Why Judges Always Vote

Tonja Jacobi,
Eugene Kontorovich,
Professors, Northwestern University Law School*

Abstract:

This paper provides the first account of the practice of universal voting on the Supreme Court. Full participation among justices is explained using models of spatial competition, showing that two features particular to the Court encourage full participation. First, the doctrine of stare decisis makes the resolution of future cases in part dependent on the resolution of present ones. This raises the cost of abstention, particularly to risk-averse justices. Second, the so-called narrowest grounds or Marks doctrine enforces the logic of the median voter theorem in cases presenting more than two options. This makes voting by otherwise indifferent or alienated justices rational, where it otherwise would not be.

Rezumat:

Această lucrare prezintă pentru prima oară practica votului universal prezent la Curtea Supremă. Participarea tuturor judecătorilor este explicată prin utilizarea modelelor spațiale privind concurența, care arată că două elemente caracteristice Curții Supreme încurajează participarea tuturor judecătorilor. În primul rând, doctrina stare decisis determină ca soluționarea cauzelor viitoare să depindă de modul în care sunt soluționate cauzele din prezent. În al doilea rând, așa-numita doctrină Marks sau a opiniei mai apropiate încurajează raționamentul din teoria alegerii echilibrate în cauze în care există mai mult de două opțiuni. Aceasta înseamnă că judecători care altfel ar fi indiferenți sau cu opinii extreme optează pentru calea rațională.

Keywords*:* courts, judges, voting, median voter, abstention.

1. Introduction

United States Supreme Court justices always vote. In almost every recorded Supreme Court case, every justice voted either to affirm or to reverse. It is almost unheard of for justices to abstain, or to cast the judicial equivalent of a blank ballot by neither joiningnor writing an opinion. In other words, the Supreme Court has a 100% voter participation rate. The Court's record of non-abstention is so absolute that full

* e-kontorovich@law.northwestern.edu

appear to be no voluntary abstentions on merits votes in the U.S. Supreme Court or the federal Courts of Appeals[308]. There is no reference to such conduct in the extensive secondary literature on the federal courts. Nor, apparently, do state Supreme Court judges abstain[309]. Indeed, in an exception that seems to prove the rule, a judge of the New Jersey Supreme Court has made a point of explicitly abstaining in a series of cases because of what he saw as the improper appointment of another judge. His colleagues rejected the "abstainment," arguing that it was just not done, and neither side offered any examples of prior abstention on substantive votes: Absent such a reason [for recusal]… judges have an obligation both to hear and vote on cases. Judges are appointed to render decisions—not to sit on the sidelines. Nowhere in the ethics rules or prior case law is there support for the notion that a judge may abstain or recuse from voting.

Yet one should not mistake the familiar for the inevitable. One can imagine a scenario in which a justice is unable to make up his or her mind in a close case[310], or has difficulty understanding the issues, and so would choose to abstain. Such judges exist: a few members of Supreme Court and federal court of appeals have on a few occasions filed opinions labeled "dubitante," indicating that they were highly unsure which side to take, but felt obliged to vote anyway[311]. It might not be surprising for even the most thoughtful jurists to come away uncertain how best to resolve at least some especially hard or obscure areas of federal law.

Most conceptions of judicial duty – particularly for higher court judges – goes beyond casting votes to resolve specific factual disputes, and anticipates justices will provide elucidation of the law.

Abstention by professional voters – those for whom voting in a majoritarian, deliberative governmental body is part of their job – is well documented in Congress, federal adjudicative boards, administrative tribunals, and local government agencies. Indeed, many European countries have laws affirmatively requiring judges to vote, illustrating a concern that they might abstain but for such a rule. Thus the absence of abstention from the American federal judiciary is a puzzle. This paper first shows that existing models of voter participation and judicial behavior cannot account for the zero abstention practice of the U.S. Supreme Court. The paper then suggests two novel explanations, focusing on factors that distinguish the judiciary from other professional voting bodies.

[308] We searched the Westlaw database with a variety of queries such as [(absten! abstain!) /s vote!]; [(absten! abstain!) /s vote! /s justice!]; [(absten! abstain!) /s judge /s deci!]; [(absten! abstain!) /10 vote /s judge] and similar variants. While the results revealed the existence of regular abstention in a variety of administrative, legislative and municipal bodies, it did not reveal such a practice by federal judges themselves on merits votes, or any references to it. The few abstentions we could identify were all in votes on rehearing en banc in the courts of appeals. See. e.g., In re Asbestos Litigation, 101 F.3d 368 (5th Cir. 1996).

[309] We identified one exceptions, which appear anomalous and involved a procedural issue. Doll v. Major Muffler Centers, Inc., 208 Mont. 401 (1984).

[310] Dillard v. Musgrove, 838 So.2d 26, (Miss. 2003) (Waller, concurring, to explaining that he had abstained in preliminary votes on the case)

[311] See Jason J. Czarnezki, *The Dubitante Opinion, 3*9 Akron L. Rev. 1, 3-4 (2006).

In other voting contexts, voter indifference or alienation contributes to abstention. With the American judiciary, certain institutional features produce countervailing incentives to vote for otherwise indifferent judges. Thus we show that the norm of *stare decisis,* aided by the *Marks* doctrine of rule-determination in the absence of a single majority opinion, render the standard rational choice explanations of abstention inapplicable to the judicial context[312].

Voting participation on courts has never been studied, but it lies between two significant and related literatures. There is an extensive literature on citizen abstention in popular elections. Abstention on legislatures and other standing committees has recently received attention, including both empirical studies[313] and formal models[314]. A separate literature studies judicial behavior – how judges vote. Yet the question of *why* judges vote has not been studied. Indeed, in standard accounts of judicial voting, the decision to vote is exogenous, and sometimes explicitly understood to be institutionally mandatory[315].

Before proceeding, it is important to note some constraints. Because there are apparently no deviations from the norm of non-abstention in the U.S., it is not possible to attribute causal weight to the mechanisms promoting non-abstention that we identify. We can only say that they are consistent with the full judicial participation norm and also that they are *absent* from other institutions that *lack* full participation. Instead of empirically finding causal significance for these factors, we show that they explain why the standard theoretical accounts of voter non-participation do *not* apply to the judiciary.

We do not know what the "baseline" level of abstention would be in the absence of the features we identify and thus cannot show how much of a difference these features make. No doubt sociological factors also contribute to full participation, such as collegiality norms, and concerns about public image[316]. It is rare to observe a 100% rate of anything over a large number of cases; it is likely that such a robust phenomenon has multiple contributing causes. Thus while our explanations are consistent with the observed norm of complete voting participation, we do not claim to provide an exhaustive account of the reasons for the norm. However, the explanations presented here may have particular purchase because they involve mechanisms peculiar to the judiciary, and thus help explain why full participation is observed among courts but not on analogous committees.

Despite the inability to assign casual weights to the factors we identify, our inquiry is still has some practical relevance because it suggests that a weakening

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[312] *Marks v. United States* 430 U.S. 188, 193 (1977).

[313] Abdul Noury, *Abstention in Daylight: Strategic Calculus of Voting in the EP*, 121 Public Choice. (2004), 179-211; Linda Cohen& Roger Noll, *How to vote, whether to vote: Strategies for voting and abstaining on congressional roll calls 13 Political Behavior* 97-127 (1991).

[314] See Rebecca Morton & Jean-Robert Tyran, *Let the Experts Decide? Asymmetric Information, Abstention, and Coordination in Standing Committees* (2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1296453#.

[315] *See* Jeffrey A. Segal, Harold J. Spaeth, The Supreme Court and the Attitudinal Model Revisited 383-385 (2002) Maxwell I. Stearns, Constitutional Process: A Social Choice Analysis of Supreme Court Decision Making 134 (2000); Phillip L DuBois and Paul F. DuBois, *Measuring Defensive Behavior on State Courts: an Application and Adaptation of Known Measurement Techniques,* Polity 13:147, 152 n.10.

[316] Informal discussions with several federal court of appeals judges found that they were unaware of any "norm" against abstention, yet felt strongly that it simply would not be institutionally acceptable for a judge to ever abstain. They could not account for the difference between this understanding of judicial duty and the duty of other professional voters.

either the *stare decisis* norm or the *Marks* doctrine may result in increased abstention by judges. This is valuable in thinking about potential adjustments to those doctrines. Preventing abstention among judges is a policy goal in some countries, where it is pursued through statute. Our analysis is useful for identifying institutional mechanisms by which participation can be increased.

This paper focuses on the U.S. Supreme Court for the sake of concreteness and salience, and because of the extensive information about its processes and its unique role as a policy-setting body. The discussion is mostly generalizable to any collegial courts with more than three judges. The implications of abstention are different with three or fewer members because in a split decision, abstention by an indifferent third would result in no ruling and no precedential decision. In such a case, as with a single judge, individual abstention results in institutional abdication

2. Do Justices Always Have to Vote?

2.1. Abstention defined

Judicial non-participation can occur due to illness, incapacity or recusal due to a real or perceived conflict of interest[317]. These are not forms of abstention in the sense we seek to study. There are important formal differences between voluntary abstention and recusal or incapacity. Voter participation applies only to *eligible* voters; when a judge recuses herself, she rules herself ineligible (and thus would not be counted in the quorum).[318] Furthermore, recusals, illness and forced absences arise fortuitously, for reasons outside the justice's immediate control. Thus recusal is not part of the policy or strategic choices that judges make.

Under certain circumstances, recusal is mandatory, but in most cases, judges determine for themselves whether they should be recused. There are no precise rules governing all potential conflict situations, and justices traditionally do not explain their reasons for recusal.[319] An individual justice is simply given the option of recusing herself in a case in which her "impartiality might reasonably be questioned."[320] While such recusal is in a sense discretionary, the decision is presumed to turn on factors exogenous to any substantive elements of the case.

Conceivably, some voluntary abstentions can disguise themselves as conflict or health recusals.[321] Yet in the abundant literature on the courts there has been no suggestion of such artifice. Recusal itself is infrequent, and manufactured recusal is entirely speculative. Thus recusal will be set aside for the purposes of this paper. Consequently, we define abstention as purposeful non-participation in the determination of a case, when not caused by exogenous factors – such as illness or relationship to the parties. Such abstention could take the form of recorded "abstaining" votes, as are found in legislatures, faculties and many other contexts, or simple non-voting of the kind commonly associated with popular elections.

2.2. Abstention elsewhere.

The *potential* for judicial abstention in the absence of a contrary norm is indicated by the judicial codes or constitutions of many European countries

[317] Ryan Black & Lee Epstein, *Recusals and the "Problem" of the Equally Divided Supreme Court,* Journal of Appellate Practice and Process, 7 (1): 75-99 (2005).

[318] Arnold v. Eastern Air Lines, Inc., 712 F.2d 899 (4th Cir.1983) (concurring op.) (en banc).

[319] See Black & Epstein.

[320] 28. U.S.C. 455(a).

[321] Black & Epstein, 87 n. 50.

that specifically forbid abstention by their judges, particularly those on high or constitutional courts, through constitutional provisions, statutes or judicial codes. In Central and Eastern Europe, where constitutions and judicial codes have been extensively revised in recent decades, antiabstention rules are quire common. For example, Bulgaria, Belarus, Bosnia, Slovenia, Romania, Russia Hungary, and Lithuania have legal provisions requiring voting at least on the constitutional court and sometimes more generally. The Italian Constitutional Court's practice is typical:

All judges present during the deliberations must vote for or against any proposal put to the vote; they may not abstain. Furthermore, all the judges present... cannot, as is often the case in political assemblies, "leave the room" to effectively abstain from voting.[322]

Such rules are also seen in treaties organizing international courts[323], where judges have noted that they are only voting because of the mandate of the rule[324]. The need for such provisions suggests that judicial abstention was a potential concern for the drafters.

Abstention is a familiar feature of other professional voting contexts. For example, congressmen and state legislators routinely fail to attend votes, and often vote "abstain" when present. In a non-trivial number of votes, these abstentions affect outcomes[325]. In approximately 5% of roll calls, the abstention rate is higher than the roll call margin, and in an additional 4% of roll calls, there is the possibility of participation being crucial, "since the mean number of abstentions for all roll calls exceeds the margin of victory."[326] Indeed, the U.S. Constitution anticipated sufficiently widespread strategic nonparticipation by members of Congress that it includes a provision to deal with it[327]. Members of federal regulatory commissions with adjudicatory functions regularly abstain[328]. All of this highlights the peculiarity of full participation among judges.

2.3. Implications from explanations of legislative abstention

The theoretical and empirical literature suggests several factors that would lead to less abstention among judges than among legislators. The first is the value of being the pivotal voter. In the classic

[322] See Corte Costituzionale, *How the Court Works,* http://www.cortecostituzionale.it/versioni_in_lingua/eng/lacortecostituzionale/cosaelacorte/pag_39.asp

[323] Compare International Court of Justice, Resolution Concerning the Internal Judicial Practice of the Court, Art. 8(v) ("Every judge, when called upon by the President to record his final vote in any phase of the proceedings, or to vote upon any question relative to the putting to the vote of the decision or conclusion concerned, shall do so only by means of an affirmative or negative."), available at http://www.icj-cij.org/documents/index.php?p1=4&p2=5&p3=2.

[324] Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 373 (Declaration of Judge Herczegh).

[325] *See* Lawrence S. Rothenberg & Mitchell Sanders, *Rational Abstention and Congressional Vote Choice,* 11 ECON. & POLITICS. 311, 312 (1999); see also, Linda R. Cohen and Roger G. Noll, How to Vote, Whether to Vote: Strategies for Voting and Abstaining on Congressional Roll Calls, 13 Pol. Behavior 97 (1991).

[326] Lawrence S Rothenberg & Mitchell Sanders, *Rational Abstention and the Congressional Vote Choice*, 11 Economics & Politics 311, 312 (2003).

[327] Half of the members present and voting, regardless of how few, can "compel the Attendance of absent Members." U.S. CONST. ART. I, § 5, cl. 1; *Kilbourn v Thompson*, 103 U.S. 168, 190 (1880). The provision anticipates the possibility that strategic non-participation could be used to prevent a quorum, a problem still found in statute legislatures.

[328] See, Bradley Cannon, *Voting Behavior on the FCC,* 13 Midwest J. Pol. Sci. 587, 592 n.17 (1969)

rational choice model of Downs[329], formalized by Riker and Ordeshook[330], abstention is expected to be negatively correlated with the chance of casting the pivotal vote. However the few studies of abstention present conflicting evidence on this point – with Rothenberg & Sander one surprisingly finding that the likelihood of a legislator abstaining is unrelated to success margins. The much smaller size of the Court makes the likelihood of being the pivotal voter considerably higher than in a legislature, and so leads to an expectation of less abstention among judges than among legislators.

On the other hand, a factor promoting participation in legislatures and other committees, developed particularly by Cohen and Noll[331], is that indifferent legislators vote on some measures because of vote-trading. Even among justices who admit to various forms of strategic behavior, none have ever admitted to vote-trade across cases[332]. Doing so would contradict a core notion of the judicial function – to decide issues on their merits. Consequently, this second incentive for legislative voting is absent in the judicial context.

The third prominent cause of abstention suggested by rational choice models is asymmetric information. Some voters have more expert about a topic, and thus the outcomes in such cases assume greater salience for them[333]. There is some suggestion in the judicial literature that individual justices have greater expertise or interest in specific topics, and this may influence opinion assignment. However, given the considerable resources now available to federal appellate judges, including several clerks capable of extensive research, and the rule against ex parte contacts with the parties, as well as access to the same briefs and amicus opinions, one cannot assume that differences among judges' information is likely to cause significant differences in their preference to participate in voting. Moreover, while in recent decades Supreme Court nominees have invariably been lawyers, who might have some particular area of expertise, in the past statesmen, politicians and other "amateurs" sat on the court. Yet the abstention rate has apparently remained constant at zero.

More generally, considering basic comparative utilities, one important finding of studies on legislative abstention is the importance of external benefits. Legislators abstain in part to engage in other activities, such as electioneering and constituent services. While justices also engage in external activities, such as giving speeches, and writing articles and books, one might think the value of these external activities is small enough – or their judicial workload light enough - not to distract justices from voting.

Similarly, in terms of potential negative utility of voting, for members of Congress, voting cans establishing a track record that can prove problematic in an upcoming election. While abstaining produces some risk of being criticized as an absentee legislator by political rivals, a rational legislator weighs that risk against the anticipated cost of alienating organized constituencies.

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[329] Anthony Downs, AN ECONOMIC THEORY OF DEMOCRACY (1957).

[330] A Theory of the Calculus of Voting, 62 Ammerican Political Science Review 25-42 (1968)

[331] (1991)

[332] See H.W. Perry, Deciding to Decide (1991); Lee Epstein and Jack Knight, The Choices Justices Make (1998).

[333] Timothy J. Feddersen & Wolfgan Pesendorfer, *Abstention in elections with asymmetric information and diverse preferences, 93* American Political Science Review, 381-398 (1999)

The electoral concerns that help explain legislative abstention do not apply to the federal judiciary, which enjoys life tenure. This predicts a higher rate of participation by federal judges. Yet freedom from electoral pressures cannot entirely explain full participation on the Court. On the federal courts of appeals, a desire for a Supreme Court nomination may play a function similar to reelection for legislators.[334] Moreover, in states like Texas, the Supreme Court is e chosen through adversarial partisan elections. Such judges with higher career ambitions might have an incentive analogous to legislators – not wanting to go on record with a particular position because it may prove inconvenient later. In addition, given that judicial reputation and legacy hinges in large part on an appearance of methodological rigor and logical consistency, it is fair to expect that justices may be interested in appearing to be at least internally consistent. Thus one might imagine judges not wanting to vote their preferred policy position in a particular case where there preference intensity is low if they can imagine favoring the opposite position in a more important future case. In such circumstances, abstention would be preferred to voting against one's policy preference in the first case. Yet one does not observe abstention in these contexts either.

Overall, then, the existing literature on legislative abstention has conflicting implications for judicial abstention. The relatively high prospect of being a pivotal voter gives judges less incentive to abstain, but vote trading and asymmetric information theories apply considerably less or not at all to judges, and so allow more incentive to abstain. Similarly, comparing legislators and judges, for the latter there seems to be less opportunity and career costs to voting, which cuts against the judicial incentive to abstain, albeit this applies differently to higher and lower courts.

Yet even the reasons one might expect less abstention on courts than legislators do not seem adequate to explain the its complete absence in the former. Congressional abstention rates can be as high as a few percent even in close votes; and the theoretical models do not predict full participation on committees under almost any specifications. Thus the mystery we identify and seek to explain it not that judicial abstention is quite rare – which would be expected, given the foregoing discussion – but rather the longterm complete absence of abstention.

2.4. Potential Legal Explanations and their Limits

Again, the game theoretic mechanisms we identify in Parts 3-6 as reinforcing nonabstention do not exhaust the reasons for non-abstention. The complete absence of abstention suggests it is overdertermined. Before turning to the rational choice mechanisms, we should discuss several rules and institutions that might also discourage abstention. The mechanisms we focus on complement, rather than supplement, producing a combined anti-abstention effect whose various components cannot be separately weighted.

2.4.1. Certiorari

One might think that the *certiorari* process, whereby positive votes by four justices are required for a given case to be chosen for Supreme Court review, would reduce the possibility for abstention. Why should justices not vote on a case they were not obliged to hear in the first

[334] Richard A. Posner, *What Do Judges and Justices Maximize*? (*The Same Thing Everyone Else Does*), 3 Sup. Ct. Econ. Rev. 1 (1993).

place? But the full participation norm existed long before the Court came to have an entirely cert-based docket. Moreover, the cert process cuts both ways: cases are selected based on the difficulty of the legal issues they pose as well as their importance. Presumably, these would be cases would be the hardest for at least the median justice to decide, making abstention from indifference and alienation (explained in Part 3, below) more likely. Certiorari clearly does play one role in reducing abstention, however: by preventing organized abstention designed to defeat a quorum of the kind the Constitution's Attendance Clause is concerned with. Because the Court has the unusually high two-thirds supermajority quorum rule, if the four justices who voted to grant cert all wish to vote on the case, it would require abstention by an extraordinary 80% of the remaining justices to defeat quorum.

2.4.2. Tie avoidance

Abstention increases the probability of an evenly-divided court, a result that by judges and scholars regard as embarrassing and inefficient, complicating the law more than clarifying it.[335] Yet the a study of discretionary recusal – those voluntary recusals because of a perceived or potential conflict of interest that, because of the uncertain nature of the conflict are either mandated nor frivolous but fall within a broad grey area of the jurist's personal discretion – shows that justices do not appear to avoid such recusals because of a concern about tie-avoidance, and such recusals do not appear to increase the likelihood of ties, which are very rare. This might suggest that tie-avoidance would also not discourage abstention.

Yet the possibility of recusal is not correlated with the ideological division of the Court in the case, and is thus no more likely in close cases than others. Abstention may be related to such divisions, if they result in indifference. Abstention by a single justice would result in a tie in such cases, which the potentially abstaining justice may wish to avoid. Thus tie avoidance might discourage abstention in 4-1-4 splits, though not in the rarer 4-2-4 or 4-1-3 splits.

3. Political Theory Explanations of Abstention in Non-judicial Contexts

In spatial models of voting, abstention results from voters being indifferent or alienated.[336]

This Part explains those two accounts of abstention in the non-judicial context. In the next Part we argue why those theories do not apply to the judicial context.

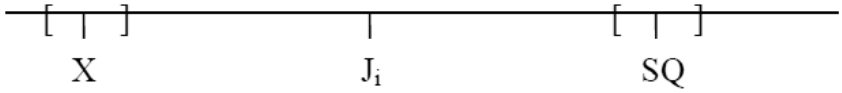


Figure 1: Abstention Arising from Indifference

Figure 1 illustrates why indifferent voters may abstain. It shows a player, Ji, who is considering a dichotomous choice[337] between the status quo, SQ – the outcome that will result if no action is taken – and a potential policy outcome,

[335] Black & Epstein.

[336] Melvin J. Hinich & Peter C. Ordeshook, *Abstentions and equilibrium in the electoral process*, 7 Pub. Choice 81-106 (1969), Dennis L. Plane & Joseph Gershtenson, *Candidates' Ideological Locations, Abstention, and Turnout in U.S. Midterm Senate Elections*, 26 Political Behavior 69-93 (2004).

[337] How the outcome position, X, is determined is described in Part IV.B, *infra*.

X. Assuming single-peaked preferences, such that utility declines monotonically with increases in the distance of an outcome from each voter's ideal point, Ji will be indifferent between SQ and X if the two options are equally distant from her ideal point, Ji. As such, even a median voter may rationally choose to abstain from voting for either of the two options. This is particularly so if there is any cost associated with taking either position. Generally there will be such costs: legislators voting against the preferences of either side can expect retribution, or at least lack of future reciprocity; if the voter is indifferent, by definition this gives her

nothing to gain in terms of the vote outcome to overcome this cost.

In a situation of perfect information, this result is fairly trivial, as it only arises when the status quo and the policy option are exactly equidistant from the relevant voter's ideal point. However, when any uncertainty exists as to the exact nature of the policy – for example in how it will be implemented by the executive – then a risk averse voter may choose to abstain more frequently. In Figure 1, the bracketed regions around the policy options X and SQ represent the uncertainty as to how each policy outcome, and this translates to an equally sized range in which Ji will abstain. As such, indifference can arise in a significant range of situations.[338]

This indifference explanation shows why moderates will sometimes abstain. The next explanation, alienation, shows why extremists will sometimes abstain.

Figure 2 illustrates the effect of alienation. Ji is one of three voters, along with J2 and J3, but the logic applies to larger panels also. Ji now prefers any movement from the status quo toward the left, and thus ordinarily we would expect Ji to sign a majority opinion at the ideal point of J2, the median justice. However, if Ji values factors other than simply minimizing the distance between her preferences and the outcome X, she may prefer to refuse to give her support to an outcome so distant from her ideal point. The distance between the two options, SQ and X is small, and thus the utility gained by Ji of agreeing to such a change is also small, and may be dwarfed by uncertainty – for example, in application the outcome X could in fact be to the right of SQ – or by the cost of being on record supporting an outcome so far from her preferences – for example in terms of losing the opportunity to subsequently oppose policy outcome X.

In addition, with repeated interactions, it may be worthwhile to Ji to fail to support outcome X, since abstention can be used to strategically punish the other voters for supporting a policy too distant from Ji's preferences. This requires low discount rates and multiple rounds of policy-making – a scenario that arguably applies to Supreme Court justices, who face approximately 80 cases per year and have life tenure, and thus ample opportunity to shape doctrine far into the future.

These two explanations of abstention constitute rationales for abstention across

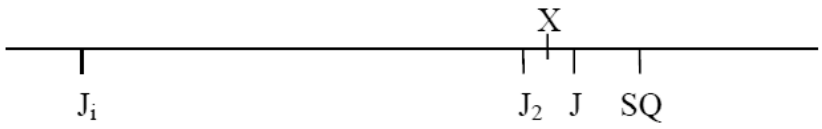


Figure 2: Abstention Arising from Alienation

[338] If judicial utility UJ is a product of the distance d of the outcome X relative to the status quo SQ, such that UJ = E[d(s)]
where d = – (Ji – SQ)2,
= – (Ji – X)2 if s = X,
then s* = X iff (Ji – SQ)2 > (Ji – X)2
but if Ji is risk averse, then
UJ = E[d(s)] – r.varE[d(s)].

the ideological spectrum: while indifference explains abstention amongst moderate voters, alienation explains abstention amongst extremist voters. An extensive literature has established that both of these scenarios provide important explanations for abstention: abstention has been shown to be a potential, and in some cases likely outcome of indifference[339], and the literature has well-documented alienation-based abstention.[340]

There are, however, reasonable criticisms that can be made of both of these explanations of abstention in the non-judicial context. One might challenge the indifference explanation by querying whether the voter will abstain when indifferent, rather than randomly choose one option, as is commonly assumed in many models of voter choice. Similarly, alienation can be criticized as requiring assumptions that a voter will prefer to incur the cost of not voting and gain the benefit of punishing the center, rather than contributing her vote, even when the policy position she supports loses. Rather than pursuing these criticisms, we show that even assuming that the two standard political theory explanations of abstention are sound in other contexts, nonetheless indifference and alienation nevertheless fail to apply in the judicial context because of institutions peculiar to the courts. As such, in Part 5 we provide a rational choice explanation for the observed absence of judicial abstention. But first, in the next Part, we show that the conditions for abstention arise significantly often in the judicial context, and thus the failure to observe judicial abstention is not because there is no indifference or alienationbased incentive for abstention in the judicial context.

4. How Often Might Indifference and Alienation Arise in the Judicial Context

The literature on indifference and alienation causing legislative abstention is welldeveloped, but it may appear implausible to some that such incentives would arise in the judicial context. This section provides an impressionistic empirical account of how often the indifference and alienation incentives to abstain are likely to arise in the judicial context.

We analyzed data on all Supreme Court cases since 1953 using the Spaeth database in combination with the Martin-Quinn scores of judicial ideology. The Spaeth database provides a record of every justice's vote in every case, including concurrences. Martin-Quinn scores are measures of relative judicial positioning, designating an ideal point for each justice from the 1937 Term onwards, based on voting patterns in each Term.[341] The scores leverage inferences from voting coalitions; for example, a justice who is often a lone dissenter in conservative cases will be ranked as more liberal than a colleague who sometimes joins her in dissent in 7-2 conservative decisions. This measure allows for standardized comparisons over time, using the manifold cross-overs between justices' tenures to compare justices who

[339] Federssen & Persendorfer 1999; Hao Li & Wing Suen, *Delegating Decisions to Experts*, Journal of Political Economy 112: S311-335 (2004).

[340] The classic example of alienation is when extreme voters abstain in a general election to punish their party for choosing a moderate candidate in primaries. In a popular election, such punishment requires a well-organized group with high preference intensity, with repeat play and low discount rates, features that can be realistically assumed on the Court.

[341] *See* Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999,* 10 Pol. Analysis 134, 135 (2002). The updated Martin and Quinn ideal point estimates are available at http://mqscores.wustl.edu/measures.php (last visited Aug. 19, 2012).

were never on the Court together.[342] The scores are positive for conservative justices, negative for liberal justices; the historical mean of the Court is approximately 0, and the scores are distributed roughly normally.

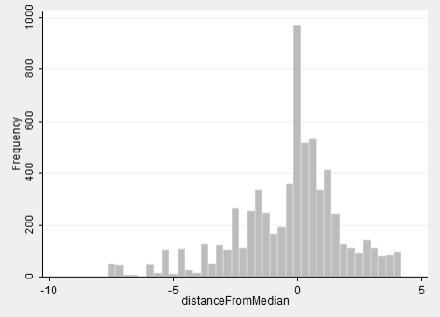
To determine first how often the potential incentive for abstention arising from indifference might occur, we measured the rate of concurrence by each justice as a product of their distance from the Court median, using Martin-Quinn scores.

Figure 3A provides the density distribution of all concurrences on the Supreme Court since 1953, arrayed by judicial ideology, as measured by distance from the median justice, position at zero. It shows that the distribution of concurrences across all Supreme Court cases is roughly normal, but for the considerably higher rate of concurrence by the Court medians – represented by the exceptional peak at 0.

Court medians concur at almost twice the rate of other moderate judges, who concur more often than extremists. This is true also if we only look at the subset of cases where voting is not disordered – that is, where no justice in a liberal (conservative) coalition is more conservative (liberal) than any dissenting justice. By excluding those cases in whichcoalitions are formed counter to the ideological ordering of the justices, for instance where liberals and conservative extremist justices form a coalition without the moderate justices, Figure 3B provides a secondary check to ensure that Figure 3A is not driven by some factor that cuts across ordinary ideological boundaries. The scale in Figure 3B is smaller than Figure 3A, but the results are otherwise the same, with a roughly normal distribution, but for the considerably higher rate of concurrence by the Court median.

Given that Martin-Quinn scores are premised on a normal distribution of judicial ideological positions[343], it is reasonable to expect a normal distribution of concurrences,but for some intervening effect, such as we theorize below. This analysis is impressionistic, but it shows that concurrences occur at considerably higher rates by the Court medians than by other justices, suggesting that the conditions for abstention due to difference occur significantly often. It cannot be presumed, then, that judicial abstention occurs simply because justices are seldom indifferent.

3A: All Cases



3B: Non-Disordered Cases

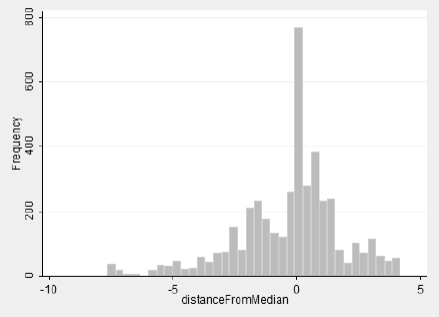


Figure 3: Rate of Concurrences, by Judicial Ideological Position

[342] *Id.* The Martin-Quinn scores are estimated using a dynamic item response theory model which models every imaginable combination of Supreme Court justices' preferences that could explain the pattern of cases over their study period of time.

[343] *Id. at* 139

That conclusion is further buttressed by Figure 4, which provides a measure of distance between Court concurrences and majority opinions. It measures the distance between a concurring author's Martin-Quinn score and the position of the majority opinion. The latter is measured using the mean of the scores of all of the justices joining the majority opinion, a measure which, as discussed below, was shown by Jacobi and Sag to be the best score of case outcome measures based on the standard models of judicial behavior.[344]

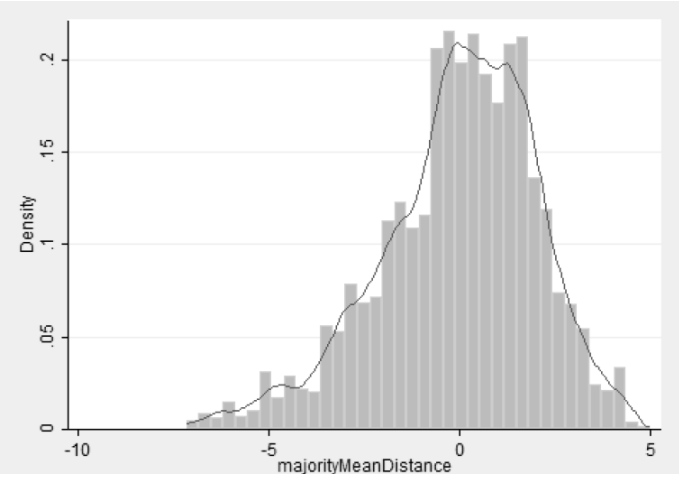


Figure 4: Density Distribution of Distance of Concurrences from the Mean of the Majority Coalition

Despite the slight skew toward concurrences by moderate conservatives, it is clear from Figure 4 that the most common distance between a concurring justice and the majority coalition clusters around zero. That means that most concurring justices' ideological positions are not far from the majority coalitions in those cases in which they concur. A large proportion of concurrences are written by justices whose preferences are very close to those espoused by the majority coalition, suggesting that concurrences arising from indifference are likely. The alternative of simply not joining or authoring an opinion then, given this indifference and the cost of opinion writing[345], would then presumably be attractive in a significant number of cases for these justices, but for the explanation we provide below.

Our final empirical test is informative on the question of both whether indifference and alienation can arise in the judicial context. It examines whether the results illustrated in Figures 3 and 4 were not simply aggregation effects created by looking at the patterns of justices' positioning on the Supreme Court. Models

[344] Tonja Jacobi & Matthew Sag, *Taking the Measure of Ideology: Empirically Measuring Supreme Court Cases* 98 Geo. L.J. 1 (2009) (showing that the mean or median of the Court majority coalition best captures case outcomes, as compared to the median of the Court or the "last justice in" to the coalition); see Part IV.B, *infra*.

[345] Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everyone Else Does)* 3 Supreme Court Economic Review 1 (1993) (arguing opinion writing is time-consuming and rational judges will try to minimize the effort).

of the incentive to abstain suggest that indifference will arise when voters cluster in factions on either side of the essentially indifferent, moderate voters, and that alienation will arise when individual voters are far from the majority position.

Figure 5 illustrates how often such clustering will occur.

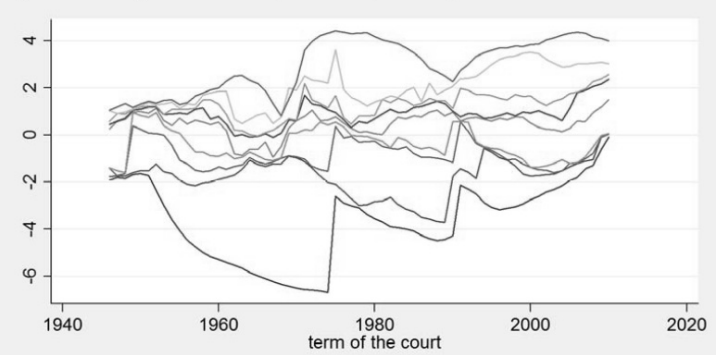


Figure 5A: Supreme Court justices by ideological "slot"

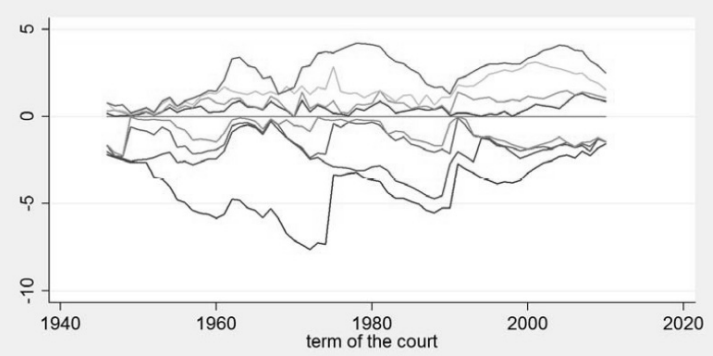


Figure 5B: Supreme Court justices by ideological "slot" relative to J5

Figure 5: Distribution of Supreme Court Justices, by Ideological Position, over Time

To examine the relative ideological positions of justices over a period of decades, we treat each justice as taking an ideological "slot", such that J1 is the most liberal justice at any time and J9 is the most conservative. The lines in the graph are not fixed to a particular justice, so if a justice's relative position within the Court changes, then that justice will jump to a different line. In the case of inter-Term replacements, the scores of the outgoing and incoming justices are averaged for that Term. Figure 5A shows the raw scores of each justice-slot, Figure 5B normalizes by the median justice, J5.

In terms of the indifference incentive to abstain, we see clear periods characterized by clustering of the type discussed that would create indifference for the median justice, J5. For instance, under the current Court, there is an evident cluster of four liberal justices, two moderately conservative justices and two strongly conservative justices, with both factions centering around the median, Justice Kennedy. Similarly, in the 1980s,

there were clearly groups consisting of one side of two liberal justices and two moderate liberal justices, and on the other side four moderate conservative justices and one more conservative justice. These patterns, which lasted for years, would often create the incentive to abstain due to indifference.

In terms of alienation, there are stark instances where at least one justice is so far from the rest of the Supreme Court that abstention may be preferable to voting for any likely plurality or majority, even if doing so would marginally tilt the outcome toward the justice's preferences. For instance, between the late 1950s and the 1970s, Justice Douglas, whose position can be seen secluded in the lower segment of the graph, was clearly isolated from the rest of the Court, even though the majority of the Court was liberal (below zero). In other periods, either individuals or pairs of justices were full standard deviations from the mainstream of the court, such as Justice Thomas on the far right (top) in the 2000s. This analysis is more individualized than the aggregate evidence above of the incentive to abstain due to indifference, but the nature of the alienation theory is rather idiosyncratic: that a voter considers an outcome "too far" from his or her preferences, even if an improvement on the alternative.

This section has shown that the conditions under which one might expect judicial abstention have occurred not infrequently often in the last 60 years, and so the failure to witness any abstention on the Court constitutes an empirical and theoretical puzzle. The next Part provides a novel explanation as to why, despite these ripe conditions, judicial abstention has not been observed.

5. A POLITICAL THEORY OF NON-ABSTENTION IN THE JUDICIAL CONTEXT

In this Part, we develop a model of judicial institutional incentives for full participation. Our explanation of full participation among justices is that there are two judicial institutions that have the effect of encouraging full participation. First, *stare decisis* makes the resolution of future cases in part dependent on the resolution of present ones. This creates interdependence among cases and raises the cost of abstention, particularly to risk-averse judges. Put differently, although a judge may conceivably be indifferent about the outcome of a given case, she is less likely to be indifferent about all future related cases, the outcomes of which are in part a function of the present case. (This is akin to the log-rolling account of non-abstention in Congress – the current vote is linked to another vote, but without trading between voters.) Second, abstention is also discouraged by the *Marks* doctrine – in which later courts adopt as precedent the opinion in an earlier case that is decided on the narrowest grounds, when a single rationale does not command a majority in the earlier case and the latter court has to choose between two or more plurality or concurring opinions. This rule-determination doctrine reinforces the logic of the median voter result in cases presenting more than two options, and thus encourages full participation. Together, these two institutional incentives make voting by otherwise indifferent or alienated justices rational, where it otherwise would not be.

5.1. Stare Decisis

Stare decisis is the first reason the judicial context has lower incentives for abstention. Unlike other voting groups, the Supreme Court is at least presumptively bound to adhere to its own previous decisions. Although the Court can in theory overrule or disregard its own precedents, doing so imposes significant costs, including destabilizing legal doctrine, and compromising the Court's prestige. Thus adjudication is path-dependent to a significant degree.

In such a system, abstention creates unique problems. Imagine an issue where four justices favor one extreme outcome, three favor an opposite extreme alternative, and two cannot decide between the rival camps. We can imagine that this situation arose quite frequently in the Rehnquist Court era, where there were four consistently liberally voting justices, three consistently conservatively voting justices, and two justices at the center who switched back and forth as to who was the median Justice[346]. Figure 6 illustrates such a scenario which arose in the 2004 Term, displaying the relative positions of the justices at that time using Martin-Quinn scores of judicial ideology.

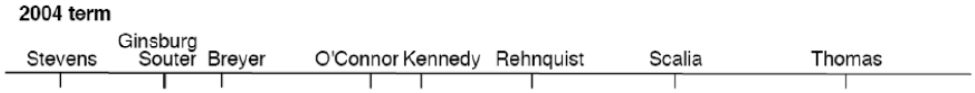


Figure 6: Martin-Quinn Scores of Judicial Preferences in the 2004 Term

If the justices can develop a policy outcome at any point, and care only about outcome positions[347], then the median voter theorem predicts that both camps, perhaps at conference after argument, would moderate their positions until they win the votes of the median justice. However, opinions cannot always be written to fully reflect the preferences of the median voter, for a number of reasons. First, justices may be "bonded" by prior opinions in a way that prevents them from adopting positions far from their previously stated ones.

Substantial deviations from prior positions lead to accusations of partisanship or ad hoc rationalizations, which could potentially damage judicial reputations. (This is one reason justices attempt to distinguish inconsistent precedents.) Furthermore, dichotomous outcomes result in discontinuities in the policy space, and thus it may be impossible to craft a compromise position that is close enough to the median's ideal point. Second, both linguistic and doctrinal constraints may prevent the justices from crafting a doctrine that fully reflects the median's preferences, both because language is discontinuous, and because some preferences if expressed as law would harm the credibility or legitimacy of the courts – for example, a preference to discriminate against a particular group of litigants[348]. So one can imagine a situation where after all adjustments towards the median are made, neither side has picked up the votes of the moderates, who remain in the zone of indifference.

Thus if policy outcomes are always continuous and can be precisely refined such that the median always gets her exact preferences, she will never be indifferent. But otherwise, median justices will sometimes be indifferent. Nonetheless, we argue that moderate justices, unlike other professional moderate voters, will *not* abstain even when indifferent, because of *stare decisis*.

[346] *See* Epstein and Jacobi, *Super Medians*, 61 Stanford Law Review 37 (2008) (detailing how justices O'Connor and Kennedy each held the position of the median court throughout the Rehnquist court era, though with Justice O'Connor more often been the median Justice).

[347] If justices care about norms of collegiality and consensus building, this conclusion does not always hold. *See* Tonja Jacobi, *Competing Theories of Coalition Formation and Case Outcome Determination,* Journal of Legal Analysis 411 (2009) – discussed further *infra*.

[348] *See* Tonja Jacobi and Emerson Tiller, *Legal Doctrine and Political Control*, 23 Journal of Law, Economics and Organization 326 (2007).

In Figure 6, if both moderates elected to abstain, the four liberal justices would propose a case outcome that would triumph over one proposed by the three conservative justices. The moderate justices could expect that in the future, new cases would come before the Court that raise similar issues in a slightly different factual context. Even a small difference could be enough that on this set of facts the moderates who were indifferent in the previous case may now prefer an outcome closer to the conservatives' ideal points than the liberals' ideal points. A moderate member of Congress would be free to vote contrary to the prior ruling; but for a justice, to do so would require escaping the precedent established in the previous case.

This can be seen in Figure 7, which provides a starker version of the Rehnquist Court as illustrated in Figure 6.

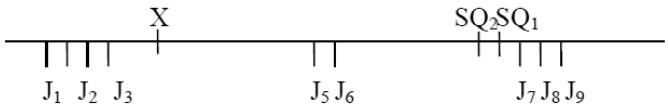


Figure 7: The Effect of Stare Decisis

When facing an initial case, represented by SQ1, both moderate justices, J5 and J6 are indifferent between maintaining the status quo and the proposed liberal policy X (this arises either if J5 and J6 are identically positioned or if there is again uncertainty around a given SQ or X, as discussed above). But even a minor difference in the facts of the subsequent case, represented by SQ2, can change the equation, such that both moderate justices would prefer to vote to maintain SQ2 than to adopt policy X again. But stare decisis makes it difficult for the moderate justices to change their position once X becomes precedent.

The dilemma for the moderate justices if they have abstained in the initial case is made worse by the fact that not only would they be allowing a very small difference between two sets of case facts, SQ1 and SQ2, to dictate highly divergent policy outcomes, X versus SQ2, the move in policy outcomes would be in the opposite direction to that anticipated by doctrine. That is, it is not just the divergence between the size of the changing case facts and the change in policy outcome, but also its direction. A small move to the *left* in case facts, from SQ1 to SQ2, would result in a large move to the *right* in the case determinations, from X to SQ2.

Given the legitimacy concerns of having such a lack of expected correlation between both the size of any shift in Court position and the size of the difference between cases, as well as the perverse direction of such a Court shift, we can expect that the Court moderates would prefer to vote according to how they expect future cases to lie, rather than to abstain.

The quandary for the potentially abstaining justice does not only arise in the scenario where the justices are arrayed in groups of four liberals, two moderates and three conservatives (or vice versa). A moderate justice could find herself in a similar predicament even where she is the sole median: if there are clusters of justices to either side of her and one of those justices recuses herself. Then, the array of justices in a 3-1-4 formation, or vice versa, raises exactly the same conundrum for the sole moderate justice – even if those groups of justices are not tightly clustered. The difficulty even arises where there are a cluster of *moderate* justices – e.g. an array of 2-4-3, such as in the 1991 Term, where Justices

White, Souter, Kennedy and O'Connor clustered at the middle of the Court, with Justices Stevens and Blackmun on the left and Chief Justice Rehnquist and Justices Scalia and Thomas on the right – as long as there is the above-mentioned uncertainty about the impact of case outcomes. As we saw in our empirical assessment in Part 4 above, these scenarios arise quite not infrequently.

This just leaves one major category: where the justices are arrayed, however loosely, in a 4-1-4 formation. Then, if the median justice is indifferent, *stare decisis* alone will not discourage abstention based on indifference, because any group of four justices will not form a binding precedent that will tie the hands of the moderate justice in future cases. Nonetheless, we argue that in such a scenario, the median will still not abstain, but for a different reason: due to the *Marks* doctrine, as discussed in the next section.

5.2. The *Marks* Doctrine

This section shows how the ability of the moderate justices to write separate opinions, along with the Court's *Marks* doctrine, ensures that the median justice will, in subsequent cases, be able to entrench her position as the holding of the Court. This gives moderate justices an incentive to participate in the current case by writing an opinion at their own ideal points instead of abstaining, even when they are indifferent.

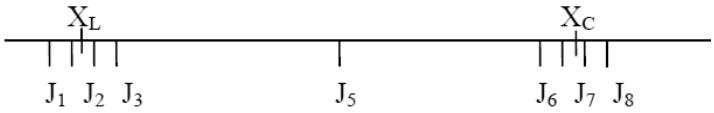


Figure 8: The Effect of the *Marks* Doctrine

Figure 8 displays a variation of Figure 7 above; now the sole median justice, J5, is indifferent between two proposed policy outcomes, XL and XC. Any other professional voter, such as a legislator, may well abstain in the scenario illustrated in Figure 8 because, as discussed, there may be costs to legislators in voting against either group, and nothing to gain, since the voter is indifferent, as experience in Congress confirms. But a justice in the position of J5 has an incentive not to abstain. The *Marks* doctrine holds that in any case where there is not a majority of justices endorsing a given position, it is the narrowest concurring opinion that is binding on subsequent courts.[349]

The effect of the *Marks* doctrine is to create an incentive to write narrow opinions, rather than to either abstain or to join a broad opinion. Abstaining will allow another concurring opinion to create binding precedent, so even if a justice is indifferent on the current case facts, she will nonetheless have an incentive to write an opinion, for the reasons discussed in Part 5.1, above, in relation to *stare decisis*. And since a broad opinion will have no binding effect, whereas narrowing that opinion may subsequently win the day, there is no incentive to join a broad opinion.

The logic of this rule suggests that plurality opinions should have no binding impact whatsoever. If every justice has

[349] *Marks v. United States* 430 U.S. 188, 193 (1977) ("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…", citing the opinion of Justices Stewart, Powell and Stevens in *Gregg v. Georgia*).

an incentive to write an opinion marginally narrower than every other opinion concurring in the outcome, then ultimately all of the opinions should collapse down to zero.[350] But there are two reasons why the process may not unravel entirely. First, the present case may have great salience for at least one justice. This effect is the reverse of the alienation effect discussed above: the justice may care strongly enough about the outcome in a given case that she is less concerned with subsequent precedent than the current outcome.[351] Second, what constitutes the narrowest opinion is something determined by subsequent courts, courts that are most probably going to be dominated by the median justice.

As such, the *Marks* doctrine empowers the median justice: either the fractured opinion has no effect, or else the subsequent median gets to determine which judgment in the previous case was the most narrow and thus binding. As such, an indifferent justice in the position of J5 has an incentive to write a narrow opinion at her ideal point, rather than abstaining.[352]

The *Marks* doctrine explains why the alienation incentive for abstention does not apply in the judicial context and stare decisis explains why the indifference incentive for abstention does not apply in the judicial context. But these two explanations are not entirely separate: they are both forms of decisional interdependence which renders judicial decision-making different to decision-making on other multiple-voter panels. Judicial decisions form part of a whole fabric, such that each case has effects beyond the immediate outcome. This institutional effect changes the costs and benefits flowing from each case, and so alters the incentives of a potentially indifferent or alienated jurist away from abstention. The next Part considers some complicating factors.

6. The Role of Opinion Writing

Although much empirical legal scholarship looks only at judicial voting, most conceptions of judicial role expect judicial opinion writing, or some other form of reason giving. Most conceptions of judicial duty – particularly for higher court judges – goes beyond casting votes to resolve specific factual disputes, and anticipates justices will provide elucidation of the law. This Part considers how opinion writing affects the incentives to abstain in the judicial context.

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[350] *See* Chad Westerland, *Who Owns the Majority Opinion? An Examination of Policy-Making on the U.S. Supreme Court*, Annual Meeting of the American Political Science Association (Working Paper) (2003) at 19-20.

[351] In fact, the dominant database upon which most judicial analysis is traditionally been based, Spaeth's Supreme Court judicial database, implicitly assumes this effect in cases generally. It categorizes outcomes based not on doctrine developed in the case, but based on success of individual litigants before the Court, and proof of the influence of judicial ideology has been based on showing the correlation between the liberalness or conservativeness of those outcomes and indicia of pre-existing judicial preferences. *See* The Original U.S. Supreme Court Judicial Database, *available at* The Judicial Research Initiative website, http://www.cas.sc.edu/poli/juri/sctdata.htm (last visited Aug. 19, 2012); *see also* Harold J. Spaeth, The Original United States Supreme Court Judicial Database 1953-2003 Terms Documentation (2005). The general database is available at the Judicial Research Initiative website http://www.cas.sc.edu/poli/juri/sctdata.htm. For criticism of this approach, see Matthew Sag, Tonja Jacobi and Maxim Sytch, *Ideology and Exceptionalism in Intellectual Property – An Empirical Study* 97 CAL. L. REV. 801: 856 (2009).

[352] One might argue that a narrow, fact-specific opinion, or balancing analysis is functionally equivalent to abstention. However, such behavior should not be considered as abstention any more than one would consider voting for a bland, moderate candidate in party primaries an abstention. Moreover, the *Marks* doctrine can make such narrow opinions the ultimate holding of the case, an effect quite unlike abstention.

6.1. An Alternative Form of Abstention: Concurrences without an Opinion

Although justices never abstain from voting, they have been known to abstain in terms of opinion writing when they "concur in result" rather than the judgment of the Court, but without writing a separate opinion. Such silent concurrences provide a vote for the outcome endorsed by the majority, but refuse to sign onto any existing opinion or to provide an opinion of her own.[353] Such concurrences are uncommon across the Supreme Court's history, but may have been somewhat more common in the early and mid-20th century.[354] The practice certainly seems more common, and less controversial, than fullblown abstention.

To understand why concurrences without an opinion provide an alternative mechanism of abstention that does not raise the difficulties created by *stare decisis* and the *Marks* doctrine, it is helpful to borrow from the model of judicial learning provided by Scott Baker and Claudio Mezzetti.[355] Baker and Mezzetti model judicial learning and doctrinal evolution where sincere judges attempt to hone in on an exogenous optimal threshold between dichotomous outcomes – such as liability and non-liability – that they can only estimate through deciding a series of cases.[356]

Figure 9 illustrates their model.

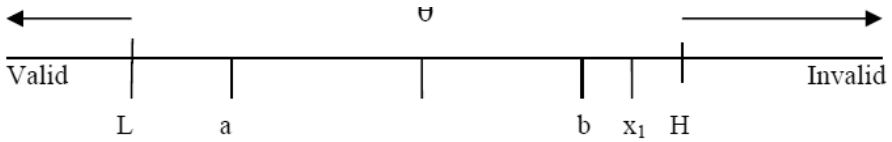

Figure 9: A Model of Doctrinal Development, *Marks* and Concurrences in Result Only

The optimal threshold between validity and invalidity is set by some exogenous point, O. Prior doctrine establishes high and low bounds, H and L respectively, which translate into settled rules: cases the left of L will be valid, cases to the right of H will be invalid. When new cases arise, such as x1, the justices can assess whether each case is to the right or left of O, even though they do not know the exact position of O. This sets the new L or H – in the scenario illustrated, the case resolution sets a new H, since x1 is to the right of O.

[353] See, e.g., Board of Directors of Rotary Intern. v. Rotary Club of Duarte, 481 U.S. 537, 550 (1987) (Scalia); Hayman v. United States, 342 U.S. 205, 224 (1951) (two justices concurring without opinion); Lau v. Nichols, 414 U.S. 563 (1974) (White); Gardner v. Broderick, 392 U.S. 273 (1968) (Black); Brown v. New Jersey, 175 U.S. 172 (1899) (Harlan); Trono v. United States, 199 U.S. 521(1905) (Holmes); Prigg v. Pennsylvania, 16 Pet. 539 (U. S. 1842).

[354] Paul H. Edelman & and Suzanna Sherry, *All or Nothing: Explaining The Size of Supreme Court Majorities,* 8 N.C. L. Rev. 1225. 1244 (2000).

[355] Scott Baker and Claudio Mezzetti, *A Theory of Rational Jurisprudence* (October 15, 2010). Washington University in St. Louis Legal Studies Research Paper No. 10-10-07. Available at SSRN: http://ssrn.com/abstract=1697622 or http://dx.doi.org/10.2139/ssrn.1697622; see also Anthony Niblett, *Case-by-Case Adjudication and the Path of the Law*, 42 Journal of Legal Studies (forthcoming 2013).

[356] This starkly contrasts with models of doctrine which contemplate doctrine as a defined central interval, with uncertain ranges to either extreme. See McNollgast, *Politics and the Courts: a Positive Theory of Judicial Doctrine and the Rule of Law*, 68 Southern California Law Review 1631 (1995). Whereas McNollgast are modeling doctrine in terms of tolerance of lower court disobedience, Baker and Mezzetti are concerned with doctrine as gradually narrowing uncertainty as to where inherent thresholds actually lie, without considering enforceability.

According to Baker and Mezzetti, the justices are not limited to articulating only the ruling that all future cases to the right of x1 are now known to be invalid. Instead, they can also define a holding that defines b, a broader holding of the new threshold H, which is closer to O than x1 is.[357]

This model is helpful for thinking about not only doctrinal development, but opinion writing more generally, and the difference between narrow rulings – such as is encouraged by the *Marks* doctrine – and concurrences in result only. The effect of *Marks* is to encourage the range (x1 – b) to be very narrow. In contrast, concurring in result only is the equivalent to agreeing that x1 constitutes the new H, but refusing to define the range (x1 – b). It is the judicial version of saying "I'm not telling."

Concurrences in result only cannot be taken to imply that (x1 – b) = 0. A justice may wish to say (x1 – b) = 0 for two reasons: either because x1 = O, and there is no room to the left of x1 in which to define a further range of invalidity; or because the justice knows that x1 < H, but lacks enough additional information about O to define b < H with confidence that b > O. In either case, a simple concurrence would provide this explanation. A concurrence in result only, in contrast, may arise for either of these reasons, but it does not necessarily imply either of these motivations. It constitutes a refusal to define (x1 – b), without explaining whether this is because of the expected relationship between b and

O, the justice's uncertainty, or any other reason.

In the common law system, judges are expected to do more than simply adjudicate specific factual disputes, they are expected to elucidate the law because that process of elucidation is meant to gradually reduce uncertainty as to the law, as more terrain is gradually demarcated, which in turn reduces the need for future litigation. A concurrence in the result only undermine this judicial role in a way that the *Marks* doctrine does not, and for this reason it is a type of judicial abstention. As Baker and Mezzetti point out, increasing the range between H and b reduces litigation costs, by resolving more previously unanswered questions of law, but it also increases the probability of some cases having been put on the wrong side of the threshold – that is, judicial error costs. *Marks* discourages this reduction of future litigation costs, but encourages minimization of error costs. In contrast, concurrences in the result do nothing to reduce future litigation costs, since they do not define b < H, but they also do not reduce error costs either, since they provide no information of the justice's view of where b lies. As such, concurrences in the result can be seen as a form of judicial abstention from the part of the job involving articulations of the law beyond case results. The existence of such partial abstentions provides further evidence that the incentive for judicial abstention arises significantly often.

Opinion writing, however, is not immune from institutional judicial incentives against abstention. The next section shows how coalition formation around opinion-writing reinforces our two previously specified institutional incentives against abstention in the judicial context.

6.2 Further incentive against abstention: Shaping the coalition opinion

This section shows how the nature of judicial coalition formation amplifies the

[357] In addition, justices can provide dicta that re-estimates L at the point a, although this can be somewhat unreliable. This can be ignored for our purposes.

incentive that stare decisis provides away from abstention and toward joining majority coalitions, by requiring consistency of justices, creating an incentive not only in future cases but even when considering only the current case.

Prior work on judicial coalition formation shows that the outcome agreed upon by a majority – the position taken in the majority opinion – will reflect the average preferences of the majority coalition. Jacobi showed theoretically[358], and Westerland[359] and Jacobi and Sag[360] showed empirically, that of various competing models, the mean or median of the coalition best captures majority opinion outcomes. If this is the case, then, this will further strengthen the impact of *stare decisis* in discouraging abstention due to judicial indifference.

In Part 3.1 we showed that while a moderate justice Ji may be indifferent between case outcome X and SQ1, a future status quo even slightly closer to Ji's preferences than SQ1, such as SQ2, will make Ji cease to be indifferent in the current case. However, Figure 10 illustrates how, if the outcome X is an endogenous product of negotiations among the majority coalition, then by joining that coalition, Ji can move X closer to her preferences, and Ji will cease to be indifferent.

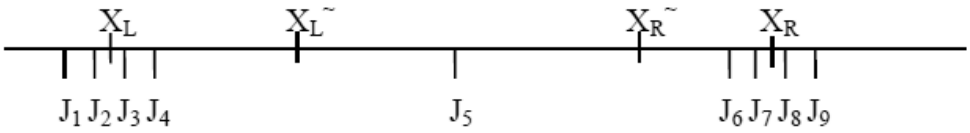

Figure 10: The effect on the outcome of joining the majority coalition

Figure 10 illustrates a scenario as in Figures 7 and 8 above, except now instead of simply weighing two proposed policy outcomes, XL and XC, we consider X to be an endogenous product of the two potential majorities that J5 can help constitute, a liberal or a conservative five justice majority. If J5 joins with the liberal justices, then the equilibrium outcome will not be XL but rather XL~, the mean of the liberal majority coalition; conversely, if J5 joins with the conservative justices, then the outcome will not be XR but rather XR~. Even if, as depicted in Figure 10, J5 is still indifferent as between XL~ andXR~, J5 will nevertheless have a strong incentive not to abstain, as now the simple fact of joining a majority reduces the distance between the outcome and her own preferences considerably, from J5 – XL to J5 – XL~, or the equivalent on the right.

The literature on this topic is ambivalent as to whether the majority outcome will reflect the mean or the median of the majority coalition. If the latter, then the reduction in the distance will only be from J5 – (J3 – J2)/2 to J5 – J2, or the equivalent on the right – that is from the median of the four person plurality to the median of the five person majority. But either way, the shift will be consistently toward the swing justice's preferences, and thus will constitute a consistent incentive against abstention.[361]

This coalition-shaping incentive away from abstention is uniquely stringent in the judicial context. In the legislative context, the outcome of each case can be

[358] Jacobi, *supra* note 14.

[359] Westerland, *supra* note 18.

[360] Jacobi and Sag, *supra* note 10.

[361] The scenario discussed here shows why the mean of the majority coalition is more likely to apply: as the pivotal justice J5 has a credible threat to join a coalition with either the left four justices or the right four justices, and thus she is likely to be able to move the majority coalition far closer to her preferences than the median of the coalition – see Jacobi, *supra* note 14.

expected to more consistently reflect the preferences of the pivotal voter, as the median voter theorem predicts. If a coalition forms around an alternative outcome, the median legislator can threaten any action, including voting with the opposition, in order to achieve an outcome that reflects her own exact ideal point. But unlike legislators, justices are bound by a norm of internal consistency of their decisions and reasoning, and so while she may be able to threaten to switch sides, there are limits on the extent to which a pivotal justice can threaten to vote in a manner inconsistent with her past record or her intended future actions. Consequently, the median on the Court can move an outcome X toward her preferences by joining a coalition, but she does not always have the capacity to hold aut for her absolute ideal.[362]

Since the act of joining will draw the majority outcome from XL to XL~, abstaining will be strictly dominated by joining, but the potentially abstaining justice has the choice not only to join or abstain, but also to concur at her ideal point, J5, leveraging the effect of *Marks*. However, such a possibility must be discounted probabilistically, since her concurrence may not be adopted as the narrowest and thus determinative position in future cases. Thus the potentially abstaining justice must weigh the certain benefit of joining the majority and entrenching XL~ in lieu of XL, as against the preferred but uncertain achievement of an opinion at her exact ideal point, J5. The outcome of this equation will depend on the justice's expectation of the distribution of future cases and her expectation of being the median of the Court in future cases, and so to be able to expansively interpret her own concurrence. But either outcome strictly dominates abstention.

Conclusion

A natural response to the question of why judges always vote rather than abstain is to say that abstention is simply not consistent with the judicial role. This is an incomplete response, not only because it relies on an essentialist notion of judging, but because abstention by indifference is extremely likely, given the fact that the costs of litigation, along with the structure of the appellate system, creates an case selection mechanism favoring extremely close, 50:50 cases coming to court.[363] Our theory, based on incentives created by unique judicial institutions, provides an additional rational choice perspective on *why* it is not of the nature of judging to abstain: judging is different from legislative policymaking due to the interdependence of cases, in contrast to the freedom of legislative idiosyncrasy.

Stare decisis and *Marks* are both mechanisms by which cases are made interdependent. They are mutually reinforcing in that both constitute institutional interdependence mechanisms that push judges away from abstention. Case independence draws in future benefits and costs into the judicial utility equation, making indifference or alienation in the current case likely to be outweighed by the opportunity to shape future doctrine in addition to the present determination.

Nevertheless, those two interdependence mechanisms can conflict when an

[362] This constraint is not unknown in the legislative context: as discussed above, the alienation theory stems from the recognition that sometimes a voter would rather abstain as a means of objecting to an outcome very distant from her own preferences, even if joining may result in a marginally better outcome. But in the judicial context, this constitutes a norm reflecting more than simply pique but rather an expectation of consistency in principle.

[363] George L. Priest and Benjamin Klein, *The Selection of Disputes for Litigation* 13 Journal of Legal Studies 1 (1984).

otherwise indifferent justice weighs the advantages of joining or concurring. *Stare decisis* makes the value of drawing a majority opinion closer to the median's own preferences by joining appealing, but *Marks* means concurring at the median's ideal point lays the groundwork for the median to get her ideal in future. This conflict explains why we see the one form of semi-abstention that we do: concurrences in the result without opinion. Otherwise, judicial abstention simply does not occur, even though we have shown that the conditions for abstention – indifference and alienation – arise regularly before the Supreme Court, and it is reasonable to expect similar results for other courts.

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