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Explaining the (Non) Occurrence of Equal Divisions on the U.S. Supreme Court

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Abstract

When the U.S. Supreme Court sits with an even number of justices participating, there is a risk that the Court will be deadlocked in a tied vote. While this outcome awards the individual respondent with a victory, it also preserves circuit splits and other ambiguities in the law. In this article, we examine the conditions under which an even-membered Supreme Court actually results in a tie vote. We argue that the Court recognizes the potentially damaging consequences of 4-4 rulings and seeks to avoid them when those consequences would be most severe. Consistent with that conjecture, we find that ties are less likely when a decision is necessary to resolve a dispute in the lower courts and when cases are important to the executive branch.

Keywords

judicial politics, U.S. Supreme Court, law, equal divisions

When a unanimous Supreme Court struck down a little-known Pennsylvania law that ear-marked US$20 million a year to benefit parochial and religious schools in June of 1971, the nation paid little attention. Indeed, in the midst

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of the controversy over the publication of the Pentagon Papers, *Lemon v. Kurtzman* was far from the most salient case decided by the Supreme Court that week. However, in the years that followed, scholars and commentators recognized the profound long-term impact the three-prong test that became known simply as the "Lemon test" would have on the Court's First Amendment jurisprudence. In the 40 years since *Lemon* first provided guidance on when governmental involvement in religious organizations is constitutional, it has been cited by federal and state courts more than 6,500 times and has appeared in more than 3,000 law review articles. Indeed, it is still arguably the most important case the Supreme Court has ever decided on the religious establishment clause of the Constitution.

What most legal scholars do not realize, however, is that the Court very nearly set no precedent at all in *Lemon*. When the Court voted at conference in March 1971, it did so short one member, as Justice Marshall did not participate because of the NAACP's role in the case. The remaining justices were split 4-4, with Justices Black, Blackmun, Douglas, and Stewart agreeing that the Pennsylvania law was invalid and Justices Brennan, Harlan, White and Chief Justice Burger taking the opposing view (Wahlbeck, Spriggs, & Maltzman, 2011). When the Court evenly divides, it provides for a winner in the case immediately before the Court, "affirming the judgment below" without opinion, but does not provide broader legal guidance and its decision cannot set precedent.[1] Endeavoring to avoid this outcome, Chief Justice Burger assigned the opinion to himself in the hopes of building a majority coalition during the opinion-writing process.[2] His opinion, in which he switched his own vote to reverse, also changed the minds of three of his colleagues. Thus, Burger's decision to write an opinion, instead of issuing a one-sentence order upholding the Pennsylvania law, resulted in a *unanimous* decision that struck down the law and dramatically redefined America's understanding of the relationship between church and the state.

Lemon is illustrative of the potential consequences that the Court faces when it decides cases with an even number of justices and the lengths justices will go to avoid those consequences. While even divisions award an individual respondent with a victory, they preserve circuit splits and other ambiguities in the law. So disconcerting was the possibility that the Supreme Court would evenly divide on some of the nation's most important controversies that Senator Patrick Leahy, Chairman of the Judiciary Committee, recently proposed allowing retired justices to serve as replacements when a member of the Court was recused (see Black & Bryan, 2014; Dorf & McElroy, 2011).

Ultimately, even divisions present an interesting challenge for the justices. On one hand, justices seek outcomes in line with their policy preferences

(Epstein & Knight, 1998; Maltzman, Spriggs, & Wahlbeck, 2000). On the other hand, failing to decide a case and set precedent is a failure of the Court to fulfill its most fundamental role of America's final voice in important legal controversies. The specter of equal division, then, presents one of the clearest examples of the tension justices face between their ideological goals and their desire for legal clarity and the rule of law. Using data from all even-membered Courts over more than 60 years, we seek to understand the conditions under which the Court ends in a tied vote. In particular, we argue that the Court recognizes the damaging impact of equally divided rulings on legal clarity and seeks to avoid them when those consequences would be most severe. We find that the justices are better able to overcome even divisions when cases are legally important—when a decision is necessary to resolve a dispute in the lower courts—and when cases are important to the other branches of government, most notably the executive.

Our findings make several unique contributions to the literature both substantively and theoretically. First, understanding the conditions under which equal divisions are likely to occur (or not occur) is critical. Even-membered Courts are neither recent nor particularly rare as they happen any time the Court either has a vacancy during its active term or, more frequently, a justice recuses herself. Justices Roberts, Alito, Sototmayor, and Kagan have all recused themselves in recent terms merely because of their previous service in either the lower federal courts (e.g., Roberts, Alito, and Sotomayor) or the executive (e.g., Kagan). Given the increasingly public role justices have played prior to their appointment to the Court, recusals are likely to remain a common feature for future nominations, which also makes equal divisions possible. We therefore bring theory and data to bear on an important aspect of the judicial process.

Second, and more broadly, we suggest that the avoidance of an equally divided court presents a clear instance where justices must balance competing goals. On one hand, justices have an institutional obligation to, among other things, further legal clarity by resolving circuit splits and answering important legal questions. At the same time, however, we know that justices have strong preferences to accurately decide cases. These two goals can come in direct conflict when a justice casts a vote on a court with an even number of members. This is to say our findings add to the literature on how justices pursue multiple, occasionally conflicting, goals (Baum, 1997).

Our effort proceeds in several steps. The next section begins with an introduction to the history of even divisions and a discussion of their implications and frequency. From this foundation, we articulate a series of hypotheses to explain the (non)occurrence of tied votes—seeking to answer the fundamental question of why these decisions are so rare. Next, we present our data,

methods, and results of our analysis. Finally, we conclude with a discussion of the implications of our findings.

The Infrequency of Evenly Divided Courts

Reynolds and Young (1983) provide what we believe to be the first comprehensive history of equal divisions on the Court. As they note, the Court first articulated the rule for dealing with equal divisions in *The Antelope* (1825). The case involved the standard for determining the rightful owners of slaves who were suspected of being transported through piracy. Chief Justice Marshall ruled that the African slave trade could only be prohibited where it violated the laws of both nations engaging in the trade but refused to articulate a legal reasoning in the case because "the Court is equally divided on [the issue] and consequently no principle is settled." As is the case in judgments of the Court, when the Court evenly divides, its decision has no precedential value. However, unlike a judgment of the Court in which either party can win, equally divided cases simply "affirm the judgment below" and are announced without opinion. Evenly divided cases then provide for a winner in the case immediately before the Court (the respondent) but do not provide broader legal guidance (Reynolds & Young, 1983).

The Court has been careful to articulate that in the same way that a refusal to hear a case (i.e., the denial of certiorari) is neither a tacit validation of the lower court's legal reasoning nor an affirmance by an equally divided court. For instance, in the per curium opinion in *Ohio Ex. Rel. Eaton vs. Price* (1960), the Court wrote, "four of the Justices participating are of opinion that the judgment should be affirmed, while we four think it should be reversed. Accordingly, the judgment is without force as precedent." The per curium in *Price* went on to explain the reasoning for announcing the judgment without opinion, writing as follows:

> Usual 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 approached with less commitment.

Perhaps because of the steep opportunity costs associated with an even division—justices go through the entire decision-making process without actually producing an opinion—they are rare. Between the Court's 1946 and 2011 terms, nearly one fifth of the Court's decisions were made with an even number of justices participating. Yet, in only 4.7% of these cases did the Court end up with an equally divided vote.[3] In addition to being low in an

absolute sense, this rate is also significantly lower than what we might expect to naturally occur. On a court with eight remaining justices, for example, if vote outcomes were simply random, then we would expect to observe a tie in 20% of cases where it is possible (i.e., one out of five possible voting splits). Even a more conservative approach still predicts that a tie should emerge in 11% of the cases—more than double what is actually observed.[4]

In Figure 1, we illustrate the occurrence of both even-member courts and tie votes across time. Here, the *x*-axis depicts each Court term. On the *y*-axis, we portray the number of cases where there was an even number of justices that did (light gray) and did not (dark gray) result in a tie vote. As the figure makes clear, while there is substantial term-by-term variation in the number of cases where the Court is "at risk" of ending up in a tie, as a general matter, the frequency with which it does deadlock in a divided vote is quite low. Unsurprisingly, we tend to observe significantly higher numbers of "at risk" cases in terms that immediately follow a personnel change on the Court. For example, 2005, the term following the appointment of Chief Justice John Roberts, observed the highest number of "at risk" cases since 1991—the term in which Justice Thomas joined the bench. The data also reveal what appears to be a longitudinal trend, with the number of cases decided by an even-membered court dropping off somewhat precipitously under the leadership of Chief Justice Rehnquist. This is consistent with existing accounts, which suggest that Rehnquist urged his colleagues to avoid discretionary recusal whenever possible (Black & Epstein, 2005).

In short, equally divided courts appear far less often than one might expect based on the Court's voting patterns. Despite uncovering this interesting and important aspect of the Court's decision making, Black and Epstein (2005) fail to address the question their study naturally begs: Why do so few even-membered Courts result in a tie vote? Indeed, they concede,

> Whatever the explanation for the lack of evenly divided cases, this may be a more interesting and even more pressing matter for future exploration . . . [These findings] alone commend greater attention to the question of why more ties do not occur. (Black & Epstein, 2005, p. 97)

The next section provides such an analysis.

Explaining Evenly Divided Courts

More than 50 years of scholarship have been devoted to understanding the goals that motivate justices, what actions they take to achieve those goals, and the effect of those goals on American jurisprudence. However, less is understood on how justices prioritize those goals when they are in conflict.

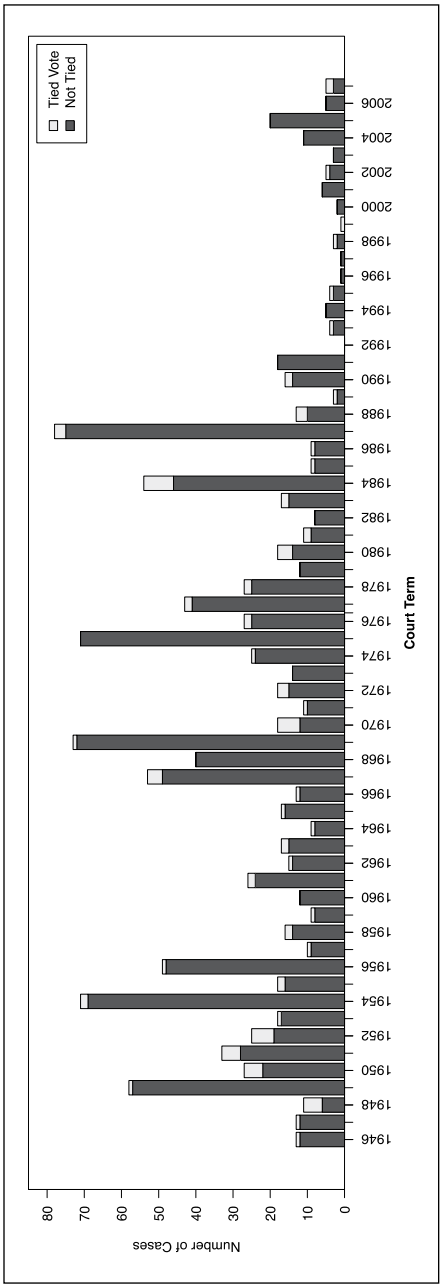

Figure 1. Frequency of even-membered Courts and tied votes, by term (1946-2007).

Baum (1997) argues that justices are not single-minded pursuers of policy goals. Rather, their goals exist in a hierarchy. While justices obviously care about deciding the law "correctly" (which can encompass a commitment to policy preferences, precedent, and legal doctrine), they are also concerned with deciding the law clearly. Justices understand that their position atop the federal judicial hierarchy gives them the additional obligation of sending clear signals to the courts below, the elected branches, and the American people on what the law means. Accordingly, justices are often more concerned with deciding the law clearly than they are with deciding it correctly.

If justices seek to avoid equal divisions, it shows a potential willingness to forgo policy preferences for the sake of the structure as well as the content of the law—a desire to sacrifice for legal clarity. The heart of our theory rests on the assumption that justices should be especially willing to make this sacrifice when legal clarity is of heightened importance. We turn here to case factors—legal and otherwise—that should trigger such a willingness. In short, we hypothesize below that justices recognize signals from the lower courts and the other branches that indicate that certain cases are in particular need of resolution and legal clarity.

First, abundant evidence suggests that the Supreme Court is deeply concerned with resolving lower court conflict. Indeed, Rule 10 of the Supreme Court states that the presence of lower court conflict is a key factor in the Court's decision to grant certiorari. Not only does the presence of conflict increase the likelihood that the Court will grant a case (Caldeira & Wright, 1988; Ulmer, 1984), but it can also induce justices to suppress policy-minded behavior when casting their agenda-setting votes (Black & Owens, 2009). Conflict in the lower courts is consistently cited by the justices themselves as one of the key problems of equal division (see, for example, Leahy, 2010; Rehnquist, 1972); the obligation to resolve dissensus between the lower courts is one of the key reasons the justices are so committed to legal clarity. Because a tie vote perpetuates the existence of lower court conflict, we expect the following legal conflict hypothesis:

Hypothesis 1: The Court will be less likely to evenly divide when there is conflict between the lower courts.

The Court also receives information from the elected branches that clarity in the law is important in particular cases. The clearest of these signals comes from the Office of the Solicitor General (OSG). An abundance of literature suggests that the Court pays significant attention to OSG recommendations, both in terms of helping the Court shape the content of its agenda (Black & Owens, 2009; Caldeira & Wright, 1988, Perry, 1991) and even when deciding

a case in a particular manner (Black & Owens, 2012; Wohlfarth, 2009). Whether because it speaks for the preferences of the executive branch, or because it is a trusted repeat player, the OSG's elective involvement is an indication that resolution of the legal issue is considered important by the federal government. Accordingly, we expect the following executive involvement hypothesis:

Hypothesis 2: The Court will be less likely to evenly divide when the Solicitor General actively involves herself in a case.

Unlike the president, Congress does not have an official representative to the Court. Because of this, it must communicate using more subtle signals. For instance, while members of Congress cannot directly lobby the justices, they can and frequently do get involved in a case as amicus participants. During the 104th session of Congress (1995-1996), for example, just over a third of the members signed at least one brief; in earlier sessions, a majority of legislators signed briefs as well (Spill Solberg & Heberlig, 2004).

Likewise, Congress can signal its interest in a case if it is directly involved as a petitioner, as it determined the case was important enough to warrant a challenge of an adverse decision below, or if the case involves a constitutional challenge to a piece of federal legislation or involves the legislative veto. Each of these factors sends strong signals to the Court that settling the rule of law in those cases might be more important than the content of the law. Thus, we suggest the following legislative involvement hypothesis:

Hypothesis 3: The Court will be less likely to evenly divide when the legislative branch actively involves itself in a case.

While institutional obligations and constraints will reduce the likelihood that the Court deadlocks in a tied vote, it is also important to account for the policy component of the Court's decision making. One critical dimension of policy is the opinion-writing process itself. To produce a lasting precedent, an opinion writer must ultimately produce a draft that can garner the support of at least five of her colleagues. The ease with which this can be accomplished, of course, is a function of the policy preferences of justices on the Court. On a Court where justices have relatively consistent preferences, there will be a larger degree of overlap in terms of policy outcomes that are acceptable. This, in turn, makes it easier to build a consensus. By contrast, when the Court is ideologically splintered, the overlap is smaller, and building a majority coalition will be more difficult (Maltzman et al., 2000). Accordingly, we expect the following ideological heterogeneity hypothesis:

Hypothesis 4: As the Court's ideological heterogeneity increases, so too should the likelihood of an evenly divided court.

Of course, not all cases are equally important to the justices. A wealth of scholarship demonstrates that justices are more committed to their ideological positions in salient cases (see, for example, Johnson, Spriggs, & Wahlbeck, 2005; Maltzman et al., 2000). Because avoidance of an equal division requires the justices, to an extent, to sacrifice their own policy preferences for the sake of legal consistency and institutional legitimacy, we expect the following salience hypothesis:

Hypothesis 5: Equal divisions will be more likely in politically salient cases.

Finally, while recusals are the primary reason for even-membered Courts, they are also the least predictable. Justices have the discretion to recuse or not recuse at any time for any reason. Thus, justices cannot plan around recusals, either by organizing the docket to avoid granting cases that should be decided with a full slate of members or by holding over important cases until the bench is at full strength. By contrast, when justices leave the bench permanently, their colleagues are better able to plan for an even-membered Court. They both know who has left the bench and can likely anticipate how long the absence will last and the probable ideological predisposition of their future colleague. There is abundant anecdotal evidence that justices hold over important or controversial cases when faced with a permanent vacancy (see, for example, Woodward & Armstrong, 1979). We anticipate that this ability to strategically plan ahead allows justices to better avoid even divisions and therefore expect the following permanent vacancy hypothesis:

Hypothesis 6: Equal divisions will be less likely when vacancies on the Court are caused by the departure of a justice rather than her recusal.

In summary, we argue that the Court strives to balance between institutional and policy considerations when attempting to avoid tie votes. The presence of institutional factors such as legal conflict and the interest of other branches of government act to depress the likelihood of a tie vote because legal clarity is more important, while ideological forces tend to push the Court toward an even split because the justices place more weight on legal accuracy. We next turn to describing the data and measures we deploy to test these hypotheses.

Data and Measurement

To test the above-mentioned hypotheses, we started by combining the Spaeth Database "allcourt" and "vinwar" files and examining all orally argued cases heard between the Court's 1946 and 2007 terms. The year 1946 represents the first term included in a multiuser database and 2007 corresponds to the most recent term available when we began this research project. Because a tie vote can only occur in cases with an even number of justices, we then excluded any and all cases that were decided by an odd number of justices. This left us with a total of 1,242 cases that were "at risk" of observing an evenly divided court. Our dependent variable is whether the Court, when at risk of an even division, actually ended up doing so (1 = *yes*; 0 = *no*). The initial coding of this variable was done by using the "dec_type" variable in the Spaeth databases.[5] We then conducted two reliability checks. First, we searched the Lawyers' Edition of Supreme Court opinions available on LexisNexis for the phrase "affirmed by an equally divided court" to capture any cases that were not included in Spaeth. Second, we read the text of each opinion identified as an evenly divided court to ensure that such a division actually occurred.[6] All told, 97 of our initial 1,242 observations satisfied this criterion (about 8%).

Turning to our independent variables, Hypothesis 1 argues that the Court will be less likely to reach a tie vote when there is conflict among two or more circuits on an important legal question. Because evenly divided courts (i.e., the "1s" in our data) do not produce a written opinion, we cannot use the most common approach of measuring conflict, which is to use the database's variable of whether the Court's final written opinion noted the existence of legal conflict. Instead, we turned to the parties' initial certiorari briefs or jurisdictional statements. We started by determining whether the petitioner alleged the existence of legal conflict. If she did, then we examined the respondent's brief in opposition to determine whether the respondent contested this allegation. We take this step to control for the potential that a petitioner has exaggerated the extent of a conflict in order to attract the Court's attention at the agenda-setting stage. If the respondent conceded or otherwise failed to refute the conflict claim, we code *Legal Conflict* as 1.[7]

With Hypothesis 2, we argue that the Court will be less likely to reach a tie vote in cases where the United States has expressed a strong preference toward having the case resolved. Accordingly, we code *U.S. Case Interest* as 1 if the OSG, the executive branch's primary judicial representative, participated in the case as the petitioner or submitted any type of amicus brief in a case.[8]

To operationalize our Legislative Involvement Hypothesis, we started with data from Epstein, Segal, Spaeth, and Walker (2007), which we updated using LexisNexis to cover the 1997-2007 terms, to determine whether any

member of Congress participated in a case. If one did, we coded the variable as 1. We also coded the variable as 1 if any of the following conditions were met: The House or Senate was the petitioner in a case, the case involved judicial review of a federal statute, or the case presented an issue involving the legislature as an institution (e.g., the legislative veto). We code these additional elements to capture other cases that are likely important to Congress. Our variable, *Congressional Interest*, takes on a value of 1 in just about 12% of our observations and 0 in the other 88%.[9]

To measure the ideological influence on the Court's propensity to result in a tied vote, we include *Ideological Heterogeneity*, which we code in three basic steps. First, for each case, we identified the remaining justices who participated in that decision. Second, using data from Martin and Quinn (2002) we estimated their policy preferences using their ideal point for the term in which the case was decided. Finally, we calculated the interquartile range for the justices' scores.[10] Substantively, then, our measure taps into the extent to which the policy preferences of the remaining justices are tightly clustered versus diffused. The intuition here is that it will be more difficult to amass a coalition of five votes when the Court is ideologically divided than when it is not (Maltzman et al., 2000). Higher values correspond to a more diffused court whereas lower values suggest the Court is more homogeneous.

To measure political salience, we follow the general tack of Epstein and Segal (2000) and code *Case Salience* as the number of stories—excluding "round up" summaries—written about a given case in the *New York Times* from the day the case was accepted for review up to (but not including) the day of the decision. That is, we do not include any coverage by the *Times* about the decision itself, since so doing would constitute a noncontemporaneous measure of case importance (Black, Sorenson, & Johnson, 2013).

To operationalize Hypothesis 6, we merely identified if the Court was operating at less than full strength because a justice had retired or died and her replacement had not yet been appointed rather than as a result of a recusal, illness, or other temporary vacancy.[11] Therefore, *Open Seat Vacancy* equals one when the Court was waiting for a new member to be appointed and zero when the vacancy was the result of a recusal or nonparticipating member.

Finally, to address the potential confounding effect case complexity might have with our variables of interest, we control for case complexity by coding the total number of amicus curiae briefs present in a case (Collins, 2008).[12]

Method and Results

Because our dependent variable is dichotomous, we estimate a logistic regression model.[13] Parameter estimates for our model are reported below in

Table 1. Logistic Regression Model of Whether an Even-Membered Supreme Court Results in a Tie Vote.

Variable	Coefficient	Robust *SE*
U.S. case interest	−0.558**	0.236
Case salience	0.277**	0.110
Legal conflict	−0.546*	0.277
Congressional interest	−0.689	0.456
Ideological heterogeneity	0.159	0.136
Case complexity	−0.008	0.022
Open seat vacancy	−1.574**	0.430
Constant	−2.200**	0.258
Observations	1,242	
Log likelihood	−321.340	

*$p < .05$. **$p < .01$, one-tailed tests.

Table 1. As hypothesized, we find that the Court is less likely to evenly divide when the case presents the Court with legal conflict. Similarly, when the Solicitor General is involved in the case—evidence of interest from the executive branch—the Court is also less likely to end up deadlocked in a tie. We also find, as expected, that the Court is more likely to evenly divide when the case is salient as opposed to when it is not. In addition, the Court is less likely to result in a tie when operating at full strength due to a retirement or death rather than a recusal. This, too, is consistent with our initial hypothesis.

However, several of our hypotheses were not supported. We had expected more heterogeneous courts to be more likely to result in a tie. Although our coefficient is in the expected direction its p value exceeds conventional levels of significance ($p = .12$, one-tailed test).[14] We also find no evidence that justices are any more (or less) likely to avoid an equal division when they observe interest by members of Congress. However, it is worth noting that this null finding is largely consistent with existing work on the topic. Indeed, Spill Solberg and Heberlig (2004), in their comprehensive analysis of congressional amici, conclude, "congressional amicus curiae briefs are not efficacious signals of the merits of policy or statements of institutional prerogatives but low cost methods to reveal members' positions to all those within earshot" (p. 604). Because the signals are less powerful and much more indirect, it seems logical that the Court would be less responsive to them than it is to signals from the Solicitor General (SG). Finally, we fail to document any systematic relationship between a case's complexity and the Court's likelihood of reaching an equally divided outcome.[15]

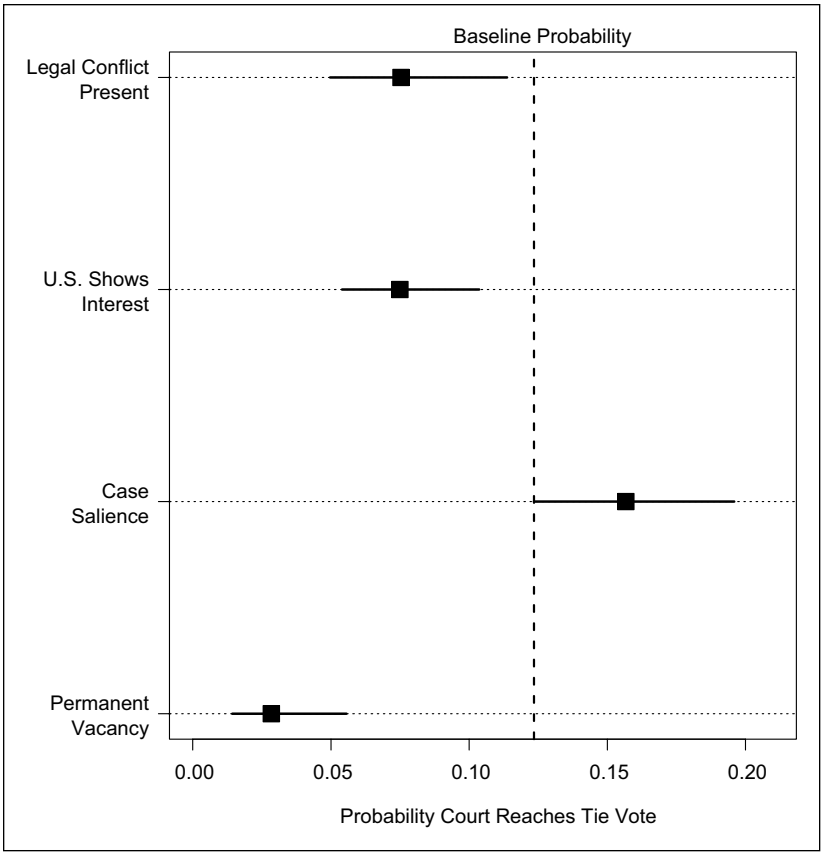

Figure 2. Predicted probability that the Court evenly divides given different variables of interest.

Note. The dots indicate the point value prediction and the horizontal whiskers depict the 90% confidence intervals. The dashed vertical line is the baseline probability of an even division when all values are held to their means or modes.

To further examine the substantive nature of our results, we turn to predicted probabilities, which we present in Figure 2. Along the *x*-axis, we show the estimated probability of observing a tie. The *y*-axis provides a series of counterfactuals from our data. The dashed horizontal line provides a baseline comparison for the likelihood of observing an evenly divided court, holding all other variables at their mean or modal values (as appropriate)—approximately .12.

Starting on the top of the *y*-axis, we examined the effect of legal conflict. We had hypothesized that the Court would be, owing to its institutional obligations, less likely to end in a tie vote in cases where conflict is present. Our results suggest the Court does exactly that. As Chief Justice Rehnquist, Senator Leahy, and the Court itself have argued, one of the key duties of the Supreme Court is resolving lower court disputes. The fact that the Court is less likely to evenly divide in cases where there is demonstrated tension in the law is a key indicator that the justices are willing to overcome policy disputes to resolve key legal controversies and articulate consistent and enforceable law. In cases where conflict is present, the Court has only a .08 probability of resulting in a tie vote—a relative decrease of 33%. As our coding procedure, which uses the litigant's briefs, takes a fairly conservative approach to identifying conflict, we suspect this likely underestimates the true effect size.

While the Court pays significant attention to its obligations to the legal community, our results imply its ears are equally attuned to suggestions from the U.S. government that certain cases are especially in need of legal clarification. Moving down to the second line in our figure, we estimate that the likelihood of a tie vote when the United States is an active participant drops by more than 40% to a value of .07. Equal divisions make federal policy harder to implement and fail to add clarity to the law. As a result, the Court seeks to avoid them when the United States indicates that a case must be resolved.[16]

Our results do demonstrate there are limits to the Court's ability to avoid an equal division, however. In this vein, the results from our *Case Salience* variable are informative. For the roughly 84% of the cases in our data where we observe no newspaper articles, the probability of observing an equally divided court is the baseline value—that is, .12. However, we estimate a .16 probability of a tie vote in cases that observed a single newspaper story by the *Times*—a 33% relative increase. A case with an exceptionally high level of media attention (three articles or roughly the top 1% of our data) would have about a 24% chance of being equally divided, which is double the initial baseline probability.[17]

Finally, we consider the impact of the "type" of the vacancy on the probability that the Court splits. As the bottom line of the plot makes clear, the Court is exceptionally reluctant to end in a tie when the vacancy has been caused by a colleague's death or retirement. When a justice will not be returning to the bench (i.e., it is not a discretionary recusal), we estimate only a .03 probability of observing a tie vote—a relative decrease of 75%. It is interesting to note that open-seat vacancies are the single strongest predictor of whether the Court will evenly divide.

Conclusion

Justice Brandeis famously wrote, "It is usually more important that a rule of law be settled, than that it be settled right." Insights from political scientists ranging from Murphy (1964) to Epstein and Knight (1998) have taught us that "right" usually means that the law was settled in accordance with the justice's most preferred policy outcome. However, there has been significantly less work done to investigate the lengths justices go to reach the more important goal, according to Brandeis, of settling the rule of law—or, to put it another way, making the application of the law clear and consistent.

Our analysis of equal divisions on the Supreme Court examines one possible way the clarity of law can be harmed by ideological goals. In so doing, we also provide an initial answer to the broader topic of what happens when the multiple goals of judges come into conflict. Our results are important not only because even divisions are so legally problematic but also because their (non)occurrence gives us a unique insight into how the Court responds when institutional obligations and policy preferences clash. On this dimension, our results demonstrate that justices may be willing to forgo their own ideological predilections for consistent law with long-term precedential value, especially when other institutions signal that consistent law is necessary.

Understanding equal divisions of the Court is, by itself, important. Justices often use the possibility of a tied vote as a justification for not recusing themselves (*Laird vs. Tatum*, 1972). This puts them in an ethical dilemma between their obligation to decide the nation's most pressing legal controversies and avoiding potential conflicts of interest. While our findings indicate that even divisions are rare, and especially rare when legal or institutional concerns are paramount, they also demonstrate that politically salient cases are at a higher risk for division as are cases where justices have taken the perhaps most responsible course of action of acknowledging potential conflicts of interest and stepping back from a case.

Regardless of how infrequent tied votes may be, each one has a broad and lasting impact on the consistent application of law in the United States. As such, it is important for scholars to know not only when and why they occur, but also the potential consequences of trying to avoid even divisions. Our results here indicate that, by and large, the Court sees even divisions as an institutional problem that it has an obligation to prevent. Indeed, our results suggest that while justices are often ideological in their behavior, they are also ultimately good shepherds of the law.

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Notes

1. Interestingly then, had the Court remained divided, not only would *Lemon* have lost its value as precedent but the Court's substantive decision would have gone the other way and ruled—albeit by technicality—that the Pennsylvania law was constitutional.
2. Burger was known to frequently buck the norms of the Court and assign the opinions even when his position did not command a majority (Johnson, Spriggs, & Wahlbeck, 2005; Woodward & Armstrong, 1979).
3. This is similar to the result obtained by Black and Epstein (2005), who examine even-membered courts caused by recusal (as opposed to retirement/death) during the 1946-2003 terms and find equal divisions in under 6% of their cases.
4. We reach this estimate of 11% by multiplying .20, which is the proportion of the Court's decisions that result in a 5-4 decision, with .55, which is the proportion of justices whose recusal would transform the vote outcome into a tie (i.e., 5/9).
5. The venerable Spaeth Databases have now been supplanted by the Supreme Court Database (http://scdb.wustl.edu), of which Spaeth is still a primary contributor. A single database file now begins with the 1946 term and continues through the most recent term (with plans to backdate the database's coverage to the Court's first term in 1789). Note that the old Spaeth "dec_type" variable is now called "decisionType" in the single-file database.
6. We discovered a total of 10 additional evenly divided cases that were not included in the "vinwar" (2 cases) or "allcourt" (8 cases) databases. We did not discover any false positives (i.e., cases coded as being evenly divided that actually were not).
7. Certiorari briefs are generally available online through LexisNexis and Westlaw back to the Court's 1979 term. For earlier terms (and sporadic gaps in the coverage of online databases), we used bound volumes and microfiche versions that were available in the law library.
8. We do not code this variable as 1 if the Solicitor General participated as the respondent because defending a win in the lower courts below (i.e., being the respondent) does not demonstrate the same active interest in the case as pursuing a loss to the next level (i.e., being the petitioner).
9. Our time period is extensive, and the Court has seen many changes in the levels of interest group involvement, legislative involvement, and executive involvement

over time. Interested readers are encouraged to see the online appendix for a more in-depth description of these changes.

10. We use the interquartile range (IQR) as opposed to the standard deviation because of the IQR's robustness to outlier observations. This is substantively appealing in our context because the Court does not need to reach a unanimous outcome in a case. As a result, we desire a measure that is not unduly affected by extreme justices (e.g., Justice Douglas in his last few terms on the bench). However, it is worth noting that our results are identical if we use the standard deviation or the range of ideal points.
11. Justices who were listed as having taken no part in the opinion because they were not on the bench when the Court heard argument but *were* on the Court when the final opinion was announced are coded as temporary vacancies. We do this as it is within the prerogative of those new justices to participate if they so choose.
12. We chose to operationalize complexity as the number of amicus briefs filed for two reasons. First, we find compelling Collins's (2008) argument that as amicus involvement increases, so do the number of issues that the Court has to consider when deciding the case, thereby increasing its complexity. Second, as was the problem with several of our other variables, we could not use the number of substantive legal issues in the case as coded by the Spaeth Database because evenly divided cases do not produce opinions.
13. Because of the relative infrequency with which our dependent variable takes on a value of 1—just under 8%—we also estimated a rare events logistic regression model (King & Zeng 2001a, 2001b). We obtain substantively identical results, which we present in an online appendix to this paper.
14. We also considered two other potential operationalizations of this concept. First, we examined the proportion of previous cases decided by each natural court of nine justices that were 5-4 decisions. The intuition here is that as the percentage goes up, this is evidence of more ideological strife and should lead, all else equal, to a higher likelihood of a tie vote. The variable is positively signed with a p value of .059 (one-tailed test). We also looked at the ideological makeup of the Court by simply calculating the absolute value of the difference between how many "liberals" (Martin-Quinn score less than 0) and how many "conservatives" (Martin-Quinn score greater than 0) were on the Court. As this value gets bigger, it should suggest less ideological conflict. This variable is negatively signed with a p value of .48 (one-tailed test). We thank an anonymous reviewer for encouraging us to explore these different measurement strategies.
15. One might worry that our *Case Complexity* and *Case Salience* measures are, in fact, measuring the same thing. As a result, our null result for the *Case Complexity* variable could be due to multicollinearity. Although there is a nonzero bivariate correlation between the two measures (roughly .37), subsequent analysis of the Variance Inflation Factors for the variables reveals values that are very close to the theoretical minimum of 1 (*Case Complexity* = 1.27 and *Case Salience* = 1.17) and well below standard rules of thumb to indicate problems with multicollinearity (e.g., 5 or 10).

16. In just more than 10% of the observations in our data, legal conflict is present in cases where the United States has taken an active interest. Under this condition, we find a 67% reduction in the likelihood of the Court ending with a tie, which is to say the probability drops from the baseline of .12 to only .04.
17. This result is robust to alternative operationalizations (e.g., using a dummy variable or taking one plus the natural logarithm of the number of articles).

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