ARTICLE IN PRESS

Why judges always vote☆

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ARTICLE INFO

ABSTRACT

This paper provides the first account of the practice of universal voting on the Supreme Court – that is, why justices never abstain, unlike voters in other committee contexts. 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. Although these explanations may not exhaust the multi-causal factors behind the robust phenomenon of zero abstention, they are the first attempt to rigorously analyze how two unique institutional judicial rules mitigate the incentive to abstain.

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1. Introduction

United States Supreme Court justices always vote. It is almost unheard of for justices to abstain, or to cast the judicial equivalent of a blank ballot by neither joining nor writing an opinion. There also appear to be no voluntary abstentions on merits votes in the U.S. Supreme Court or the federal Courts of Appeals.[1] The courts' record of non-abstention is so absolute that full voting is generally taken for granted as "natural." There is no reference to such conduct in the extensive secondary literature on the federal courts.

Yet one should not mistake the familiar for the inevitable. Judges have expressed difficulty in making determinations in close cases,[2] and have occasionally filed opinions labeled "dubitante," indicating that they were highly unsure which side to take, but voted anyway (Czarnezki, 2006).

Abstention by professional voters is well documented in Congress, federal adjudicative boards, administrative tribunals, and local government agencies. Furthermore, 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 institutional explanations, focusing on factors that distinguish the judiciary from other professional voting bodies.

In other voting contexts, voter indifference or alienation is credited with driving abstention. With the American judiciary, certain institutional features produce countervailing incentives for

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☆ This article has benefited from comments by William Fletcher, George Triantis, William Landes, Richard Posner, Lee Epstein, and particularly Maxwell Stearns. Current draft: Nov. 28, 2013.

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[1] 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 handful of abstentions we could identify was 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). Nor is there evidence of abstention by state Supreme Court judges, with the exception of a handful of few particular cases involving a procedural issue. See Doll v. Major Muffler Centers, Inc., 208 Mont. 401 (1984).

[2] See e.g., Dillard v. Musgrove, 838 So.2d 26, (Miss. 2003) (Waller, concurring); *Association for Molecular Pathology v. Myriad Genetics, Inc.*, 132 S. Ct. 2107 (2013) (Scalia, J, concurring).

otherwise indifferent judges to vote. 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.[3]

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, and the phenomenon in legislatures and other standing committees has recently received attention, including both empirical studies (Noury, 2004; Cohen and Noll, 1991) and formal models (Morton and Tyran, 2008). A separate literature studies judicial behavior, yet it has not addressed the question of *why* judges always vote. Indeed, in standard accounts of judicial voting, the decision to vote is treated as exogenous (Segal and Spaeth, 2002; Stearns, 2000; DuBois and DuBois, 1980).

No doubt social norms among judges also contribute to full participation. Abstention may not be seen as a permissible voting option.[4] Yet even the most robust communal mores do not enjoy perfect compliance over a large number of cases. Moreover, this norm is not only unwritten, but unlike many other practices and conventions of the courts, is scarcely mentioned in the literature. Collegial disapproval may discourage abstention, but pointing to norms is an incomplete answer given the complete lack of abstention observed. Attributing judicial full participation solely to social norms leaves open the question of *why* such a norm exists. The mechanisms described below may actually help give rise to such norms, by encouraging a high rate of participation. This tendency toward participation can develop into a social norm as behavioral regularities become self-reinforcing. Sociologists have found that "whatever the reason for the initial action, when . . . people engage in the same behavior, that behavior comes to be associated with a sense of oughtness" (Horne, 2001). Thus the analysis here is fully consistent with judges not voting out of a sense of professional obligation.

Ultimately, such a robust phenomenon has multiple contributing causes. It is not possible to attribute causal weight to the mechanisms promoting non-abstention that we identify. We do not claim to provide an exhaustive account of the reasons for such a norm. Social norms and concerns about public perceptions of abstention may well salient factors. However, the mechanisms that we describe are not only consistent with the full judicial participation norm, crucially, that they are *absent* from other institutions that *lack* full participation.

Abstention in other voting contexts has received considerable attention. Understanding the lack of it on the court helps deepen our understanding of its occurrence in other contexts. More concretely, judicial full participation is something that is valued, as the various foreign statutes requiring it indicate. Thus there is potential utility in examining the institutional mechanisms that tend to promote full participation.

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. Nevertheless, the discussion is mostly generalizable to any collegial courts with more than three judges. However, 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.

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 (Black and Epstein, 2005). These are not forms of abstention in the sense we seek to study. 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).[5] 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. 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 could disguise themselves as conflict or health recusals. Yet in the abundant literature on the courts there has been no suggestion of such artifice. 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 is indicated by the judicial codes and constitutions of many European countries 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, anti-abstention rules are quite common. Bulgaria, Belarus, Bosnia, Slovenia, Romania, Russia Hungary, and Lithuania all have legal provisions requiring voting at least on the constitutional court and sometimes more generally. The Italian Constitutional Court's rule 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.[6]

Such rules are also seen in treaties organizing international courts,[7] where judges have noted that they are only voting because of the mandate of the rule.[8] The need for such provisions suggests that judicial abstention was a potential concern for the drafters.

Abstention is also frequent in other professional voting contexts. U.S. legislators regularly fail to attend votes, and often vote "abstain" when present. In a non-trivial number of votes, these abstentions affect outcomes (Rothenberg and Sanders, 1999; Cohen

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[3] Marks v. United States 430 U.S. 188, 193 (1977).
[4] See e.g., Johnson v. Johnson, 204 N.J. 529, 552 (N.J. 2010).

[5] Arnold v. Eastern Air Lines, Inc., 712 F.2d 899 (4th Cir.1983) (concurring op.) (en banc).
[6] Corte Costituzionale, *How the Court Works*, http://www.cortecostituzionale.it/versioni_in_lingua/eng/lacortecostituzionale/cosaelacorte/pag_39.asp.
[7] Compare International Court of Justice, Resolution Concerning the Internal Judicial Practice of the Court, Art. 8(v).
[8] Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 373 (Declaration of Judge Herczegh).

and Noll, 1991). 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" (Rothenberg and Sanders, 1999). Indeed, the U.S. Constitution anticipated sufficiently widespread strategic non-participation by members of Congress that it includes a provision to deal with the possibility.[9] Members of federal regulatory commissions with adjudicatory functions also regularly abstain (Cannon, 1969). All of this highlights the peculiarity of full participation among judges.

2.3.   Implications from explanations of legislative abstention

The theoretical and empirical literatures suggest several factors that would lead to less abstention among judges than among legislators. First, the value of being the pivotal voter is considered paramount. In the classic rational choice model of Downs (1957) formalized by Riker and Odreshook (1968) abstention is expected to be negatively correlated with the chance of casting the pivotal vote. 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 higher participation among judges than among legislators. However, the empirical studies of abstention present conflicting evidence on the centrality of this institutional factor: for instance, Rothenberg and Sander find that the likelihood of a legislator abstaining is unrelated to success margins.

Second, a factor promoting participation in legislatures and other committees, developed particularly by Cohen and Noll, 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 (Perry, 1991; Epstein and Knight, 1998). There may be implicit mutual deference among justices, but this will be weaker than legislative logrolling because of the inability to combine unrelated issues in a given case the way one can in a legislative package. Consequently, this second incentive for legislative voting is arguably weaker in the judicial context.

Third, the importance of external benefits may be lower for judges. 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 books, one might expect 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 establishes a track record that has the potential to be 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. But 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.

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 applies less to judges, and so allows for more incentive to abstain. Justices face lower opportunity and career costs to voting, which cuts against the judicial incentive to abstain.
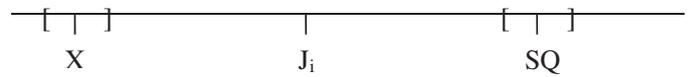

Fig. 1. Abstention arising from indifference.

2.4.   Potential legal explanations and their limits

The game theoretic mechanisms we identify in Parts 3–6 as reinforcing non-abstention do not exhaust the reasons for non-abstention. The complete absence of abstention suggests it is over-determined. Before turning to the rational choice mechanisms, we discuss two procedural mechanisms that might also discourage abstention. Neither provides a comprehensive explanation of judicial abstention, however they may contribute to it.

2.4.1.   Certiorari
One might think that the *certiorari* process, whereby positive votes by only 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 place? Furthermore, certiorari prevents organized abstention designed to defeat a quorum of the kind the U.S. Constitution's Attendance Clause addresses. Because the Court has the unusually high two-thirds supermajority quorum rule, and assuming the four justices who grant cert all subsequently vote, it would require abstention by an extraordinary 80% of the remaining justices to defeat a quorum.

Yet there are two reasons why certiorari is unlikely to be a complete explanation for judicial non-abstention. First, 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, cases granted cert would be the hardest for at least the median justice to decide, making abstention more likely.

2.4.2.   Tie avoidance
Abstention increases the probability of an evenly-divided court, a result that many judges and scholars regard as embarrassing and inefficient, complicating the law more than clarifying it. Yet a study of discretionary recusal – those voluntary recusals arising due to a perceived or potential conflict of interest but which fall within a broad gray area of the jurist's personal discretion – shows that justices do not appear to avoid such recusals because of a concern about tie-avoidance (Black and Epstein, 2005). Discretionary recusals do not increase the likelihood of ties. This suggests that tie-avoidance would also not discourage abstention.

Like the legislative literature, these two legal institutions have ambiguous implications for judicial abstention. While certiorari and tie avoidance may contribute to the tendency of judges not to abstain, neither seems capable of providing a comprehensive explanation. We now turn to whether existing political theory explanations of abstention in other contexts apply in the judicial context – and so consider whether the incentive to abstain is likely to arise for judges.

3.   Political theory explanations of abstention in non-judicial contexts

In spatial models of voting, abstention results from voters being indifferent or alienated (Hinich and Ordeshook, 1969; Plane and Gershtenson, 2004). This Part describes those two accounts of abstention in the non-judicial context. We then consider whether those theories apply to the judicial context.

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[9]   U.S. Const. Art. I, § 5, cl. 1; *Kilbourn v Thompson*, 103 U.S. 168, 190 (1880).

Fig. 2. Abstention arising from alienation.

Fig. 1 illustrates why indifferent voters may abstain. It shows a voter, J_i, who is considering a dichotomous choice[10] between the status quo, SQ – the outcome that will result if no action is taken – and a potential policy outcome, X. Assuming single-peaked preferences, such that utility declines monotonically with increases in the distance of an outcome from each voter's ideal point, J_i will be indifferent between SQ and X if the two options are equally distant from her ideal point, J_i. 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 Fig. 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 J_i will abstain. As such, indifference can arise in a significant range of situations.[11]

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

Fig. 2 illustrates the effect of alienation. J_i is one of three voters, along with J_2 and J_3, but the logic applies to larger panels also. J_i now prefers any movement from the status quo toward the left, and thus ordinarily we would expect J_i to sign a majority opinion at the expected outcome: the ideal point of J_2, the median justice. However, if J_i 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 J_i 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 rhetorical strength of subsequent opposition to policy outcome X.

In addition, with repeated interactions, it may be worthwhile to J_i to fail to support outcome X, since abstention can be used to strategically punish the other voters for supporting a policy too distant from J_i'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 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 in the non-judicial context: abstention has been shown to be a potential, and in some cases likely, outcome of indifference (Feddersen and Pesendorfer, 1999; Hao and Suen, 2004), and the literature has well-documented alienation-based abstention.[12]

There are, however, reasonable criticisms that can be made of both of these explanations of abstention. 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 alienation-based *incentive* for abstention in the judicial context.

4. How often might indifference and alienation arise for judges

The literature on indifference and alienation causing legislative abstention is well-developed, 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. To do so, we analyzed data on all Supreme Court cases since 1953 using the U.S. Supreme Court Judicial Database in combination with the Martin–Quinn scores of judicial ideology. The database provides a record of every justice's vote in every case, including concurrences (Spaeth, 2013). 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 (Martin and Quinn, 2002). To determine first how often the potential incentive for abstention arising from indifference might occur, we use concurrences as a proxy for indifference – a concurrence suggests a certain dissatisfaction with the majority outcome, yet not enough to side with the dissent. We measured the rate of concurrence by each justice as a product of their distance from the Court median, using Martin–Quinn scores.

Fig. 3A provides the density distribution of all concurrences on the Supreme Court since 1953, arrayed by judicial ideology, as measured by distance from the historical median, positioned at zero. It shows that the distribution of concurrences across all Supreme

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

[11] If judicial utility U_J is a product of the distance d of the outcome X relative to the status quo SQ, such that:

$U_J = E[d(s)]$

where $d = - |J_i - SQ|$,

$= - |J_i - X|$ if $s = X$,

then $s^* = X$ if $|J_i - SQ| > |J_i - X|$

but if J_i is risk averse, then

$U_J = E[d(s)] - r.varE[d(s)]$.

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[12] 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.
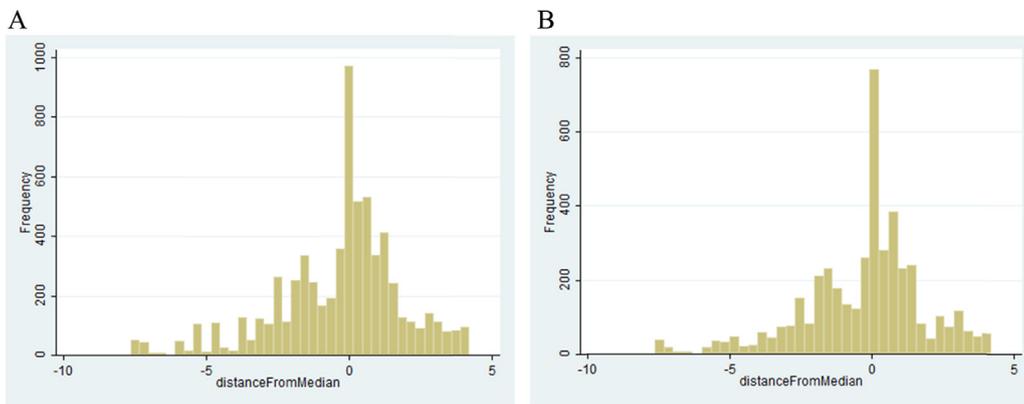
A

B

Fig. 3. Rate of concurrences, by judicial ideological position. (A) All cases. (B) Non-disordered cases.
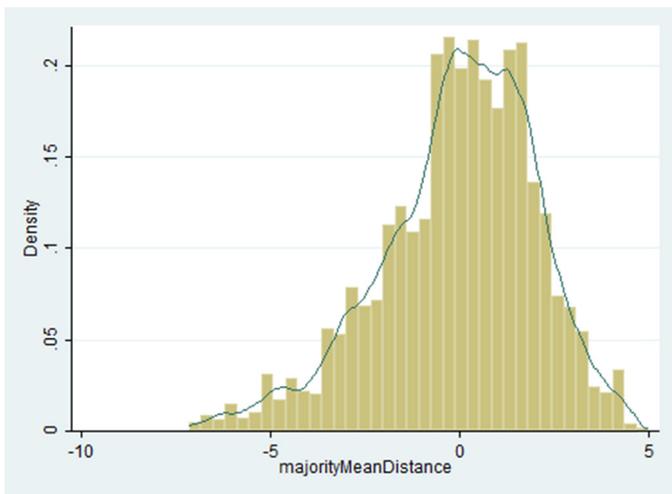

Fig. 4. Density distribution of distance of concurrences from the mean of the majority coalition.

Court cases is considerably higher for 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, suggesting Fig. 3A is not driven by some factor that cuts across ordinary ideological boundaries.

Given that Martin–Quinn scores are premised on a normal distribution of judicial ideological positions, 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 indifference occur significantly often. It cannot be presumed, then, that judicial abstention occurs simply because justices are seldom indifferent.

That conclusion is further buttressed by Fig. 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 shown to be the best score of case outcome measures based on the standard models of judicial behavior (Jacobi and Sag, 2009).

It is clear from Fig. 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, (Posner, 1993) would then presumably be attractive in a significant number of cases for these justices, but for the explanation we provide below. (Indeed, given the costliness of concurrence, it has remained somewhat a puzzle for rational choice models (Epstein et al., 2011).)

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 Figs. 3 and 4 were not simply aggregation effects created by looking at the patterns of justices' positioning on the Supreme Court. Models 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. Fig. 5 illustrates how often such clustering will occur.

To examine the relative ideological positions of justices over a period of decades, we treat each justice as taking an ideological "slot," such that J_1 is the most liberal justice at any time and J_9 is the most conservative.[13] Fig. 5A shows the raw scores of each justice-slot, Fig. 5B normalizes by the median justice, J_5.

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, J_5. For instance, under the current Court, there is an evident cluster of four liberal justices, two moderately conservative justices and two strongly conservative justices. Such patterns, which have in various configurations lasted for years, would often create the incentive to abstain due to indifference. In terms of alienation, there are clear instances where at least one justice is so far from the rest of the Supreme Court that abstention due to alienation could arise. 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).

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[13] 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.
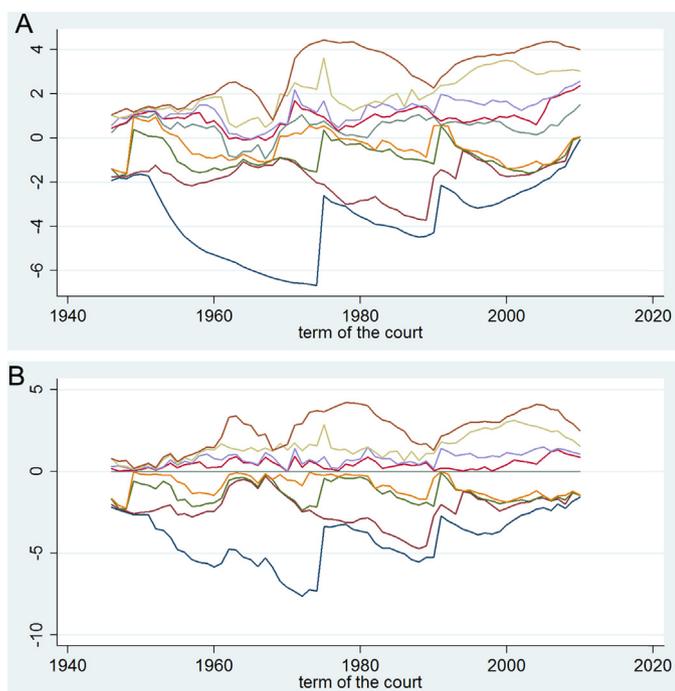
Fig. 5. Distribution of Supreme Court justices, by ideological position, over time. (A) Supreme Court justices by ideological. (B) Supreme Court justices by ideological "slot" relative to J5.

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. 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.

5.1. Stare decisis

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. 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 (Epstein and Jacobi, 2008). Fig. 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.

If the justices can develop a policy outcome at any point, and care only about outcome positions (Jacobi, 2009)[14] 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: 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. Furthermore, both linguistic and doctrinal constraints may prevent the justices from crafting a doctrine that fully reflects the median's preferences (Jacobi and Tiller, 2007). So one can imagine a situation where after all adjustments toward 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 nevertheless not abstain even when indifferent, because of *stare decisis*.

In Fig. 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 Fig. 7, which provides a starker version of the 2004 Rehnquist Court.

When facing an initial case, represented by SQ_1, both moderate justices, J_5 and J_6, are indifferent between maintaining the status quo and the proposed liberal policy X (this arises either if J_5 and J_6 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 SQ_2, can change the equation, such that both moderate justices would prefer to vote to maintain SQ_2 than to adopt policy X again. But stare decisis makes it difficult for the moderate justices to change their position once X becomes precedent.

If, on the other hand, SQ is even fractionally to the right of SQ_1, the moderate justices will prefer SQ_1 to X. Overall, the moderate justices' preferences over outcomes – the choice between SQ_1 and X – will depend on their expectation of the likely distribution of future cases: if the majority of cases are expected to be to the right of SQ_1, then they would prefer to forge an opinion with the conservative justices; if instead the majority of cases are expected to be to the left

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[14] If justices care about norms of collegiality and consensus building, this conclusion does not always hold.
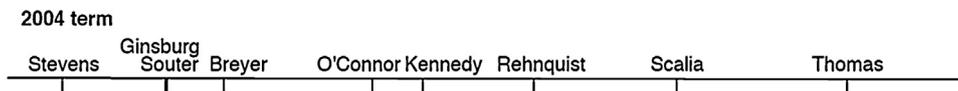
2004 term

Fig. 6. Martin–Quinn Scores of judicial preferences in the 2004 Term.

of SQ_1, then they will prefer to forge an opinion with the liberals. The important point for these purposes is that the moderate justices will not be indifferent unless not only SQ_1 is equal to X, but the expected distribution of future cases must also be equal to SQ_1, which is statistically very unlikely.

Consequently, even a judge who is indifferent in the current case is extremely unlikely to be indifferent when looking ahead to future cases. But the effect on the indifference motivation for abstention is much more dramatic than simply expecting that future cases may be slightly different to current cases and so render the otherwise indifferent justice minimally preferring one outcome over another. 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, SQ_1 and SQ_2, to dictate highly divergent policy outcomes, X versus SQ_2, 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 SQ_1 to SQ_2, would result in a large move to the *right* in the case determinations, from X to SQ_2.

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 is a cluster of *moderate* justices – e.g. an array of 2-4-3, such as in the 1991 Term. As we saw in our empirical assessment in Part 4 above, these scenarios arise frequently.

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.
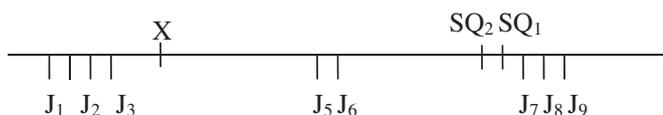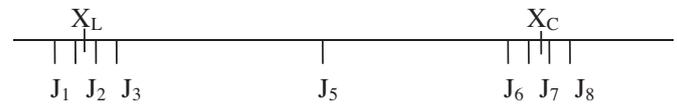

Fig. 8. The effect of the marks doctrine.

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.

In Fig. 8, the sole median justice, J_5, is indifferent between two proposed policy outcomes, X_L and X_C. Any other professional voter, such as a legislator, may well then abstain because, as discussed, there may be costs to legislators in voting against either group, and nothing to gain, since the voter is indifferent. But while a legislator may abstain in such a case, a judge in the position of J_5 has an incentive not to abstain. This is because 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.[15]

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. And since a broad opinion will have no binding effect, whereas narrowing that opinion may subsequently win the day, there is also no incentive to join a broad opinion.

The logic of this rule suggests that plurality opinions will have no binding impact whatsoever. If every justice has 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 (Westerland, 2003). But the process may not unravel entirely because 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 (Bustos and Jacobi, 2014).[16] As such, an indifferent justice in the position of J_5 has an incentive to write a narrow opinion at her ideal point, rather than abstaining.

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. 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. This institutional effect changes the costs

Fig. 7. The effect of stare decisis.

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[15] Marks v. United States 430 U.S. 188, 193 (1977).
[16] Unless the justice is likely to retire – then the cost of strategic voting in the current case will have to be discounted by the probability of the justice not being able to recoup those benefits.
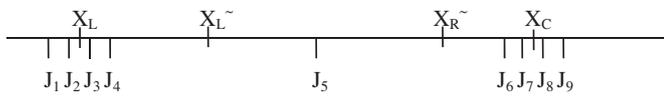
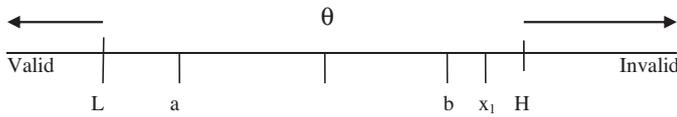**Fig. 9.** The effect on the outcome of joining the majority coalition.

Fig. 10. A model of doctrinal development and concurrences in result only.

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.

6.1. Further incentive against abstention: shaping the coalition opinion

This section shows how the nature of judicial coalition formation amplifies the 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 and Westerland, as well as Jacobi and Sag 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 J_i may be indifferent between case outcome X and SQ_1, a future status quo even slightly closer to J_i's preferences than SQ_1, such as SQ_2, will make J_i cease to be indifferent in the current case. However, Fig. 9 illustrates how, if the outcome X is an endogenous product of negotiations among the majority coalition, then by joining that coalition, J_i can move X closer to her preferences, and J_i will cease to be indifferent.

Fig. 9 illustrates a scenario as in Figs. 7 and 8 above, except now instead of simply weighing two proposed policy outcomes, X_L and X_C, we consider X to be an endogenous product of the two potential majorities that J_5 can help constitute, a liberal or a conservative five justice majority. This assumes some flexibility of outcome beyond dichotomous choices, but does not necessitate assuming continuous outcomes.

If J_5 joins with the liberal justices, this will move the equilibrium outcome from X_L to $X_L^\sim$, the mean of the liberal majority coalition; conversely, if J_5 joins with the conservative justices, this will move the equilibrium outcome from X_R to $X_R^\sim$. Even if, as depicted in Fig. 10, J_5 is still indifferent as between $X_L^\sim$ and $X_R^\sim$, J_5 will

nevertheless have a strong incentive not to abstain, as now the simple fact of joining a majority – either majority – reduces the distance between the outcome and J_5's own preferences considerably, from J_5–X_L to J_5–$X_L^\sim$, or the equivalent on the right.[17]

Since the act of joining will draw the majority outcome from X_L to $X_L^\sim$, 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, J_5, 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 $X_L^\sim$ in lieu of X_L, as against the preferred but uncertain achievement of an opinion at her exact ideal point, J_5. Which substantive outcome will be preferable 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 the important point is that either outcome strictly dominates abstention.

6.2. Concurrences without an opinion: an alternative form of abstention

Much of our discussion so far has centered on the pivotal justice or justices, but what of the other justices? Non-pivotal justices in a small majority will have a clear incentive not to abstain, for fear of upsetting the coalition and creating a potential *Marks* scenario. But majority justices in a larger coalition whose preferences lie far from the mean or median of the coalition – and thus the likely opinion position – and justices on the losing side of an issue may still have an incentive to abstain.

The reason is as shown in Fig. 2: legislative abstention theory suggests that distant voters may abstain to punish successful coalitions for the extent of divergence from their own preferences. This could conceivably apply not only to dissenters, as illustrated, but also to those concurring in the outcome – those who prefer the outcome to the alternative, but by little when compared to the distance of the outcome from their ideal points.

But unlike legislatures, the judicial setting creates an alternative to abstention arising from alienation: writing dissenting and concurring judgments. Abstention due to alienation is theorized as a form of protest vote, but additional opinions offer judges an alternative form of protest, where they can lay out the details of their objections. The downside to dissenting or concurring is that writing such opinions is costly in terms of time (Posner, 1993), but there is a form of judicial voting that does look a lot like abstention in terms of opinion writing: concurring in result only.

Such silent concurrences provide a vote for the outcome endorsed by the majority, without agreeing to its reasons or providing alternative reasons.[18] To understand why concurrences without an opinion provide an alternative mechanism of abstention that does not raise the difficulties created by *stare decisis* and

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[17] 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 $J_5 − (J_3 − J_2)/2$ to $J_5 − J_2$, 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 and further institutional incentive against abstention.

[18] 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).

the *Marks* doctrine, it is helpful to borrow from the model of judicial learning provided by Baker and Mezzetti (2012) and Niblett (2013). 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. Fig. 10 illustrates their model.

The optimal threshold between validity and invalidity is set by some exogenous point, θ. 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 x_1, the justices can assess whether each case is to the right or left of θ, even though they do not know the exact position of θ. This sets the new L or H–in Fig. 10, the case resolution sets a new H, since x_1 is to the right of θ.

According to Baker and Mezzetti, the justices are not limited to articulating only the ruling that all future cases to the right of x_1 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 θ than x_1 is.[19]

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 $(x_1–b)$ to be very narrow. In contrast, concurring in result only is the equivalent to agreeing that x_1 constitutes the new H, but refusing to define any range $(x_1–b)$.

On one view of judicial duty, in the common law system, judges are expected to do more than simply adjudicate specific factual disputes, they are expected to elucidate the law to gradually reduce uncertainty and thus reduce the need for future litigation. On this view, a concurrence in the result is an abstention from this part of the judicial role in a way that the *Marks* doctrine is not, because although increasing the range H–b reduces litigation costs, by resolving more previously unanswered questions of law, 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. The existence of such partial abstentions provides further evidence that the incentive for judicial abstention arises significantly often.

Concurrences in result only are now quite rare, but they were more common in the early and mid-20th century (Edelman and Sherry, 2000). Now, substantive concurrences are more common, perhaps because of the announcement of the *Marks* doctrine in 1976, which empowers narrow concurrences over pluralities, or due to other factors, such as the significant increase in judicial clerk resources in the last half century, which renders writing a concurrence less costly for justices.

7. 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, because it simply begs the question of why the American judicial role is conceived in a way that excludes abstention, when it is not so conceived in Europe. The incentives for abstention arise frequently:

abstention by indifference is created by the fact that the costs of litigation, along with the structure of the appellate system, creates a case selection mechanism favoring extremely close, 50:50 cases coming to court (Priest and Klein, 1984). 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 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 an opinion, but *Marks* means concurring at the median's ideal point lays the groundwork for the median to get her ideal in future.

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[19] 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.

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