

Supreme delay: Why the nation's highest court puts off big decisions until the last moment

October 2 2014, by Neil Schoenherr

As the Supreme Court of the United States begins its fall 2014 session this month, it faces decisions on several "blockbuster" cases, including freedom of speech, religious freedoms in prison, pregnancy discrimination and a possible decision on gay marriage.

Just don't expect any of these decisions until next June, just before the court's session ends. New research from the Washington University in St. Louis School of Law finds big, or "blockbuster," cases are disproportionately decided at the end of June, just before the court's summer recess.

"We knew that more than 30 percent of the court's decisions are issued in June and more than half of those in the last week," said Lee Epstein, PhD, the Ethan A. H. Shepley Distinguished University Professor.

"We were surprised to find that such a disproportionately large number of the 'big' cases were decided so late," Epstein said.

Epstein is co-author, along with William Landes, PhD, of the University of Chicago and Judge Richard A. Posner, JD, of the U.S. Court of Appeals for the Seventh Circuit in Chicago, of "The Best for Last: The Timing of U.S. Supreme Court Decisions," forthcoming in the March 2015 issue of *The Duke Law Journal*.

The researchers analyzed 7,219 Supreme Court cases from 1946-2013. Using several measures to determine the significance of the cases, including front-page newspaper coverage and how often the decision was cited in later Supreme Court rulings, they confirmed that decisions on significant cases more often come at the very end of the term.

While the "big" cases were certainly more complicated and divisive—meaning they take longer to debate—the researchers found that this explained only part of the issue.

They pose three possibilities for late decisions on big cases.

The first centers on legacy and reputational concerns.

When writing what they think will prove to be major decisions, the justices take more time polishing (or, as the researchers point out, making their law clerks polish, since these days law clerks do most judicial writing even in the Supreme Court) until the last possible moment. The hope is promotion of their own reputation, since the important cases will continue to be remembered, discussed and cited long after they are decided.

A second possible explanation is that the justices delay certain decisions for public relations reasons.

The close proximity of decisions in the most important cases may tend to diffuse media coverage and other commentary of any particular case, and thus spare the justices unwanted criticism. But the opposite effect is possible: the expectation of a crowd of important cases at the end of the term can increase media attention.

Finally, though related to the second explanation, the justices, most of whom have busy social schedules in Washington, D.C., may want to

avoid tensions at their social functions by clustering the most controversial cases in the last week or two of the term—that is, just before they leave Washington for their summer recess.

More information: epstein.wustl.edu/research/SupCtTiming.pdf

Provided by Washington University in St. Louis

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