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Why judges always vote☆

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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.

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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[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).

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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

[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).

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