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When A Justice's Vote Is Pivotal, Politics Rules: Study

By **Sam Reisman**

Law360 (October 9, 2018, 8:31 PM EDT) -- A closely divided high court is more likely to hand down decisions that were determined on ideological grounds and were intended to reshape the law, rather than relying on legal precedent, new research shows.

In a paper published online on Monday, researchers from Emory University and Northwestern University found that when a U.S. Supreme Court justice's vote is pivotal in determining the outcome of a case, he or she is far more likely to act politically and cast a vote intended to change legal precedent.

"I think our paper is the first to use data to disprove the idea that the reason justices split along ideological lines is because they have different judicial philosophies," co-author Joërg L. Spenkuch, an associate professor at Northwestern University, said. "I think we present fairly reasonable evidence to suggest: No, at least in part they vote ideologically because it allows them to determine the evolution of the law."

In their analysis of Supreme Court decisions since World War II, the paper's authors found that when a justice is set up to cast the pivotal vote, they are far more likely to let political ideology, rather than professed legal philosophy, guide their decision than usual.

"In situations in which it matters the most, justices polarize rather than moderate," the paper said.

The single biggest determining factor in whether a justice votes based on ideology is not — as has been previously argued — a situation in which the existing law is unclear, but instead whether a justice is pivotal in a particular case.

"What we're finding is that when a justice has the ability to shape which litigant wins or loses, they appear to behave in a way that allows them to get the kind of case disposition that they would prefer," according to co-author Tom S. Clark, a political science professor at Emory University.

The paper employs a framework of distinguishing between expressive preferences, which derive from a professed legal philosophy or a desire to preserve the reputation of the court, and instrumental preferences, which are borne of an intention to shape a specific outcome. A justice who knows they are casting the pivotal vote may find their expressive and instrumental preferences in conflict and vote strategically, the paper argues.

According to the model proposed by the authors, justices will generally vote along ideological grounds, but this becomes much more pronounced if they find themselves the pivotal vote and especially if they believe the outcome of the case is especially important.

In a summary of their findings, the authors write that the data appear to refute Chief Justice John Roberts' often-invoked 2005 assertion, made during his confirmation hearing, that "judges are like umpires."

"When the opportunity permits, justices behave more like politicians in robes than impartial umpires trying to interpret and apply the extant set of rules," according to the authors.

The paper, currently pending and under review, is entitled "Politics From the Bench?: Ideology and

Strategic Voting in the U.S. Supreme Court” and appeared online two days after Justice Brett Kavanaugh **was confirmed** on a 50-48 Senate vote to the high court.

Clark said, “Now that the conservatives have a pretty solid 5-4 majority on the court, it’s going to be a much rarer circumstance, I think, where you see the justices behaving in a way that appears ideological. But that’s only because they will be able to take cases that allow them a lot of freedom to write the opinions they want to write. Their voting won’t reveal it as much as the content of their opinions.”

The paper is co-authored by Clark, Spenkuch and B. Pablo Montagnes, an assistant professor of political science at Emory University.

--Editing by Janice Carter Brown.

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