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Ryan Black

Lee Epstein

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# RECUSALS AND THE “PROBLEM” OF AN EQUALLY DIVIDED SUPREME COURT

Ryan Black and Lee Epstein\*

## INTRODUCTION

For over five decades now we political scientists have been systematically studying the United States Supreme Court. We have examined how the justices attain their seats,<sup>1</sup> what factors explain the Court’s decision to grant certiorari,<sup>2</sup> what impact oral arguments have,<sup>3</sup> whether the Chief Justice self-assigns particularly important cases,<sup>4</sup> why the justices vote the way they do,<sup>5</sup> what rationales they invoke to justify their decisions,<sup>6</sup> and in what ways those decisions affect social, legal, and economic policy.<sup>7</sup> In short, it seems as though no feature of the Court has

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\* Ryan Black (rblack@artsci.wustl.edu) is a Ph.D. student in Political Science at Washington University in St. Louis; Lee Epstein (<http://epstein.wustl.edu/>) is the Edward Mallinckrodt Distinguished University Professor of Political Science there. We thank the National Science Foundation for supporting our research on the U.S. Supreme Court. For helpful suggestions and comments, we thank Nancy Staudt and Tim Johnson. We used STATA 8.2 to conduct the analyses and generate the graphs presented in this article. The project’s web site (<http://epstein.wustl.edu/research/recusal.html>) houses the database. Please send all correspondence to Lee Epstein (epstein@wustl.edu).

1. E.g. Charles M. Cameron, Albert D. Cover & Jeffrey A. Segal, *Senate Voting on Supreme Court Nominees: A Neoinstitutional Model*, 84 Am. Pol. Sci. Rev. 525 (June 1990).

2. E.g. Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 Am. Pol. Sci. Rev. 1109 (Dec. 1988).

3. E.g. Timothy R. Johnson, *Oral Arguments and Decision Making on the United States Supreme Court* (St. U. N.Y. Press 2004).

4. E.g. Forrest Maltzman & Paul J. Wahlbeck, *May It Please the Chief? Opinion Assignments in the Rehnquist Court*, 40 Am. J. Pol. Sci. 421 (May 1996).

5. E.g. Lee Epstein & Jack Knight, *The Choices Justices Make* (CQ Press 1998).

6. Nancy C. Staudt, Lee Epstein, Peter Wiedenbeck, René Lindstädt & Ryan J. Vander Wielen, *Judging Statutes: Interpretive Regimes*, 38 Loy. L.A. L. Rev. 5 (forthcoming 2005).

7. E.g. Gerald N. Rosenberg, *The Hollow Hope* (U. Chi. 1991).

escaped our attention—with one notable exception: recusal. A search of political science articles in J-STOR<sup>8</sup> on the term “recusal” yields exactly one article, which, in fact, was not at all about recusal.<sup>9</sup> We also ought note that broadening the J-STOR search (to include terms such as disqualif! w/10 Supreme Court or disqualif! w/10 judge or disqualif! w/10 justice) was equally unproductive, turning up no articles. By contrast, a Lexis search of law reviews on that same term produces 1,395 articles.<sup>10</sup>

Why the discrepancy exists is a good question, but we do not think the answer is a lack of interest on the part of political scientists. Quite the opposite. While a justice’s decision to recuse “isn’t entirely . . . discretionary,”<sup>11</sup> as Justice Ginsburg once said,<sup>12</sup> neither is it entirely lacking in discretion:

[F]or . . . a court of appeals judge on a three-judge panel . . . [i]f there were any doubt, that judge could step out and let one of her colleagues replace her. But on the Supreme Court, if one of us is out, that leaves eight, and the attendant risk that we will be unable to decide the case, that it will divide evenly. . . . When cases divide evenly, we affirm the decision below automatically. Because there’s no substitute for a Supreme Court Justice, it is important that we not lightly recuse ourselves.<sup>13</sup>

Ifill underscores Ginsburg’s point when she notes that the justices

8. Available at <http://www.jstor.org/search>. J-STOR, a subscription database, houses the text of major journals in the humanities, sciences, and social sciences.

9. Stefanie A. Lindquist, David A. Yalof & John A. Clark, *The Impact of Presidential Appointments to the U.S. Supreme Court: Cohesive and Divisive Voting Within Presidential Blocs*, 53 Pol. Res. Q. 795, 799 n. 2 (2000) (using the term “recusal” only to explain why they excluded the 1949 term from their study—because “Douglas’s equestrian accident that year led to his recusal in a large percentage of cases”).

10. Search conducted on Jan. 14, 2005.

11. See 28 U.S.C. § 455 (available at <http://uscode.house.gov>). For recent commentary on § 455, see Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 Iowa L. Rev. 1213 (2002); for general analyses of disqualification law, policies, precedents, and practices with some attention to the Supreme Court, see Seth E. Bloom, *Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges*, 35 Case W. Res. L. Rev. 662 (1985); John P. Frank, *Disqualification of Judges*, 56 Yale L.J. 605 (1947); Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 Brook. L. Rev. 589 (1987). As an aside, while we understand that differences exist in the meaning of the words “recusal” and “disqualification,” for purposes of this essay we use them interchangeably.

12. Ruth Bader Ginsburg, *An Open Discussion with Justice Ruth Bader Ginsburg*, 36 Conn. L. Rev. 1033, 1038 (2004).

13. *Id.* at 1039.

enjoy the unreviewable power to determine individually whether and when to disqualify themselves from cases in which their impartiality could reasonably be questioned. Historically this appears to have produced a highly idiosyncratic application of the [disqualification] standard.<sup>14</sup>

By way of example, she points to Justice Marshall's decision to recuse himself from cases in which the NAACP (or NAACP Legal Defense Fund) appeared as counsel,<sup>15</sup> and compares it to then-Associate Justice Rehnquist's refusal to disqualify himself in *Laird v. Tatum*.<sup>16</sup>

That room for choice exists over the decision to recuse provides the makings of a political science problem,<sup>17</sup> and we

14. Sherrilyn A. Ifill, *Do Appearances Matter?: Judicial Impartiality and the Supreme Court in Bush v. Gore*, 61 Md. L. Rev. 606, 620 (2002); see also *Jewell Ridge Coal Corp. v. Local No. 6167*, 325 U.S. 161, 897 (1945) (Jackson & Frankfurter, JJ., concurring) ("The Court itself has never undertaken by rule of Court or decision to formulate any uniform practice on [disqualification]. Because of this lack of authoritative standards it appears always to have been considered the responsibility of each Justice to determine for himself the propriety of withdrawing in any particular circumstances. Practice of the Justices over the years has not been uniform."); Frank, *supra* n. 11, at 606 (noting that there are "enormous difference[s] of opinion in the Supreme Court on the subject of disqualification").

15. Thurgood Marshall served as counsel to the NAACP and, later, to the LDF.

16. 408 U.S. 1 (1972). *Laird* presented a challenge to the Army's domestic intelligence program. In their motion requesting Justice Rehnquist to disqualify himself in the case, respondents alleged that Rehnquist's

impartiality is clearly questionable because of his appearance [when he served as Assistant Attorney General] as an expert witness for the Justice Department in Senate hearings inquiring into the subject matter of the case, because of his intimate knowledge of the evidence underlying the respondents' allegations, and because of his public statements about the lack of merit in respondents' claims.

*Laird v. Tatum*, 409 U.S. 824, 825 (1972). Then-Associate Justice Rehnquist denied that motion. *Id.* at 839. More recently controversy has arisen over Justice Ginsburg's decision to participate in cases brought by certain women's rights groups. See e.g. 150 Cong. Rec. H2383 (daily ed. Apr. 27, 2004) (statement of Rep. Pitts).

17. In some areas it appears that justices do not enjoy discretion; for example, "it's money that matters." Jeff Bleich & Kelly Klaus, *Deciding Whether to Decide*, 48 Fed. Law. 45, 45 (Feb. 2001). Or as John P. Frank once put it, "In short, Supreme Court Justices disqualify when they have a dollar interest." John P. Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 L. & Contemp. Probs. 43, 50 (1970). See also Ginsburg, *supra* n. 12, at 1039 (noting that a justice's ownership of a single share of stock in a corporation appearing before the Court is sufficient to require his or her recusal). But even that apparent constraint may be subject to interpretation. See Bleich & Klaus, *supra* this note, at 46 (recognizing that even the "hard and fast" money rule, however, is not inviolable); see also Leslie W. Abramson, *The Judge's Relative Is Affiliated with Counsel of Record: The Ethical Dilemma*, 32 Hofstra L. Rev. 1181, 1194-96 (2004) (referring to the 1993 commentary associated with the *Statement of Recusal Policy, Supreme Court of the United*

can think of many possible solutions. It may be, for example, that a justice is less willing to recuse herself in cases she thinks will produce an equally divided Court—a possibility to which Justice Ginsburg alludes above. So too, it could be that certain kinds of justices, perhaps those who are pivotal in a particular area of the law or who have been on the Court for some period of time, may also be less inclined to remove themselves from particular cases.

Other explanations are readily apparent, and later we discuss several. But the larger point is that a dearth of possibilities hardly exists. Where there is a void—and what we think explains the lack of research on recusal—is in the data to assess those explanations, and the near insurmountable obstacles in collecting such data. Fundamentally, the problem boils down to this: While we can observe when justices recuse themselves, we cannot observe when they considered recusing themselves but did not.<sup>18</sup> We thus lack a “denominator” for testing hypotheses about the decision to recuse; only by assuming that a justice could choose against participating in each and every case could we develop one.<sup>19</sup> But that assumption is insufficiently realistic to put to use in serious research.

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*States*, that describes the circumstances under which seven Justices (all but Justices Blackmun and Souter) indicate that they would or would not recuse themselves if a relative is a lawyer in a firm appearing before the Court); Ifill, *supra* n. 14, at 624-26 (same); Richard K. Neumann, Jr., *Conflicts of Interest in Bush v. Gore: Did Some Justices Vote Illegally?* 16 *Geo. J. Leg. Ethics* 375, 425-26 (2003) (same).

18. Or, as the Chief Justice put it in a letter to Senator Patrick Leahy, “While a member of the Court will often consult with colleagues as to whether to recuse in a case, there is no formal procedure for Court review of the decision of a Justice in an individual case. This is because it has long been settled that each Justice must decide such a question for himself.” Ltr. from Rehnquist, C.J., U.S. S. Ct., to U.S. Sen. Patrick Leahy (Jan. 26, 2004), reprinted in *Irrecusable and Unconfirmable*, 7 *Green Bag* 2d 277, 280 (2004). And Justices may consult with outside experts as well. See Tony Mauro, *Breyer Consulted Ethics Expert over Sentencing Case Recusal*, *Leg. Times* 10 (Jan. 17, 2005) (indicating that Justice Breyer consulted a law professor with expertise in legal ethics when deciding whether he should participate in the federal-sentencing-guideline cases).

19. We suppose we could examine motions filed by counsel asking justices to disqualify themselves. But, as Ifill, *supra* n. 14, at 622, notes, “Although recusal motions are filed against Justices on the Court, most litigants do not seek disqualification . . . because to do so suggests a lack of confidence in a Justice’s ability to evaluate the issues objectively.” *Bush v. Gore*, 531 U.S. 98 (2000), may provide an example. While several scholars have raised questions over whether one or more justices should have recused themselves from the case, no party sought the disqualification of any Court member. Representative of the articles raising the recusal question are Bleich & Klaus, *supra* n. 17, at 45 (“[N]one of the justices recused themselves from [*Bush v. Gore*] (although many

And we do not. What we do instead is take a more manageable cut at the problem of recusal and study whether it is in fact a problem. We raise this question in light of the abundance of commentary echoing Justice Ginsburg's concern: that Supreme Court justices ought not take recusal "lightly" because of the possibility of a four-to-four split. As Bleich and Klaus note,

[I]n a case where one justice is recused, an even number remains, which creates a risk of deadlock by an equally divided Court. Just last term, for example, Justice O'Connor was recused in a case concerning the scope of federal removal jurisdiction, because she owned stock in one of the parties. The court wound up deadlocking, 4-4, and as a result an important issue of federal procedural law was not decided and remains the subject of a split between the federal circuits today.<sup>20</sup>

Justice Scalia apparently concurs with this general sentiment. In a controversial memorandum explaining his decision to participate in *Cheney v. United States District Court*,<sup>21</sup> he wrote:

Let me respond, at the outset, to Sierra Club's suggestion that I should "resolve any doubts in favor of recusal." That might be sound advice if I were sitting on a Court of Appeals. . . . On the Supreme Court, however, the consequence is different: The Court proceeds with eight Justices, raising the possibility that, by reason of a tie vote, it will find itself unable to resolve the significant legal issue presented by the case. . . . A rule that required members of this court to remove themselves from cases in which

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issues of partisanship were raised by the press.)), Ifill, *supra* n. 14, and Neumann, *supra* n. 17.

20. Jeff Bleich & Kelly Klaus, *Deciding Whether to Decide: Should There Be Standards for Recusal?* 61 Or. St. B. Bull. 9, 18 (Nov. 2000). See also Frank, *supra* n. 11, at 608 ("[I]f a justice sits who should not, great interests may be jeopardized; but if a justice disqualifies who should not, vital questions may be needlessly left without authoritative decision."); William L. Reynolds & Gordon G. Young, *Equal Divisions in the Supreme Court: History, Problems, and Proposals*, 62 N.C. L. Rev. 29, 31 (1983) ("problems created by an equal division can be serious"); Bloom, *supra* n. 11, at 664-65 (arguing that "if an overly strict disqualification standard were applied at the Supreme Court level, it could result in vitally important legal issues not being decided. . . . In most circumstances where a quorum does not exist, the Court must affirm the judgment. . . [and] the affirmance has no precedential value").

21. 541 U.S. 913 (2004).

official actions of friends were at issue would be utterly disabling.<sup>22</sup>

And, now, Chief Justice Rehnquist has taken this idea to new heights. Owing to his bout with thyroid cancer, he has said he will only participate in cases “when necessary to prevent a tie vote.”<sup>23</sup> That Rehnquist would take this step is not altogether surprising. Any number of times in the past he has expressed concerns about the consequences of affirming judgments by an equally divided Court.<sup>24</sup>

What we examine is whether this is a legitimate concern on the part of the legal commentators and justices who have expressed it. Specifically, we explore the extent to which discretionary recusals produce an equally divided Court. As it turns out (and contrary to some commentary), in only a small fraction of cases in which one justice recuses him- or herself (forty-nine out of 599) does a tie result.<sup>25</sup>

We develop this finding in three steps. First, we provide a brief look at the “problem” of an equally divided Court; next we present our analysis of the results of discretionary recusals. Along these lines, we provide some descriptive data on recusals

22. *Id.* at 915-16 (memo. of Scalia, J.).

23. Charles Lane, *Rehnquist Won't Vote in Every Case Heard This Term*, Wash. Post A08 (Dec. 14, 2004).

24. Consider, for example, his denial of the motion to recuse himself in *Laird v. Tatum*, 409 U.S. 824, 837-38 (1972):

While it can seldom be predicted with confidence at the time that a Justice addresses himself to the issue of disqualification whether or not the Court in a particular case will be closely divided, the disqualification of one Justice of this Court raises the possibility of an affirmance of the judgment below by an equally divided Court. The consequence attending such a result is, of course, that the principle of law presented by the case is left unsettled. The undesirability of such a disposition is obviously not a reason for refusing to disqualify oneself where in fact one deems himself disqualified, but I believe it is a reason for not “bending over backwards” in order to deem oneself disqualified[.]

and his statement in *Microsoft Corp. v. U.S.*, 530 U.S. 1301, 1303 (2000):

[I]t is important to note the negative impact that the unnecessary disqualification of even one Justice may have upon our Court. Here—unlike the situation in a District Court or a Court of Appeals—there is no way to replace a recused Justice. Not only is the Court deprived of the participation of one of its nine members, but the even number of those remaining creates a risk of affirmance of a lower court decision by an equally divided Court.

25. We deal here only with the Supreme Court. For appellate court practices, see Daniel Egger, Student Author, *Court of Appeals Review of Agency Action: The Problem of En Banc Ties*, 100 Yale L.J. 471 (1990); for an interesting comparative analysis, see J.T. Irvine, *The Case of the Evenly Divided Court*, 64 Sask. L. Rev. 219 (2001) (comparing the handling of evenly divided cases in Canada, the United States, and England).

since the 1946 term, as well as demonstrate that recusals generally do not produce equally divided Courts. We end with a discussion on possible explanations for our results and with suggestions for future research on recusals.

### I. “AFFIRMED BY AN EQUALLY DIVIDED COURT”

While several contemporary justices have written about the “problem” of an equally divided Court, it is hardly a novel issue. Indeed, as far back as 1792, the Court divided three-to-three on a motion filed by the Attorney General—with the result being a denial of the motion.<sup>26</sup> Three decades later when the justices split in *The Antelope*,<sup>27</sup> the Court once again affirmed on the question that divided them “without much discussion.”<sup>28</sup> Only in the following term, in *Etting v. Bank of the United States*, did Chief Justice Marshall explain that “the principles of law which have been argued cannot be settled; but the judgment is affirmed, the court being divided in opinion upon it.”<sup>29</sup>

Subsequent cases have fleshed out Chief Justice Marshall’s words such that now, when the justices evenly divide, the resulting decision (“affirmed by an equally divided Court”):<sup>30</sup>

- affirms the decision of the court below;<sup>31</sup>
- binds the parties under the principle of res judicata;<sup>32</sup> and
- carries no precedential weight.<sup>33</sup>

26. *Hayburn’s Case*, 2 U.S. 408, 409 (1792) (“But the Court being divided in opinion on that question, the motion, made ex officio, was not allowed.”). See Edward A. Hartnett, *Ties in the Supreme Court of the United States*, 44 Wm. & Mary L. Rev. 643, 653 (2002).

27. 23 U.S. 66 (1825).

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

29. 24 U.S. 59, 78 (1826).

30. The canonical cases here are *Neil v. Biggers*, 409 U.S. 188, *Ohio ex rel. Eaton v. Price*, 364 U.S. 263 (1960); *Hertz v. Woodman*, 218 U.S. 205 (1910); and *Neil v. Essex Co.*, 74 U.S. 107 (1868).

31. See e.g. *Durant*, 74 U.S. 107; *Etting*, 24 U.S. at 78.

32. *Durant*, 74 U.S. at 109; Egger, *supra* n. 25, at 473; Reynolds & Young, *supra* n. 20, at 35. Worth noting, though, is that “the appointment of a new justice . . . may be a ground for petitioning for a rehearing.” 5 Am. Jur. 2d *Appellate Review* § 832 (2004).

33. *Eaton*, 364 U.S. at 264 (“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.”). For commentary on these principles, see generally Egger, *supra* n. 25, at 473-75; Hartnett, *supra* n. 26; and Reynolds & Young, *supra* n. 20, at 33-35.



Over the Court's use of these rules, little disagreement exists,<sup>34</sup> in fact, as Hartnett explains, the justices have been unwavering in their attachment to them.<sup>35</sup>

Nor does much disagreement exist over the problems associated with equally divided Courts.<sup>36</sup> Aside from the sheer

34. In fact, there is so little disagreement that even the ever source-driven student-edited law reviews do not seem to require the usual supporting citation when writers state that affirmances by equally divided Courts lack precedential value. This is not to say, however, that scholars have failed to debate the wisdom of these rules. *See e.g.* Thomas E. Baker, *Why We Call the Supreme Court "Supreme": A Case Study on the Importance of Settling National Law*, 4 Green Bag 2d 129 (2001) (criticizing the practice of affirming by an equally divided Court); Hartnett, *supra* n. 26, at 678 (defending it); Reynolds & Young, *supra* n. 20, at 41-55 (proposing alternatives to the rule).

Questions too arise over the appropriate course of action when the justices evenly divide over a case coming to them on original jurisdiction—in part because they have been somewhat inconsistent in their practices, sometimes staying the proceedings (*e.g. Va. v. W. Va.*, 78 U.S. 39 (1870)), sometimes not (*e.g. In re Isserman*, 345 U.S. 286 ((1953))). *See* Egger, *supra* n. 25, at 475; *see also* Hartnett, *supra* n. 26, at 657; John V. Orth, *How Many Judges Does It Take to Make a Supreme Court?* 19 Const. Commentary 681, 686 n. 27 (2002). And there also is commentary (and the occasional controversy) over separate opinions written in evenly divided cases. While

the usual practice is not to express any opinion, for such an expression is unnecessary where nothing is settled, expressions . . . have been made . . . where there was a question whether one fact situation was to be distinguished from a related one on which a majority of the Court had rendered an opinion.

*Eaton*, 364 U.S. at 264, 264 n. 1. For commentary on such "expressions," *see*, for example, *U.S. v. Barber*, 119 F.3d 276, 286 (4th Cir. 1997) (Murnaghan, J.) (claiming that "Judge Wilkins' opinion explaining the rationale of the seven votes of one side of the equally divided court is inappropriate"). *See also e.g.* S.J. Meltzer, Student Author, United States v. Greer: *Is a Racial Inquiry Necessary for an Adequate Voir Dire?* 67 Tul. L. Rev. 1700, 1709 n. 66 (1993) (explaining that although "an affirmance by an evenly divided court. . . has no precedential value," opinions issued in *U.S. v. Greer*, 968 F.2d. 433 (5th Cir. 1992), "will affect cases that come before the court in the future"); Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 Ohio St. L.J. 649, 687 n. 140 (2002) (noting that while *Holmes v. Jennison*, 39 U.S. 540 (1840), "involved an evenly divided Court," the position taken by Chief Justice Taney was later approved in dicta and in a leading nineteenth-century treatise on the subject).

35. Hartnett, *supra* n. 26, at 653 ("The Supreme Court applied this broader principle from the very beginning.").

36. On the other hand, many commentators point out the problems associated with the failure to recuse. *See e.g.* Ifill, *supra* n. 14, at 619-20 ("Given the . . . important interest in maintaining the integrity and legitimacy of the Court, affirmances caused by split decisions from an evenly divided Court and a greater burden on parties seeking cert may simply be the unavoidable and necessary cost of strict compliance with 455(a)."); Stempel, *supra* n. 11, at 625 ("Although it would be preferable if the Court . . . never made split affirmances of inconsistent cases, it does not follow from this observation that any such inconsistency justifies a relaxed view of judicial ethics and the recusal statute."). We return to this commentary in Part III.

“embarrassment” of issuing such decisions,<sup>37</sup> they are inefficient: They take up precious space on the Court’s plenary docket, waste the time and energy of the justices and their clerks, as well as tap the time, energy, and resources of lawyers, litigants, and any amici curiae.<sup>38</sup> Then there is the matter of the decision (or, rather, non-decision) itself. By “failing to provide definitive statements of the law,”<sup>39</sup> thereby enabling lower courts at least occasionally to continue on a collision course, affirmances by an equally divided Court can leave a legal area murkier than before the justices entered it.<sup>40</sup>

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37. See e.g. Christopher P. Banks, *The Politics of En Banc Review in the “Mini-Supreme Court,”* 13 J. L. & Pol. 377, 381 n. 34 (1997) (citing *Lang’s Est. v. Commr.*, 97 F.2d 867 (9th Cir. 1938), for the principle that enlarging the court could “lead to the embarrassment of an evenly divided court”); Kenneth M. Fall, *Liljeberg v. Health Services Acquisition Corp.: The Supreme Court Encourages Disqualification of Federal Judges under Section 455(A)*, 1989 Wis. L. Rev. 1033, 1060 (1989) (“[A]fter finally granting certiorari on a section 455 case, the Court may have found itself in the embarrassing position of a four-to-four split, which would create no precedent.”).

38. E.g. Bloom, *supra* n. 11, at 664 (noting that “the costs of delay and waste of judicial resources may be very high”); Charles S. Collier, *The Supreme Court and the Principle of Rotation in Office*, 6 Geo. Wash. L. Rev. 401, 429-30 (1938) (indicating that affirmances by an equally divided Court are a waste of “expense, effort, and argumentation”); Robert Laurence, *A Very Short Article on the Precedential Value of the Opinions from an Equally Divided Court*, 37 Ark. L. Rev. 418, 429 (1983) (pointing out that “[t]he case has been briefed and argued” and that “[a]ll this, the argument goes, will be wasted if the equal division creates no precedential value”).

39. Student Author, *Plurality Decisions and Judicial Decisionmaking*, 94 Harv. L. Rev. 1127, 1128 (1981) (“The Supreme Court has a role beyond that of resolving individual disputes; it serves as a guide for private parties, legislatures, lower courts, and its own future decisions. In order to perform this function adequately the Court must provide definitive statements of the law.”).

40. E.g. *Laird*, 409 U.S. at 837-38 (“[T]he disqualification of one Justice of this Court raises the possibility of an affirmance of a judgment below by an equally divided court. The consequence attending such a result is of course, that the principle of law presented by the case is left unsettled.”); see also Baker, *supra* n. 34, at 136 (noting that, because of the Court’s split in *Free v. Abbott Laboratories*, conflict in the circuits over the Supplemental Jurisdiction statute “can only get worse”); Eric J. Gertler, Student Author, *Michigan Citizens for an Independent Press v. Attorney General: Subscribing to Newspaper Joint Operating Agreements or the Decline of Newspapers?* 39 Am. U. L. Rev. 123, 170 (1989) (“[T]he Supreme Court, equally divided, issued a per curiam opinion in *Michigan Citizens for an Independent Press v. Attorney General*. . . . By upholding the court of appeals’ decision without any reasoning, the Court failed to clarify the existing confusion in the law and provided no guidance for future JOA applicants.”); Kenneth J. Munson, Student Author, *Standing to Appeal: Should Objecting Shareholders Be Allowed to Appeal Acceptance of a Settlement?* 34 Ind. L. Rev. 455, 461 (2001) (“The Supreme Court granted certiorari and affirmed the Seventh Circuit’s decision in a four-four decision without comment. Thus, the Supreme Court did nothing to clarify the confusion in the lower courts.”); Reynolds & Young, *supra* n. 20, at 32 (“[E]qual divisions can prolong a

It is no wonder thus that when Justice Scalia recused himself from *Elk Grove Unified School District v. Newdow*,<sup>41</sup> commentators expressed concern over the possibility of an equally divided Court.<sup>42</sup> It also is no wonder that generations of justices have worked to minimize the possibility. We already have mentioned Chief Justice Rehnquist's decision to participate *only* in evenly divided disputes. This may be extreme, but it is far from the only example of the Court or one of its members taking steps to avoid the dreaded "affirmed by an equally divided" disposition. When Justice Stone became ill, his colleagues held over *West Coast Hotel Co. v. Parrish*<sup>43</sup> because "a decision by an evenly divided Court was thought an 'unfortunate outcome.'"<sup>44</sup> Likewise, after the Court heard arguments in *NAACP v. Button*,<sup>45</sup> and after Justice Frankfurter wrote a draft majority opinion (upholding the constitutionality of the Virginia law), Justice Whittaker resigned, leaving the Court (apparently) divided four to four. Rather than hand down an evenly divided judgment, rearguments were ordered—with the end result being a six-to-three decision rendering the law unconstitutional.<sup>46</sup>

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geographical inconsistency that may cause major problems in the administration of a federal program.”).

41. 542 U.S. 1 (2004).

42. See e.g. Vikram David Amar, *Why Did Justice Scalia Decline to Participate in the "One Nation under God" Case?* FindLaw Legal Commentary (Oct. 31, 2003), <http://writ.news.findlaw.com/amar/20031031.html> (accessed Mar. 30, 2005; copy on file with Journal of Appellate Practice and Process); Charles J. Russo, *The Supreme Court and Pledge of Allegiance: Does God Still Have a Place in American Schools?* 2004 BYU Educ. & L.J. 301, 325-26. As it turns out, the Court did not resolve the case on its merits, but rather held that *Newdow* lacked standing to bring the suit.

43. 300 U.S. 379 (1937).

44. Quoted in Michael Ariens, *A Thrice-Told Tale, or Felix the Cat*, 107 Harv. L. Rev. 620, 637 (1994); The same story appears in Barry Cushman, *Rethinking the New Deal Court*, 80 Va. L. Rev. 201, 227 (1994). See generally Charles Evans Hughes, *The Supreme Court of the United States* 70-71 (Columbia U. Press 1928); Rosemary Krimbel, Student Author, *Rehearing Sua Sponte in the U.S. Supreme Court: A Procedure for Judicial Policymaking*, 65 Chi.-Kent L. Rev. 919, 944 (1989) (“Occasionally, the Court has requested reargument before it has reached a decision because of an equally divided Court.”).

45. 371 U.S. 415 (1963).

46. Before rearguments, Justice Frankfurter retired from the Court. He was replaced by Arthur Goldberg, and Justice Whittaker was replaced by Byron White. Both voted to strike down the law. Justice Frankfurter was critical of the ultimate decision, claiming that it was the product of the appointment of “such wholly inexperienced men as Goldberg and White, without familiarity with . . . the jurisprudence of the Court either as practitioners or

Are these near-heroic steps necessary? To what extent are equally divided cases actually a problem for the Court? The extant literature suggests that they are,<sup>47</sup> but as a general matter, equally divided cases are relatively rare occurrences.

To see this, consider that between the 1946 and 2003 terms, twenty possible vote combinations (e.g., ranging from three-to-three to nine-to-zero) occurred across the 6815 cases the Court decided after hearing oral arguments.<sup>48</sup> The possibility of a “deadlocked” Court existed for nine of those combinations (i.e.,

scholars or judges.” David M. Levitan, *The Effect of the Appointment of a Supreme Court Justice*, 28 U. Tol. L. Rev. 37, 60-61 (1996) (quoting Mark V. Tushnet, *Making Civil Rights Law*, 277 (Oxford U. Press 1994)).

47. See generally e.g. Bleich & Klaus, *supra* n. 20.

48. The table below shows the combinations.

Vote	N	Percent
3-3	2	0.03
4-1	2	0.03
4-2	10	0.15
4-3	51	0.75
4-4	72	1.06
5-0	4	0.06
5-1	7	0.10
5-2	78	1.14
5-3	250	3.67
5-4	1069	15.69
6-0	16	0.23
6-1	57	0.84
6-2	275	4.04
6-3	999	14.66
7-0	124	1.82
7-1	179	2.63
7-2	698	10.24
8-0	5080	7.45
8-1	546	8.01
9-0	1868	27.41
<b>Total</b>	<b>6815</b>	<b>100.00</b>

We derived these figures and all others reported in this article (unless otherwise indicated) from Harold J. Spaeth’s *Original U.S. Supreme Court Judicial Database* (12/9/04 release) and *The Vinson-Warren Court Database* (9/25/02 release), both available at <http://www.as.uky.edu/polisci/ulmerproject/sctdata.htm> (accessed July 1, 2005; copy of home page on file with *Journal of Appellate Practice and Process*). The vote data shown above are Spaeth’s vote variable, with *analu*=0 and *dec\_type*=1, 5, 6, or 7.

for Courts with an even number of justices: three-to-three, four-to-two, four-to-four, five-to-one, five-to-three, six-to-zero, six-to-two, seven-to-one, eight-to-zero)—or in 1319 (19.35 percent) of the 6815 cases. But in only seventy-four total cases (i.e., in fewer than six percent of the 1319 cases in which a tie was even possible) did an actual tie result.

On the other hand, some variation over time appears to exist. As we can observe in Figure 1, which shows the proportion of cases in which a tie was possible and the proportion in which a tie actually occurred,<sup>49</sup> the latter has increased monotonically across the four “chief justice” eras included in our database. During the Vinson Court, zero percent of the 165 cases decided by an even number of justices resulted in a split Court; by the Rehnquist Court terms, that percentage was 8.11 (fifteen of the 185 cases). Nonetheless, even 8.11 percent is smaller than we might expect. On a six-person Court, four vote combinations are possible (six-to-zero, five-to-one, four-to-two, three-to-three) and when there are eight justices, five combinations are possible (eight-to-zero, seven-to-one, six-to-two, five-to-three, four-to-four). If the probability of any particular vote division was equal, then we would expect ties in 2/9, or 22.22 percent, of all cases. But that was not the case—even during the Rehnquist Court years.

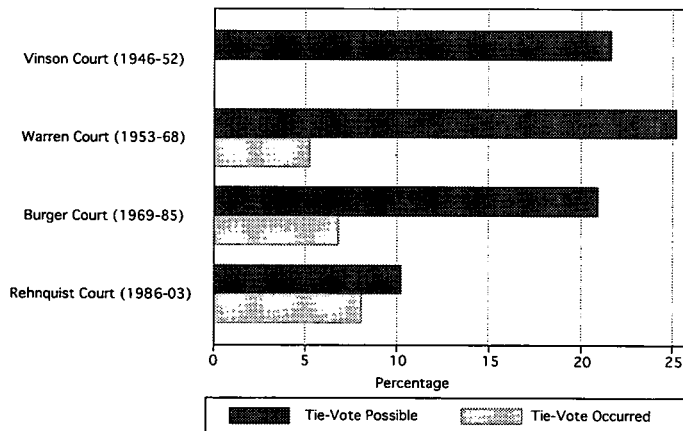


Figure 1—The percent of all cases (N=6815) in which a tied vote was possible (due to an even number of justices) and the percent of actual tied-vote decisions as a percentage of the cases in which a tie vote was possible (N=1319), 1946-2003 terms.

49. We use Chief Justice eras, rather than terms, to secure a sufficient number of cases on which to base the proportions.

## II. AN ANALYSIS OF RECUSAL AND EQUALLY DIVIDED DECISIONS

Figure 1 is suggestive: It seems to indicate that evenly divided decisions rarely result from an even-person Court. But, of course, at least some fraction of the split cases were the result of a short-staffed Court (due to a vacancy) or judicial illness—and not from a more “discretionary” recusal. Do the data return the same results if we remove these sorts of cases from the analysis?

To answer this question, we closely examined all cases in which the official Reports listed one or more justices as not participating. For those instances, we eliminated<sup>50</sup> two types of recusals: illness<sup>51</sup> and appointment effects.<sup>52</sup> Because it is impossible to know the specific rationale for each instance of recusal, it is possible that our data include some recusals that are less discretionary than others. Take, for example, when a justice owns stock in a company before the Court. Tradition and federal law<sup>53</sup> compel the justice to recuse herself, so the recusal is, for all practical purposes, outside of the justice’s discretion. (For our analysis of the current justices, only Justice O’Connor is likely to confront this situation in any more than a handful of disputes.)<sup>54</sup>

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50. Of course our procedures might have yielded imprecise results but our options are limited since the justices are not required to explain their recusal decisions—and typically do not. In fact, the justices seem more likely to publicly explain the choice to remain on a case.

51. For illness we examined the number of consecutive cases in which a justice did not participate. If there were four or more recusals over the course of two consecutive days of oral arguments, we recoded these recusals (and any additional consecutive recusals) as illness based. Ultimately 342 recusals (or 20.74 percent) were recoded as related to illness. The mean for each justice was 10.65 recoded recusals but the median was zero, thus indicating data skewed to the left. Indeed Justice Douglas (seventy-three recoded recusals) and Justice Frankfurter (fifty-six recoded recusals) were the two largest outliers.

52. Another common feature of the data was recusal in cases for which oral arguments occurred before a justice was appointed to the Court. A total of 360 recusals (or 21.83 percent) were recoded for appointment effects. The mean per justice was 11.25, but once again the data were skewed to the left. Justice Stevens (sixty-three recoded recusals) and Justice Kennedy (fifty-four recoded recusals) were the major outliers.

53. 28 U.S.C. § 455 (available at <http://uscode.house.gov>).

54. Since joining the Court in 1981, Justice O’Connor has recused herself in forty-one cases. In seven of those cases (or 17.07 percent), tie votes resulted. Justices Stevens and Kennedy are the only two other justices currently sitting whose recusal “caused” an equally divided Court (two of thirty-three and one of eight, respectively). Consider for example, *Morgan Stanley & Co. v. Pacific Mut. Life Ins. Co.*, 511 U.S. 658 (1994), in which the Court was equally divided. An examination of Justice O’Connor’s financial

This potential problem aside, our procedures yield several interesting results. For one thing, quite a bit of variation in recusal practices exists across the justices in our data base—and persists today. Figure 2, which plots “discretionary” recusal rates of the current justices, underscores this last point. The career rate of recusal ranged from the near trivial .001 for Justices Ginsburg and Souter (meaning that in only .1 percent of all cases did they disqualify themselves for reasons other than health or appointment) to the far higher .016 for Justice O’Connor. That O’Connor recused herself in a greater fraction of cases than her colleagues would, as we imply above, hardly surprise commentators. As Bleich and Klaus note,

Each year the greatest number of recusals are logged by Justice O’Connor, who it appears has investments in several U.S. corporations that sometimes seek court review. The frequency with which she has recused herself in cases involving these parties has caused court-watchers to give such cases the acronym ‘OOPS’(O’Connor Owns Party Stock).<sup>55</sup>

What is somewhat more surprising is the relative dearth of recusals in recent years by almost all the justices (O’Connor and, to a lesser extent, Stevens are exceptions).<sup>56</sup>

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disclosure forms reveals that she held stock in Morgan Stanley Dean Witter. Kent Cooper & Tony Rammond, *Money in Politics Databases, Political Money Line*, available at [http://www.politicalmoneyline.com/docs/OConnor\\_pfd\\_2002.pdf](http://www.politicalmoneyline.com/docs/OConnor_pfd_2002.pdf) (accessed on Feb. 17, 2004; copy on file with Journal of Appellate Practice and Process). Thus it is reasonable to presume that her recusal in this case, and the tie itself, should not be regarded as discretionary. This finding actually helps support our conclusion that discretionary recusals do not lead to equally divided Courts. If we recoded any fraction of those seven ties from our results and the corresponding recusals (plus the other recusals not resulting in a divided court), then the percentage of cases with an even-staffed court that lead to recusal would actually decrease.

55. Bleich & Klaus, *supra* n. 20, at 12.

56. Our analysis does not include October Term 2004, which was still in session as we were writing.

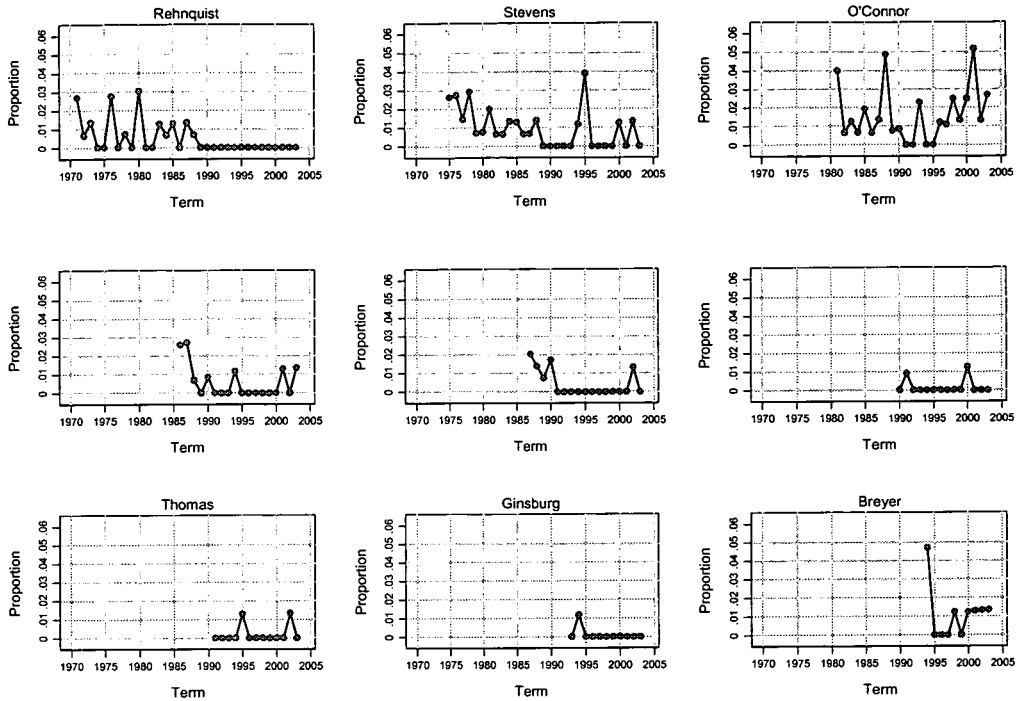


Figure 2—Proportion of cases in which justices of the current Court did not participate for reasons other than health and appointment date.

That justices of the Rehnquist Court have taken fewer discretionary recusals is hardly illusory, as Figure 3 shows. There we depict the proportion of such “disqualifications” during the three previous eras.<sup>57</sup> Notice the monotonic decline, such that during the Vinson Court era, in 17.87 percent of the cases at least one justice recused himself; by the Rehnquist Court, that figure fell to under five percent (4.89).<sup>58</sup>

57. The mean across the 6815 cases is .120, with a standard deviation of .325.

58. From 1946 through 1988 the percentage of cases with at least one recusal varies from as low as five percent in 1982 to as high as thirty-three percent in 1968. From 1989 through 2003, the variance is much lower. The percent declines to zero in 1992, but never exceeds eight percent.



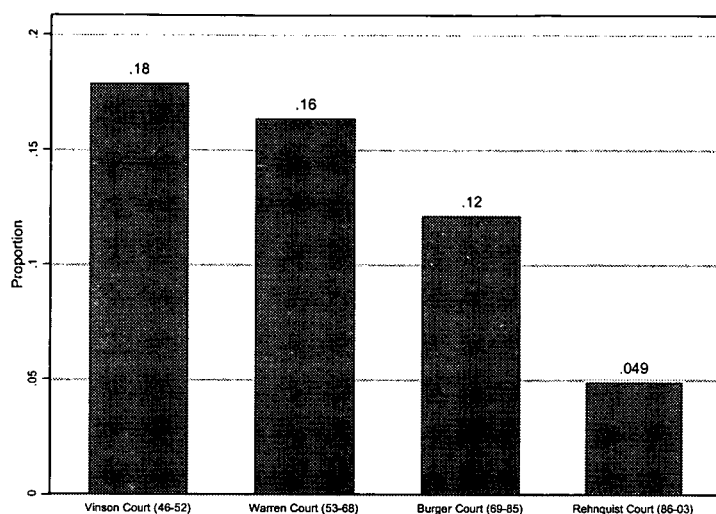


Figure 3—Proportion of cases in which justices of four Court eras did not participate for reasons other than health and appointment date. N=761 for the Vinson Court; N=1816 for the Warren Court; N=2439 for the Burger Court; and N=1799 for the Rehnquist Court.

We have a bit more to say about these interesting patterns in Part III. For now, though, let us return to our primary concern—the extent to which “discretionary” recusals (again, those related neither to health nor appointments) lead to judgments affirming “by an equally divided Court.” Overall, across the 6815 cases, “discretionary” recusals that could have produced evenly split decisions occur in 599 cases (or 8.79 percent).<sup>59</sup> But of those 599 cases, as Figure 4 shows, only forty-nine (or 8.18 percent) resulted in ties. (By contrast, 236 (or 39.40 percent) produced eight-to-zero decisions.)

59. Discretionary recusal, viewed as a dichotomous event (that is, either yes or no), occurs in 817 of our 6815 cases (or 11.99 percent). This figure does not distinguish among the number of recusals present in each case, however. For the cases we examined, there were 120 cases with two recusals and nine cases with three recusals. Additionally, there were ninety-eight cases with one recusal and a second vacancy on the Court, thereby producing an odd number of justices. We arrive at the 599 figure by subtracting from 817 the 120 cases with two recusals and the ninety-eight cases with one recusal and another vacancy.

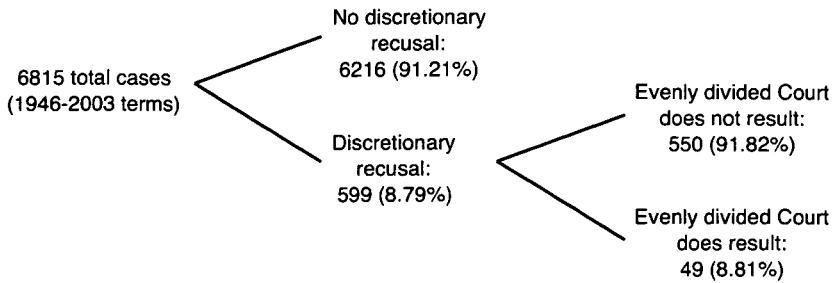


Figure 4—Cases leading to an “affirmed by an equally divided Court.”

Again, this figure of 8.18 is smaller than we would anticipate,<sup>60</sup> though era-by-era variation is evident as Figure 5 indicates.<sup>61</sup> Note that in none of the Vinson Court cases (1946-1952 terms) with a discretionary recusal did an evenly divided Court result; that figure rose during the Warren and Burger Courts but hit new heights in the Rehnquist Court era, at 14.66 percent (11 of the 75 cases).<sup>62</sup>

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60. One easily accessible calculation considers the overall frequency of minimum winning coalitions as a surrogate for contentious decisions. Indeed, if a case did result in an equally divided Court, it is likely that given a full Court, the actual decision would be a minimum winning coalition. From the *Supreme Court Database*, see n. 48, *supra*, we found that minimum winning coalitions are present in 18.92 percent of all cases. From the above calculations, we know that even-membered courts occur 8.79 percent of the time. Multiplying these two independent events together, we arrive at 1.6 percent. This represents a rough estimate of the percentage of cases that should both have been decided by a minimum winning coalition and have possessed an even number of justices. Over the population of the database, there are 6815 cases, so we should expect nearly 114 cases [ $.016 \times 6815$ ] that are equally divided. In fact, we observe just forty-nine, which is only 42.98 percent of our expected number of equally divided cases.

61. Again we group the data by Chief Justice to ensure a sufficient number of cases on to which to base the proportion. Other possibilities, such as term or natural court, do not yield ten or more cases in each grouping.

62. This statistic might be slightly misleading, however. While the percentage of cases in which an equally divided Court resulted from a discretionary recusal is high during the Rehnquist years, the raw numbers are quite low. In only seventy-five cases was a tie possible during the Rehnquist Court. By contrast, there were 218 possible ties during the Warren Court and 225 during the Burger Court. The term with the greatest number of ties is 1970, when there were five (out of a possible twenty-one). Several other years—1957, 1967, 1980, and 1988—had three ties per term.

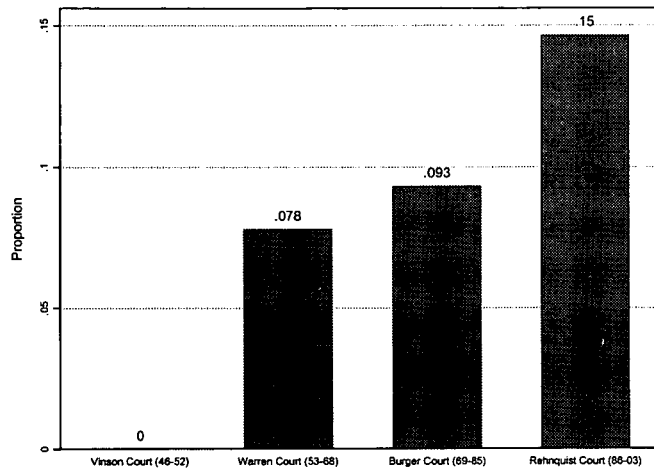


Figure 5—Proportion of cases in which a discretionary recusal led to an “affirmed by an equally divided Court.”

On the other hand, over the period from 1986-2003, the number of evenly divided cases occurring from a recusal is fewer than one per term: It was only .647 (eleven ties owing to discretionary recusals over the seventeen-term period)—a smaller proportion than that produced during either the Warren (1.133 per year) or Burger (1.312) Courts. Moreover, by most any indication none of those eleven cases seemed especially salient.<sup>63</sup> This is not to say that the Court has never divided over

63. Assessing case “salience” is no easy matter, especially for those cases lacking a majority or even plurality opinion. One possibility is whether the New York Times covered the litigation prior to the Court’s decision. See Lee Epstein & Jeffrey A. Segal, *Measuring Issue Salience*, 44 Am. J. Pol. Sci. 66 (Jan. 2000). On this measure we would deem “salient” only three of the twelve cases: *Borden Ranch Partn. v. U.S. Army Corps of Engrs.*, 537 U.S. 99 (2002) (prompting an article on oral arguments in the case); *Lotus Dev. Corp. v. Borland Intl., Inc.*, 516 U.S. 233 (1996) (prompting an article when the Court granted certiorari); *Morgan Stanley*, 511 U.S. 658 (same). We also looked at the number of law review articles, notes, and essays mentioning the lower court’s decision in these cases. The minimum was one; the maximum was forty-six, and the mean was 28.58. Whether this is high, low, or somewhere in between is hard to assess because it is difficult to know the standard against which to judge it. On the other hand, in light of the number of law review articles published over the period covered by our cases, it hardly strikes us as excessive. Finally, a piece of anecdotal evidence comes from Baker, who invokes one of the eleven cases, *Free v. Abbott Laboratories, Inc.*, 529 U.S. 333 (2000), to highlight the need for the justices to work to avoid evenly-divided decisions—even though by the author’s own admission “*Free* will not be highlighted in any of the annual most-important-cases-of-the-term articles.” Baker, *supra* n. 34, at 129.

an important dispute,<sup>64</sup> but, rather, to suggest that the data tend to support Ifill's conclusion: "In scores of cases each year, one or more of the Justices recuses him or herself without doing violence to the orderly operation of the Court and its decision-making function."<sup>65</sup>

Perhaps doing far more "violence" are other "inefficient" procedures sometimes invoked by the justices,<sup>66</sup> though none perhaps more so than plurality decisions. "Opinions announcing the judgment of the Court" are, of course, distinct from affirmances by an equally divided Court,<sup>67</sup> but commentary occasionally analogizes them.<sup>68</sup> One might speculate that if a justice recuses herself, then the chances of a plurality decision will increase. The data do not seem to support this conclusion, however. Over the fifty-seven terms analyzed, we observe forty-nine equally divided Courts (resulting from discretionary recusals) but only nineteen judgments that occur when there is a discretionary recusal (or, on average, .860 ties and .333

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64. Numerous scholars point to *Vorchheimer v. Sch. Dist. of Phila.*, 430 U.S. 703 (1977), as an example.

65. Ifill, *supra* n. 14, at 619.

66. In addition to judgments we think here of DIGs (dismissals of certiorari as improvidently granted) and disputes argued but left unresolved owing to matters of justiciability, such as mootness and ripeness.

67. For example, prior to 1977, plurality decisions generally lacked precedential value; only the result was considered "authoritative." In *Marks v. U.S.*, however, the Court set out the "narrowest grounds" rule: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" 430 U.S. 188, 193 (1977) (quoting *Gregg v. Ga.*, 428 U.S. 153, 169 n. 15 (1976)). For more on plurality decisions and, in particular, on their precedential value, see Ken Kimura, Student Author, *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 Cornell L. Rev. 1593 (1992); Linda Novak, Student Author, *The Precedential Value of Supreme Court Plurality Decisions*, 80 Colum. L. Rev. 756 (1980); Mark Alan Thurmon, Student Author, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 Duke L.J. 419 (1992).

68. E.g., Sean Pager, *Is Busing Preferential? An Interpretive Analysis of Proposition 209*, 21 Whittier L. Rev. 3, 46, n. 237 (1999) ("Although Justice Powell wrote for himself [in *Bakke*], his was the deciding vote among an evenly divided Court."); Richard L. Revesz & Pamela S. Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. Pa. L. Rev. 1067, 1098, 1098 n. 130 (1988) ("Consider a federal criminal case in which four Justices join an opinion affirming the judgment of the lower court, four Justices dissent on the merits, and the remaining Justice asserts that the case does not warrant the Court's attention and therefore does not address the merits at all. . . . This situation is akin to one in which a case is 'affirmed by an equally divided Court.'").

judgments per term).<sup>69</sup> Far outnumbering these nineteen judgments are the 195 that occur when no justice (discretionarily) recuses him- or herself. Seen in this way, our data run contrary to common belief; discretionary recusal does not appear to lead to an appreciable increase in either equally divided Courts or plurality opinions.

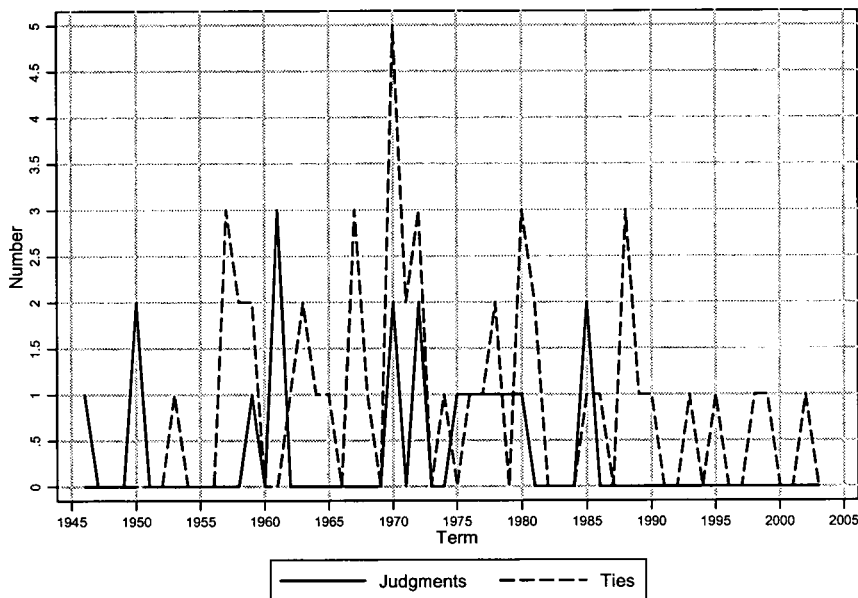


Figure 6—Number of cases resulting in a plurality opinion and an “affirmed by an equally divided Court” (as a result of a discretionary recusal), 1946-2003 Terms.

### III. DISCUSSION

In an article on the Hughes Court, Richard Friedman offered the following thought experiment:

Suppose Justices Van Devanter and Sutherland, instead of retiring in 1937 and 1938, respectively, had remained on the Court until their deaths. Suppose also that Justice

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69. We use the *Supreme Court Databases*, *supra* n. 48, coding to calculate judgments (analu=0; dec\_type=7).

Butler, instead of dying in 1939, lived and served on the Court until March 1941. Would we talk very much about the Constitutional Revolution of 1937? As suggested by this question, the course of decisions over the remaining years of the Hughes Court would have been very different had the liberals not been fortified by new members. In several areas, significant liberal victories would have been defeats.<sup>70</sup>

Friedman went on to suggest that “Numerous conservative lower court decisions on constitutional matters would have been left standing by an equally divided Court,”<sup>71</sup> including *Erie Railroad Co. v. Tompkins*,<sup>72</sup> *Helvering v. Gerhardt*,<sup>73</sup> *Helvering v. Mountain Producers Corp.*,<sup>74</sup> and *Johnson v. Zerbst*.<sup>75</sup>

Such “predictions” are not unusual in the law literature<sup>76</sup> but our analysis may cast some doubt on them—at least as they pertain to “equally divided Court” decisions. In general, that is because tie votes are rare. Even rarer, though, are tie votes that are the result of discretionary recusals. Such ties occurred in only forty-nine cases across the fifty-seven terms in our data base, and occurred in cases of (perhaps) limited salience at that.<sup>77</sup>

Why don’t we observe more opinions affirming the judgment by an equally divided Court? On this question we can only speculate, but several possibilities present themselves. It simply could be that justices are more likely to recuse themselves in cases they think will *not* result in split vote.<sup>78</sup>

70. Richard D. Friedman, *Switching in Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. Pa. L. Rev. 1891, 1978-79 (1994).

71. *Id.* at 1980.

72. 304 U.S. 64 (1938).

73. 304 U.S. 405 (1938).

74. 303 U.S. 387 (1938).

75. 304 U.S. 458 (1938).

76. See e.g. Rodney A. Smolla, *Dun & Bradstreet, Hepps, and Liberty Lobby: A New Analytic Primer on the Future Course of Defamation*, 75 Geo. L.J. 1519, 1566 (1987) (“In three of the most important decisions of the last several years—*Dun & Bradstreet*, *Hepps*, and *Bose v. Consumers Union*—retired Justice Lewis Powell was in the five to four majority. If the issues in those three important cases were to appear before the Court as presently constituted, the votes would apparently be split four to four, with the newest Supreme Court nominee, Anthony Kennedy, holding the balance.”).

77. See *supra* n. 63.

78. It also could be that the Court holds over cases that result in a divided vote. But our data eliminate that possibility by focusing only on cases in which a particular sort of

Hence, the justices themselves generate the data we observe from a self-conscious decision not to abandon likely equally divided cases. But other explanations are equally apparent. For example, some have speculated that “when the issue has been left undecided by an evenly divided court, the temptation to renew the battle in the next case or with the next change in the court is all the greater.”<sup>79</sup> If this is so, we might speculate that a participating justice will cast a “sophisticated” vote (in an apparent four-to-four case) to avoid a future decision that may be even more distant from her policy preferences than the one issued by the five-to-three Court that she has agreed to join.<sup>80</sup> Along similar lines, we think it quite possible that a justice may “change” her vote to avoid an equally divided Court for institutional reasons as well. Such concerns may explain Justice Frankfurter’s decision to join Justice Clark’s opinion for the Court in *Inman v. Baltimore & Ohio Railroad Co.*:<sup>81</sup>

In accordance with the views that I expressed in *Rogers v. Missouri Pacific R. Co.*, . . . and in which I have since persisted, the appropriate disposition would be dismissal of the writ of certiorari as improvidently granted. If these views were enforced under the special circumstances of this case, affirmance by an equally divided Court would result. Thereby this case would be cast into the limbo of unexplained adjudications, and the lower courts, as well as the profession, would be deprived of knowing the circumstances of this litigation and the basis of our disposition of it. Since I have registered my conviction on what I believe to be the proper disposition of the case, it is not undue compromise with principle for me to join Brother

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recusal occurred—not recusals relating to health or divisions produced by a short-staffed Court. In other words, we focus on cases in which the same justice would likely have to recuse him- or herself during the following Term as well.

79. Steven Bennett & Christine Pembroke, “Mini” *In Banc Proceedings: A Survey of Circuit Practices*, 34 Clev. St. L. Rev. 531, 542 (1986). The authors wrote this in the context of the Courts of Appeals but it may be equally apt for the Supreme Court.

80. By “sophisticated” we mean a vote that does not reflect the justice’s sincere preferences. On the possibility of such deviations, see Epstein & Knight, *supra* n. 5, and Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 Mich. L. Rev. 2297, 2299 (1999). On the other hand, there is at least one case in which a justice switched his vote to produce an evenly divided Court. See Edward Lazarus, *Closed Chambers: The First Eyewitness Account of the Epic Struggles inside the Supreme Court* 69 (Random House 1998) (discussing Justice Stevens’s actions in *Tompkins v. Texas*, 490 U.S. 754 (1989)).

81. 361 U.S. 138, 141 (1959) (Frankfurter, J., writing separately).

Clark's opinion in order to make possible a Court opinion.<sup>82</sup>

Whatever the explanation for the lack of evenly divided cases, this may be a more interesting and even pressing matter for future exploration than is a study of cases that do result in a split vote—if only because the latter are so few in number. As we already have detailed, in only forty-nine cases in which a “discretionary” recusal occurs did a tied vote result; in the remaining 559—or 91.82 percent—the Court was able to resolve the dispute without reverting to an affirmance by an equally divided Court. This finding alone commends greater attention to the question of why more ties do not occur. It also may suggest that justices ought worry less about producing an evenly divided vote when deciding whether to recuse themselves—as Justice Scalia suggested that he did in *Cheney* or as then-Associate Justice Rehnquist implied in *Laird*. The possibility of such a result, for reasons about which we can only speculate here, is rather remote.

These are some of the implications flowing from our analyses, but in general our study raises more questions than it answers. For example, the data suggest that recusal rates overall have declined since Rehnquist became the Chief Justice. Why? One possibility is that the Chief himself has been particularly discouraging of “bending over backwards . . . to deem oneself disqualified.”<sup>83</sup> This general view has been both applauded and

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82. *Id.* at 142. For another example of voting to avoid a split Court, see the separate opinion of Justice White in *Spinelli v. U.S.*, 393 U.S. 410, 429 (1969) (White, J., concurring) (“I join the opinion of the Court and the judgment of reversal, especially since a vote to affirm would produce an equally divided Court.”). This language is repeated verbatim by Justice Blackmun in *U.S. v. Harris*, 403 U.S. 573, 586 (1971) (Blackmun, J., concurring).

We ought note that Baker, as a normative matter, proposes that justices do precisely what we suspect they might be doing: make an effort to avoid split decisions by changing their votes. Baker, *supra* n. 34, at 130. Hartnett goes to lengths to shore up the “folly” of Baker’s proposal, Hartnett, *supra* n. 26, at 661, although in another paper, he cites Frankfurter’s apparent compromise in *Inman*. Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U.L. Rev. 123, 141 (1999). But only by formalizing Hartnett’s speculation and conducting further empirical analyses would we be able to assess fully his position.

83. *Laird*, 409 U.S. 824, 837; see also *Microsoft*, 530 U.S. at 1301-03 (statement of Rehnquist, C.J.) (taking the position that a familial relationship with a lawyer involved in a particular case is no ground for recusal, because reasonable people would not conclude that the affected justice was likely to display partiality).



condemned.<sup>84</sup> But, once again, if it is based in some part on minimizing a four-to-four split,<sup>85</sup> perhaps it should be reconsidered as well.

Then there are the many questions our study did not even attempt to address—chiefly those that arise from the more controversial form of behavior: the refusal to recuse.<sup>86</sup> Again, these sorts of decisions are difficult to study but their manifestations may be more easily susceptible to analysis. To provide but one illustration, consider that in virtually every analysis of the importance of recusal statutes, commentators stress the need to foster “public faith” in the judiciary. If this is as crucial as they suggest, then perhaps we ought to have observed a decline in confidence in the Court or, more pointedly, in Justice Scalia when he refused to recuse himself from *Cheney*.<sup>87</sup> What about when then-Associate Justice

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84. See e.g. Bloom, *supra* n. 11, at 664-65 (enumerating “reasons for limiting disqualification” of judges and justices); Student Author, *Disqualification of Judges and Justices in the Federal Courts*, 86 Harv. L. Rev. 736, 736, 747 (1973) (criticizing then-Associate Justice Rehnquist’s refusal to disqualify himself in *Laird*, and noting that “the increasing frequency of disqualification might . . . undermine public confidence in the judiciary”); Frank, *supra* n. 11; Ifill, *supra* n. 14; Stempel, *supra* n. 11, at 590 (characterizing then-Associate Justice Rehnquist’s failure to recuse in *Laird* as “a grave error”). His refusal to recuse in *Laird* also became the subject of some controversy during then-Associate Justice Rehnquist’s confirmation proceedings to be Chief Justice, though he was hardly the first to face accusations of this sort. See e.g. 132 Cong. Rec. S23719 (daily ed. Sept. 17, 1986) (statement of Sen. Mathias). For another publicized example, see Frank, *supra* n. 17, at 51-60 (describing the case of Clement Haynsworth). Nor was Rehnquist the last; after his nomination to the Supreme Court, questions arose over Justice Breyer’s failure to recuse himself in several appellate court cases. See Stanley A. Kurzban, *Legality, Ethicality, and Propriety of Justice Breyer’s Participation in United States v. Ottati & Goss*, 20 J. Leg. Prof. 139 (1995/1996).

85. The Chief Justice and others have offered a number of other justifications for not “bending over backwards” to recuse, including a desire to limit the risk of equally divided Courts. In addition, Lubet points out the consequences of a recusal at the certiorari stage, explaining why it may “harm the very party it is intended to protect.” Steven Lubet, *Disqualification of Supreme Court Justices: The Certiorari Conundrum*, 80 Minn. L. Rev. 657, 661 (1996).

86. In contemporary times, Justice Scalia’s refusal to recuse himself in *Cheney* provides an obvious example. But as Frank points out, controversies in the past are not difficult to locate. See Frank, *supra* n. 11, at 605-06. One such controversy was actually caused by Justice Jackson who, in *Jewell Ridge Coal Corp. v. Local No. 6167*, 325 U.S. 161, 897 (1945) (Jackson & Frankfurter, JJ., concurring), criticized Justice Black for participating in the case. See Frank, *supra* n. 11, at 1.

87. Here we conflate concepts of confidence and legitimacy when, in fact, they might be different things. See e.g. James L. Gibson, Gregory A. Caldeira, & Lester Kenyatta Spence, *Measuring Attitudes toward the United States Supreme Court*, 47 Am. J. Pol. Sci. 354 (Apr. 2003).

Rehnquist participated in *Laird*? Both decisions were denounced by some commentators, and *Laird* even became an issue in Rehnquist's 1986 confirmation hearings.<sup>88</sup> But did these "refusals to recuse" have any impact on the Court's legitimacy? Bleich and Klaus suggest not,<sup>89</sup> and circumstantial evidence tends to support their view.<sup>90</sup> So, for example, in response to a survey question asking Americans which justice they would like to see become the next Chief Justice, Justice Scalia ranked third (after Justice O'Connor and Justice Thomas).<sup>91</sup> That poll was taken only eight months after the appearance of Justice Scalia's memo in *Cheney*.<sup>92</sup>

Whether this and related evidence holds up under more systematic scrutiny is yet another question that we commend to others working in the field. While too often recommendations of this sort are facile at best, they are not so here—at least not for social scientists who have yet to devote sustained attention to the fascinating subject of recusal.

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88. See *supra* n. 84.

89. Bleich & Klaus, *supra* n. 17, at 47-48 ("Perhaps all this concern about the standards for recusal among Supreme Court justices may be unfounded. There does not seem to be any emerging public outcry about recusals."). Bleich and Klaus do go on to say, however, that "[o]n the other hand, there may still be some corrosive effect on the public trust if there is a widespread belief that the Court is applying too loose a standard for judicial disqualification." *Id.* at 48. And one must note the reports that the Chief Justice's appointment of a panel to study judicial conduct came in response to the public controversy caused by Justice Scalia's refusal to recuse himself in *Cheney*. Justice Breyer, the panel's head, has denied these reports. See e.g. David G. Savage, *Rehnquist Panel Embarks on Judicial Conduct Review*, L.A. Times A26 (June 11, 2004).

90. A relevant line of research in political science examines the legitimacy of the Supreme Court. This research finds that the Supreme Court can, in the public's mind, draw from a deep reservoir of goodwill to help it weather extended controversies surrounding its own work. (The prototypical example is that after its decision in *Bush v. Gore* the Court experienced only a temporary drop in confidence). See e.g. James L. Gibson, Gregory A. Caldeira, & Lester Kenyatta Spence, *The Supreme Court and the U.S. Presidential Election of 2000: Wounds, Self-Inflicted, or Otherwise?* 33 British J. Pol. Sci. 535 (2003).

91. Fox News, Nov. 16-17, 2004. (The question was: "If Chief Justice William Rehnquist were to resign, which U.S. Supreme Court Justice would you like to see elevated to chief justice?") Results on file with the authors.

92. This result would tend to bear out the theories of scholars such as Gibson, who suggest that the Court's "reservoir of goodwill" allows it to weather controversies whether in the short- (e.g., the *Cheney*/Scalia controversy) or longer-term (e.g., the Court's decision in *Bush v. Gore*). See Gibson et al., *supra* n. 87, at 354.

