

# What moves the Supreme Court's 'swing' justices?

November 1 2013, by H. Roger Segelken

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Whenever the U.S. Supreme Court hands down a 5-4 decision, the pivotal "swing" vote must be cast by the "median" justice (midway, ideologically, between four more liberal justices and four more conservative), right?

Not necessarily, according to two [political scientists](#) who reviewed hundreds of Supreme Court decisions between 1953 and 2009.

In a study published in the October issue of the *Journal of Politics* (75: 4), Cornell's Peter K. Enns, assistant professor of government, and his co-author report that in a substantial number of cases, the justice casting the pivotal swing vote was not the ideological median (think Anthony Kennedy in recent years). Furthermore, they report, [public opinion](#) – even in the Courts' most closely divided cases – has a more profound effect than [justices](#) might care to admit.

"Whether the swing justice represents the moderate center of the court or a more extreme ideological position, this justice's [votes](#) correspond more closely with public opinion and less with personal preferences than do the other justices' votes," says Enns, who wrote "The Swing Justice" with Patrick C. Wohlfarth of University of Maryland, College Park.

"We were particularly interested in cases where the most ideologically extreme justices sometimes cast the pivotal vote against their ideological predisposition," Enns said. "What makes a justice who typically votes in an ideological manner 'leapfrog' a more moderate justice and cast a

surprising vote?"

Until Supreme Court justices retire and write memoirs, scholars like Enns and Wohlfarth can only make educated guesses – backed by historical analyses of hundreds of Supreme Court decisions – and they advance two hypotheses for surprising swing votes:

Justices sometimes are moved to vote, in what Enns and Wohlfarth call a "nonattitudinal" way, by case-specific considerations such as the legal facts of the case, oral arguments or the solicitor general's amicus briefs. And sometimes justices may be uniquely influenced by the "details and context of the case," they write. Public opinion is one detail in that context. In other words, Supreme Court justices are "human actors," and swing justices might be the most human of the bunch.

While that news might encourage the sign-carrying public to congregate on the Supreme Court plaza (in defiance of the high court's ban on demonstrations there), leaders of other federal government branches – like the U.S. Congress – should also ponder the dynamics of swing voting, the political scientists suggest.

"If we want to understand who influences policy outputs in Congress," they conclude in their paper, "we cannot only look at representative behavior, on average. We must also understand the potentially unique behavior of pivotal swing members."

Provided by Cornell University

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