR (Sep. 19, 2014), http://journalstar.com/news/state-and-regional/federal-politics/chief-justice-roberts-decries-efforts-to-politicize-supreme-court/article_a5f9fbe9-d0a5-5f86-85c1-a54272c5fea3.html.

303. Baker, *supra* note 4, at 129–30.

304. Martha Davis, *Sexism Against Fathers*, BOS. GLOBE, June 15, 2011, at A11.

305. See, e.g., *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 264 (1960) (Brennan, J., dissenting).

306. See MODEL CODE OF JUDICIAL CONDUCT r. 2.10(B) (AM. BAR ASS'N 2008); Kagan, *supra* note 278.

played most acutely during the confirmation hearing process, where Justices routinely decline to answer questions about legal issues that may come before the Court.³⁰⁷ Indeed, in her dissenting opinion in *Republican Party of Minnesota v. White*, Justice Ruth Bader Ginsburg stated that “every Member of [the Supreme Court] declined to furnish such information to the Senate.”³⁰⁸

The American Bar Association’s Model Code of Judicial Conduct similarly concerns itself with statements of precommitment. Rule 2.11 requires a judge to “disqualify himself or herself” if “[t]he judge, while a judge or judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.”³⁰⁹ The rule does not apply to the Supreme Court and would not constrain courts from issuing affirmance by equal division in any case, but nonetheless acknowledges the risks of public adoption of positions.

Finally, affirmances by equal division encourage litigation gamesmanship. The Court always releases one piece of information when it divides evenly: the identity of any recused Justice. Any savvy lawyer will recognize the importance of that information.³¹⁰ In a future case presenting the same issue, that Justice will become the dominant target for persuasion. Peeling back the Court’s mask in this way and inviting strategic argumentation targeted at a single Justice not yet committed to a viewpoint can only further a cynical view of the Court.³¹¹

307. See *Republican Party of Minn. v. White*, 536 U.S. 765, 807–08 n.1 (2002) (Ginsburg, J., dissenting).

308. *Id.*

309. MODEL CODE OF JUDICIAL CONDUCT r. 2.11(A)(5) (AM. BAR ASS’N 2008).

310. See Joan Biskupic, *Lawyers Emerge as Supreme Court Specialists*, USA TODAY, May 16, 2003, at 6A (describing “elite” Supreme Court lawyers). The aftermath of the tie vote on jurisdiction in *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011), is a good example. Because it was easy to discern how each Justice voted, Bradford Mank authored an article speculating as to how the standing issue the Court did not resolve would play out in the future before the same Justices. See Bradford C. Mank, *Reading the Standing Tea Leaves in American Electric Power Co. v. Connecticut*, 46 U. RICH. L. REV. 543, 543–45 (2012).

311. Of course, litigating before the Supreme Court is already an exercise in strategy, particularly because Justice Anthony Kennedy often casts the decisive vote. Indeed, recognizing that perfecting Supreme Court practice requires detailed understanding of the personalities of the Justices, not just the law, may partially explain the meteoric rise of an elite Supreme Court bar in

While cases ending in tie votes are rare, and many fly below the radar, the procedure is unnecessary and bolsters cynicism about the Court, which should be particularly troubling to the Justices given current trends in public opinion. Replacing ties with DIGs may make only a modest difference, but it carries with it no costs.

C. DESTABILIZING SUBJECT MATTER JURISDICTION

Affirming by equal division creates doctrinal instability when the tie vote relates to subject matter jurisdiction. The Supreme Court has only engaged in this practice on one occasion, in *American Electric Power Co. v. Connecticut*.³¹² Jurisdiction issues, however, often prove divisive among the Justices, and now that the precedent has been set, the potential exists for future jurisdictional issues to be resolved in similar fashion.³¹³

The destabilizing effect of a tie vote on jurisdictional doctrines arises out of the long-standing rule that every federal court has an “independent obligation to assure [itself] that jurisdiction is proper.”³¹⁴ This obligation is nonwaivable, and a court must establish jurisdiction before proceeding to the merits of a case.³¹⁵ In other words, the Court must affirmatively establish jurisdiction, and yet, the Court has explained that “no affirmative action can be had in a cause where the judges are equally divided.”³¹⁶ The *American Electric Power* decision then can only logically be understood as undermining fundamental rules about subject matter jurisdiction,³¹⁷ or implying that in some instances tie votes can result in an affirmative act on the part of the Court.

The *American Electric Power* decision may, in the end, be *sui generis*, but it sets a dangerous precedent. Lower courts have long sought mechanisms to avoid difficult jurisdictional

recent years. See, e.g., Richard J. Lazarus, *Docket Capture at the High Court*, 119 YALE L.J. ONLINE 89 (2010).

312. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011).

313. See *Pidot, Invisibility*, *supra* note 181, at 1405–06.

314. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 324 (2008).

315. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998).

316. See *Durant v. Essex Co.*, 74 U.S. (7 Wall.) 107, 110 (1868).

317. For a discussion of the role that the independent obligation to establish jurisdiction plays in the constitutional architecture of federal courts, see *Pidot, Jurisdictional Procedure*, *supra* note 26, at 29–36.

determination,³¹⁸ and the *American Electric Power* case may provide new fuel for this endeavor. While some scholars celebrate the potential for the case to erode the rule that standing must be decided first,³¹⁹ it seems more likely that the decision will create confusion. Regardless, the independent obligation of courts to establish jurisdiction plays an important role in keeping the federal courts within their sphere of constitutional power, and the Court's ambivalence about that rule in the *American Electric Power* case may destabilize that rule.³²⁰

CONCLUSION

Nothing good comes from a tie vote in the Supreme Court. Fortunately, the Justices rarely split evenly on the judgment in a case. But when they do, this Article contends they should DIG the case, rather than affirming by equal division.

The Justices could achieve this shift in procedure without any change to jurisdictional statutes or modification of Court rule. The Court typically requires a supermajority vote to DIG a case and will do so only because of changed circumstances.³²¹ Should the Justices agree, they could unanimously DIG a case where the Court teeters on the brink of a tie vote. Moreover, DIGing would seem to reduce the likelihood that any one Justice would opine on the merits of the case, because any opinion written in the context of a DIG would ordinarily be confined to the propriety of the dismissal.³²²

DIGing would be as effective a means of disposing of a single issue presented in a larger case as would the affirmance by an equally divided Court. While the Court has rarely used a DIG to dispose of a single issue, the prevalence of such situa-

318. See, e.g., *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005), *rev'd*, 549 U.S. 497 (2007).

319. See, e.g., Daniel A. Farber, *Standing on Hot Air: American Electric Power and the Bankruptcy of Standing Doctrine*, 121 YALE L.J. ONLINE 121, 124–25 (2011), <http://www.yalelawjournal.org/forum/standing-on-hot-air-american-electric-power-and-the-bankruptcy-of-standing-doctrine>.

320. See Pidot, *Jurisdictional Procedure*, *supra* note 26, 35–36. While I am troubled by the arbitrary application of standing rules to keep regulatory beneficiaries out of court, I believe robust application of the duty to independently assess jurisdiction can ameliorate that arbitrariness by requiring courts to examine the factual underpinnings of standing themselves, rather than trapping unwary plaintiffs with new rules late in a case's life. See also Pidot, *Invisibility*, *supra* note 181, at 1407–11.

321. SHAPIRO ET AL., *supra* note 100, at 360–62.

322. See, e.g., *Rogers v. Mo. Pac. R.R. Co.*, 352 U.S. 521 (1957) (Harlan, J., concurring in one case and dissenting in three).

tions is similar in magnitude to the prevalence of opinions affirming a single issue by equal division. Professors Michael Solimine and Rafael Gely identified fifteen DIGs of the 155 they studied that dismissed part of a case.³²³ My data set reveals that the Court has affirmed by equal division part of a case fourteen out of 164 times.³²⁴

On the exceptionally rare occasion that a tie vote occurs in a case that arises under the Supreme Court's mandatory appellate jurisdiction, a DIG will not be possible.³²⁵ Such an event has occurred exactly once since 1925, and the Court should not allow the mere possibility that it must affirm by equal division in such a case in the future to prevent it from adopting a preferable procedure for the vast majority of such cases.

The Supreme Court will inevitably consider cases without a full complement of Justices, and sometimes such cases will result in a tie vote. When that eventuality comes to pass, the Justices would do well to dismiss the case. Dismissal would have the same legal effect as the current practice of affirming by equal division, but by choosing to DIG, the Court may ameliorate the harmful consequences of the latter practice.

EPILOGUE

Since this Article was virtually completed, the Supreme Court concluded its 2015 October Term. More than eighty percent of the decisions for this Term were decided after Justice Scalia's death.³²⁶ Five of those opinions involved tie votes.³²⁷ Be-

323. See Solimine & Gely, *The Supreme Court and the DIG*, *supra* note 86, at 1434.

324. See *supra* Part III.B.

325. Reynolds & Young, *supra* note 21, at 43 (arguing that the DIG is a poor substitute for the affirmance by equal division because the Court "might reasonably wish to treat substantively identical certiorari and appeals practices as formally identical").

326. The Supreme Court issued opinions in 14 of 74 cases in December 2015 and January 2016. See Kedar Bhatia, *Final October Term 2015 Stat Pack*, SCOTUSBLOG 37 (June 29, 2016, 11:25 PM), <http://www.scotusblog.com/2016/06/final-october-term-2015-stat-pack>. The opinions released in February were all issued after Justice Scalia died. See *Calendar of Events*, SCOTUSBLOG, <http://www.scotusblog.com/events/2016-02> (last visited Oct. 14, 2016).

327. See *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (per curiam); *United States v. Texas*, 136 S. Ct. 2271 (2016) (per curiam); *Franchise Tax Bd. of Cal. v. Hyatt*, 136 S. Ct. 1277 (2016); *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083 (2016) (per curiam); *Hawkins v. Cmty. Bank of Raymore*, 136 S. Ct. 1072 (2016) (per curiam).

cause two of those cases were among the most closely watched cases of the term, the practice of affirming by an equally divided court has been catapulted into the limelight. There have been more newspaper articles published about tie votes in the Supreme Court in the last four months than had been published between January 1, 1978 (the beginning of the Lexis newspaper database) and the date of Justice Scalia's death.³²⁸ Tie votes are no longer of interest primarily to Supreme Court insiders, but have captured public attention and the headlines of major newspapers around the country.³²⁹ This glut of attention only magnifies the fears this Article expressed about tie votes threatening public perceptions about the legitimacy of the Supreme Court.

By the numbers, the October Term 2015 is something of an outlier, but not extremely so. No more than two tie votes have occurred in any year since 1989, but that year experienced five tie votes and there have been others with similar numbers. The cases also fall within the pattern of the 164 cases involving a tie vote between 1925 and 2015. All five arose under the Supreme Court's discretionary certiorari jurisdiction. Four of the five took the form of a one sentence per curium decision simply announcing that a tie had occurred. In the fifth, *Franchise Tax Board of California v. Hyatt*, the Justices deadlocked on a significant preliminary issue, but ultimately a majority of the court disposed of the case on a secondary issue of lesser importance.³³⁰

While it is too soon to know the lasting doctrinal importance of these cases, there is reason to believe that they are unlikely to create prolonged splits of authority. At the very least, the Supreme Court is likely to have ample opportunity to revisit the questions presented in these cases should they so desire. *United States v. Texas* is perhaps the easiest example

328. This data was compiled by running the following search in the Lexis Advanced "news" database: "Supreme Court" /p ("tie vote" or "equally divided" or "4-4" or "4 to 4") and narrowing by "newspapers." That search returns 3,413 results. When the search is further narrowed to only those results occurring after February 12, 2016, 1,897 results are returned.

329. See, e.g., Sam Hananel, *High Court Tie Lets States Face Suits in Other States*, WASH. POST, Apr. 20, 2016, at A3; Adam Liptak, *Justices' 4-4 Tie Gives Unions Win in Labor Lawsuit*, N.Y. TIMES, Mar. 30, 2016, at A1; David G. Savage, *Tie Blocks Obama's Immigration Plan; Supreme Court 4-4 Vote Leaves in Place Lower Ruling*, CHI. TRIB., June 24, 2016, at 18.

330. 136 S. Ct. 1277 (2016).

for this opportunity.³³¹ The case involved a district court granting a nationwide preliminary injunction against the Obama Administration's decision to defer deportation for certain classes of immigrants within in the United States without legal authorization. The tie vote that terminated the case, leaving the injunction in place, immediately and dramatically affects the millions of people who were eligible for deferred deportation. In other words, the real world significance is dramatic. But because the case involved only a preliminary injunction, the Supreme Court will have a second opportunity to review the legality of the deferred deportation plan after the Fifth Circuit renders its decision on the merits. The Court is also likely to be presented with another opportunity relatively soon to address the issue in *Friedrichs v. California Teachers Association* because cases related to the public sector unions appear to be in no short supply.³³²

What sets the tie votes of October Term 2015 apart is that they have involved highly contentious and closely watched cases. This is particularly true of two of the decisions. *United States v. Texas* involved the Obama Administration's signature policy on immigration, which deferred deportation for individuals within the United States without legal authorization who are parents of citizens of lawful permanent residents.³³³ The decision garnered widespread attention and even prompted a swift response from President Obama, who described it as "heartbreaking for the millions of immigrants who have made their lives here."³³⁴ The *Friedrichs* case was also carefully watched and considered among the most important cases of the term.³³⁵

331. *United States v. Texas*, 136 S. Ct. 2271 (2016) (per curiam).

332. For example, the First Circuit has already decided a case related to public sector unions. See *D'Agostino v. Baker*, 812 F.3d 240 (1st Cir. 2016). While the issue is not precisely the same, the sheer volume of litigation in this arena suggests that the Court will have another opportunity to address the issue it couldn't resolve in *Friedrichs*.

333. See *Texas v. United States*, 809 F.3d 134, 147–49 (5th Cir. 2015).

334. Adam Liptak & Michael D. Shear, *Split Court Stifles Obama on Immigration*, N.Y. TIMES, June 24, 2016, at A1.

335. See, e.g., Josh Gerstein, *5 Cases To Watch as the Supreme Court Term Begins*, POLITICO (Oct. 4, 2015), <http://www.politico.com/story/2015/10/supreme-court-abortion-obamacare-214400>. For a discussion of the importance of the issues in *Friedrichs*, see Charlotte Garden, *What Will Become of Public-Sector Unions Now?*, THE ATLANTIC (Feb. 16, 2016), <http://www.theatlantic.com/business/archive/2016/02/scalia-friedrichs/462936>.

While the Court issued particularly high profile affirmances by equal division this year, other decisions indicated that the Justices may be aware that tie votes threaten their credibility with the public. While the Court issued no DIG in a case that divided them, in two cases it issued unusual orders to effectively punt cases that appeared headed for a deadlock. In *Zubik v. Burwell*, the Court considered several consolidated challenges to the contraceptive mandate contained within the Affordable Care Act.³³⁶ Rather than affirming the lower court decisions by equal division, the Court issued an order after oral argument requesting supplemental briefing on means of accommodating the religious views of the plaintiffs that had never been raised by any party.³³⁷ The Court then issued an order remanding the cases to allow the lower courts to consider the views expressed in the supplemental briefs.³³⁸ In *Spokeo, Inc. v. Robins*, the Court again remanded to the lower court without offering a view on the legal issue presented.³³⁹ It's hard to understand either of these orders as anything other than an effort on the part of the Justices to avoid a tie vote.

The Senate appears unlikely to confirm a ninth Justice in the near future and, as a result, October Term 2016 will present the Court will new opportunities to either divide evenly or to find other means of disposing of cases. To avoid further eroding public confidence in the institution, the Court should seek out those other means. This Article suggests that the DIG may provide one such avenue for consensus rather than division. In light of the decisions in *Zubik* and *Spokeo*, this suggestion may find fertile ground among the Justices.

336. 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>.

337. See Order, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016), No. 14-1418, 2016 WL 1203818 (Mar. 29, 2016).

338. *Zubik v. Burwell*, 135 S. Ct. 1557, 1561 (2016) (per curiam).

339. *Spokeo, Inc. v. Robins*, 135 S. Ct. 1892 (2016).