



How the states avoid supreme stalemates

State high courts avoid tie votes in a variety of ways, some more juris-prudent than others.

JUSTICE ANTONIN SCALIA'S PASSING PORTENDS A SEISMIC REALTERING OF SUPREME COURT'S IDEOLOGICAL BALANCE. Unsurprisingly, political stalemate over his successor has yielded judicial stalemate, with the court deadlocked 4-4 in some cases. The Supreme Court, unlike a tennis court, is tiebreaker-free, meaning the lower-court ruling stands without any high-court guidance. The Scalia-less court has evenly divided multiple times, sometimes pleasing liberals (aiding public-sector unions in *Friedrichs v. California Teachers Association*) and

sometimes conservatives (thwarting President Obama's immigration plan in *United States v. Texas*).

Most American justice, however, is dispensed in state courts. Every state supreme court is odd-numbered (five, seven, or nine justices), but because of recusals, unfilled vacancies or prolonged absences, each court occasionally dips below full strength, thus raising the specter of supreme stalemate.

How do the 50 states handle high-court deadlock? Turns out, when it comes to impasse resolution, the laboratories of democracy offer innovations galore.

Sixteen states emulate the high court's "ties happen" approach, though interestingly, lack of a decision doesn't always mean lack of guidance. Some courts, like Iowa's, list each individual justice's vote. Justices in Pennsylvania and Massachusetts even issue dueling opinions explaining their views of the deadlocked case.

The other 34 states have a substitute-justice procedure to avert or break legal logjams. State-by-state details vary widely, but some approaches are plainly more juris-imprudent than others.

These 34 anti-stalemate states differ in three important ways:

When are temporary appointments made?

Twenty-three states aim to bypass impasse, assigning substitute judges on the front end to avert stalemate, rather than on the back end to break it. Hole-filling happens as soon as the court is short-staffed. Many states favor front-loaded appointments to avoid charges of court-packing or gamesmanship to secure a favored result. The other 11 states, however, name a tiebreaking justice only after the court is deadlocked. The substitute is The Decider.

Who does the appointing? In 22 states, the chief justice names the pinch hitter; in seven, the court does so; and in four, the governor picks. (In Nevada, the governor and chief justice share power.) Roughly 85 percent of states with tiebreaking, or tie-avoiding, systems keep selection wholly within the judicial branch. Sometimes, though, the court clerk is deputized to do the picking, to curb accusations that the chief justice or court is stacking the legal deck.

How much discretion does the appointer have? In some states, the pick isn't a "pick" at all – fill-in justices are chosen alphabetically, randomly, or rotationally from eligible appointees. In Louisiana, for example, the court clerk plucks names from a plastic Halloween Jack-o'-Lantern. Washington state, a bit more urbane, uses an elegant chalice.

At the opposite end of the spectrum, states like South Dakota give the chief justice unfettered discretion. But sometimes unchecked power checks itself. California's chief justice, for example, has unbounded latitude, but old charges of cherry-picking led more-recent chief justices to opt for alphabetical appointments. Similarly, Hawaii's chief justice has wide-open discretion but uses a rotational system.

In New Mexico, where pro tem assignments happen frequently, the current chief justice simply goes down the list of appellate judges in seniority

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order. In North Dakota and Utah, the first lower-court judge to volunteer gets the gig – like Uber, but for judges.

New Hampshire is the only state where randomness is required by law, the result of an impeachment scandal involving abuse of temporary assignments. Today, the state's supreme court draws names from an envelope.

Five states, including my home state of Texas, give the governor a role in picking substitutes. But the Lone Star State is the only state where the governor unilaterally names a tiebreaker post-deadlock, knowing which case has stymied the court. Put another way, the governor of Texas – fully informed about the tie-causing issue and the judicial philosophies of eligible appointees – can vicariously decide the case by deciding who decides the case.

Such a mechanism seems unimaginable on the federal level. Ponder this mother of all hypotheticals:

Bush v. Gore tied 4-4, with President Bill Clinton wielding the singular power to decide by proxy whether his vice president succeeds him. What president could resist putting an anvil on the scale by picking a justice who would vote the "right" way?

The American Revolution produced a revolutionary design. How might the Framers – so persnickety about separating, not integrating, power – have responded to a president-picks tiebreaker? One can almost see James Madison scribbling in his debate notes: "Pure applesauce!"

As with judicial selection generally, there's no glitch-free mechanism for impasse resolution, just varying degrees of imperfection. That said, here's one proposal for Texas: Before each term, have the Supreme Court collectively name five potential appointees, and if deadlock arises, draw a name randomly from a 10-gallon Stetson.

Of course, that proposal accepts the premise that every tie needs breaking. Rabid football fans would self-immolate outside NFL headquarters if the Super Bowl ended in a soulless tie. The first U.S. Supreme Court, however, was a six-member court (later growing to 10), before Congress settled on nine in 1869.

State high courts have an irreplaceable function: to be supreme and to speak supremely about what their state's laws prescribe and proscribe. A supermajority of states reject the Supreme Court model of nonprecedential affirmance. But the substitution systems differ immensely, each with its own virtues and vices.

Supreme Court stalemates in the post-Scalia era dominate the spotlight. But deadlock dramas in state high courts – and how ties get untied – merit public attention, too.

– **DON WILLETT** is a justice on the Supreme Court of Texas. This essay is an summary of his Duke Law Master of Judicial Studies thesis paper. It was previously published in *The Wall Street Journal*.