came in 1795 with the defeat of John Rutledge's nomination as chief justice. What is different about today's appointment process, he argues, is not its politicization but the range of players involved and the political techniques they use.

Defeat elevated Robert Bork to national prominence. His views, once expressed only in law reviews, gained a national audience with the publication in 1989 of his book *The Tempting of America*, which set forth his conservative views of law.

Senate confirmation votes reflect many of the same political considerations that influence presidents in their initial selection. Policy preferences of presidents and senators are of primary importance. When a strong president nominates a highly qualified, ideologically moderate candidate, the nominee passes the Senate in a lopsided, consensual vote. Because presidents have often chosen to nominate that type of candidate, consensual Senate votes have been fairly common. When presidents nominate a less well qualified, ideologically extreme candidate (especially when the president is in a weak political position), then a conflictual vote is likely. Appointments that are ideologically distant from the president also take more time to confirm (Shipan and Shannon 2003). Surprisingly, presidents have nominated quite a few candidates of that description through the years, and, therefore, conflictual votes occur periodically (Cameron, Cover, and Segal 1990; Segal, Cameron, and Cover 1992).

The bruising battle over Bork left political scars that have been slow to heal. Subsequent presidents appeared to avoid controversial nominations. Perhaps typical is the quick confirmation of David Souter. When Justice William Brennan, 84, resigned from the Supreme Court citing "advancing age and medical condition," President George H. W. Bush hoped to place a conservative on the Court without a bloody confirmation fight. Acting quickly, the president nominated David Souter, 50, a lifelong bachelor and Rhodes scholar. The selection was viewed as a surprise because, despite more than twenty years in public life, Souter's judicial philosophy was largely a blank slate. Liberals were fearful and conservatives apprehensive. In particular, pro-choice groups feared that he might be the fifth vote needed to overturn *Roe v. Wade* (1973). Conservatives, on the other hand, were concerned that Souter might not be conservative enough and, therefore, might *not* provide the needed fifth vote to anchor a conservative Court. During three days of nationally televised confirmation hearings, Souter discussed his general judicial philosophy but refused to state his views on specific cases and issues. During the confirmation hearings, Souter appeared neither highly political nor threatening. By an overwhelming margin (90–9), the U.S. Senate confirmed David Souter to be the 105th justice of the Supreme Court.

President Clinton likewise avoided controversy, choosing to tap those who would not be controversial over those who were likely to provoke a fight with conservative Senate Republicans. Stephen Breyer, for example, was noted for being a moderate pragmatist and a legal technician during his thirteen years on the federal appellate bench (O'Brien 2003).

Nominations can be particularly contentious if the nominee holds ideological views different from those held by the retiring justice. The nomination of John Roberts is a case in point. Originally, he was nominated to fill the seat being vacated by Sandra Day O'Connor—widely regarded as the most centrist justice on the Court. His

selection became much less contentious when it was shifted to replace the recently deceased William Rehnquist. Now one conservative was replacing another conservative, which did not affect the balance of power on the Court. The nomination of Samuel Alito involved a deeper political struggle because he was viewed as much more conservative than O'Connor and, therefore, more likely to shift the Court in a more conservative direction.

THE DECISION-MAKING PROCESS

Whenever a new justice is appointed to the Supreme Court, observers speculate about the impact the newcomer may have on the Court. At the same time, analysts recognize that new justices, like anyone assuming a new position, must undergo an adjustment period before becoming completely assimilated into the Court. This adjustment period has been called the "freshman effect." A majority of the justices undergo a period of transition, but some experience this effect more than others (Hagle 1993; Hurwitz and Stefko 2004; compare Bowen and Scheb 1993). During his first term on the Court, for example, Justice Souter wrote few opinions, wrote none of the Court's important decisions, and merely supplied an additional vote for the Court's already-solid conservative majority (Johnson and Smith 1992). By contrast, Justice Anthony Kennedy appeared to settle into his new job within a short period (Melone 1990).

One aspect of the freshman effect is adapting to the ebb and flow of the Court's docket. As Justice Brennan once noted, "Such factors as workload, unfamiliarity with . . . procedures and the unique nature of constitutional decision-making tend to create difficulties for any neophyte justice" (quoted in Heck 1979, 710). The rules and procedures by which the Court conducts its business are easily mastered. What takes longer is assimilating the informal norms that give life and substance to the formal structure. Newly appointed justices find that the Court operates much like nine separate law firms, each with its own support staff. In essence, the justices lead separate, even isolated lives; they deal with one another only in quite formalized settings and then retreat to their own chambers.

Briefing

After the Court accepts a case for review, the lawyers for both parties prepare written **briefs** setting forth the arguments and precedents for their side of the case. Each side also has the opportunity to file reply briefs. Interest groups and the government often file amicus curiae briefs as well, each offering a position on how the controversy should be settled. In the briefs, the lawyers muster evidence to support their interpretations of constitutional provisions and statutory language, particularly discussing relevant Supreme Court decisions. Although Supreme Court rules limit briefs to a maximum of fifty pages (and thirty pages for amici), the justices and their law clerks are nonetheless inundated with reading material. Examples of highly regarded Supreme Court briefs can be found in a series called *Landmark Cases and Briefs*, available in many libraries and more recently on the Web at sites such as http://www.findlaw.com.

Oral Argument

The time allowed for **oral argument** is strictly limited. Except in cases of extraordinary public importance, each side is allotted thirty minutes, which the attorneys for the parties may, if they wish, share with counsel for interest groups who have filed amici.

The lawyers come prepared with arguments they wish to present, but rarely do they get very far before they are forced to respond to questions from the justices. Justices Scalia, Souter, and Ginsburg are known to pepper lawyers with questions: During one hour-long argument, this trio asked more than fifty questions, a practice that some observers consider disruptive of the proper functioning of oral argument (Mauro 1993). According to Justice Scalia, he asks the lawyers tough questions because he wants to give each attorney his or her best shot at overcoming what is, in his mind, the major obstacle to deciding the case in favor of that side (Adler 1987). Thus, the justices, more so than the attorneys, actually control the direction of oral argument. Responding to such queries is tricky business, because the lawyers are arguing not to a collective court but to nine individual justices, each of whom has his or her own thought process. Attorneys are acutely aware of the justices' voting patterns and seek to plug their arguments into those patterns in an effort to assemble a coalition of five justices in their favor. In turn, the justices use oral argument to help them reach a final decision. As Chief Justice Rehnquist (1987, 277) wrote, oral argument is the only time before conference "when all of the judges are expected to sit on the bench and concentrate on one particular case." Johnson, Wahlbeck, and Spriggs (2006) have shown that the quality of legal arguments presented varies and that the better the legal argument the more likely it is that party will be victorious. At times, justices use questions much like a post office to send messages to another justice; part of oral argument, therefore, reflects the justices arguing with one another through the lawyers (Johnson 2004). Oral arguments are not televised or broadcast simultaneously, but the transcripts and audiorecordings are later released by the Court to the media. The transcripts are widely available, and many audiorecordings are available on the Web at http://www.oyez.org.

Conference

Two or three days after oral argument, the justices assemble in private—behind closed doors—to discuss the cases recently argued and to take a tentative vote. Only the justices attend the conferences, which are not open to the public or to other Court personnel. The chief justice presides, opening the discussion by reviewing the facts of the case, stating the decision of the lower court, outlining his (or her) understanding of the applicable case law, and stating how he (or she) thinks the case should be decided (Rehnquist 1987). Next, the associate justices present their views in order of seniority (determined by years of service on the Court, not biological age). Because their colleagues have already voiced similar positions, the more junior justices generally speak quite briefly. "The truth is that there simply are not nine different points of view in even the most complex and difficult case, and all of us feel impelled to a greater or lesser degree to try to reach some consensus that can be embodied in a written opinion that will command the support of at least a majority of the members of the Court" (Rehnquist 1987, 290). When the discussion ends, the chief justice tallies the votes in what is called the

"original vote on the merits." In an earlier era, discussion and voting were separate, with voting conducted in reverse order of seniority. Today, however, the justices discuss and then vote.

Discussions in conference are less freewheeling than they once were. Largely because of the press of cases, the justices no longer have time to reach agreement and compromise on opinions for the Court. On the basis of a reading of the briefs, the lawyers' presentations during oral argument, and discussions with their clerks, the justices have developed strong opinions about the case before conference. Moreover, the justices evaluate cases "on the basis of their own, frequently strong, attitudes about policy" (Baum 1995, 117). Conferences, therefore, serve only to discover consensus (O'Brien 2003). According to Chief Justice Rehnquist (1987, 295), "This is not to say that minds are never changed in conference; they certainly are. But it is very much the exception and not the rule. . . ." Thus, it is through opinion writing, rather than the face-to-face discussions during conference, that the justices communicate and negotiate.

Opinion Assignment

Soon after the original vote in conference, the chief justice, if in the majority, assigns one of the justices to write the majority opinion explaining the results reached. If the chief justice is in the minority, then the most senior associate justice in the winning coalition makes the assignment. The opinion assigner can assign the opinion to any justice in the winning coalition, including himself or herself. The justice who writes the majority opinion has substantial control over its content and, as a consequence, can strongly influence the future development of the law on the subject (Bonneau et al. 2007). It is not surprising, therefore, that opinion assignment has been a frequent area of interest for Supreme Court scholars (Brenner and Palmer 1988). Four factors emerge as the most important considerations.

Workload Equality of workload is an important, unwritten rule of the Supreme Court (Spaeth 1984). As Chief Justice Warren explained after his retirement, "I do believe that if [assigning opinions] wasn't done . . . with fairness, it could well lead to gross disruption in the Court. . . . During all the years I was there . . . I did try very hard to see that we had an equal workload. . . ." (Lewis 1969). That each justice does receive an equal share (that is, one-ninth) of the Court's opinions to write is borne out by a comprehensive study of 6,275 opinion assignments from the beginning of the Taft Court in 1921 to the 1973 term of the Burger Court. Elliot Slotnick (1979) found that, since World War II, the chief justices have tended to assign to each justice approximately the same number of majority opinions. Similarly, Chief Justice Burger's assignment practices indicated a record of equality unmatched by any of his predecessors (Spaeth 1984). Likewise, Chief Justice Rehnquist attempted to achieve an equal distribution of opinions (Davis 1990; Rehnquist 1987). Roberts continued that trend during the 2007–2008 term: All of the justices authored seven (Stevens, Kennedy, Thomas, and Alito) or eight (Roberts, Scalia, Ginsburg, Stevens) opinions.

Ideology Selection of a justice in the ideological middle is another important factor in assigning the writing of the majority opinion. Any justice is free to change his or

her vote at any time before the public announcement of the decision. Thus, the other members of the majority opinion coalition are not powerless, especially when the vote is close (that is, 5–4). The author of the Court's opinion, therefore, is not a free agent; typically, he or she must also satisfy the views of at least four other justices. In cases with a minimum winning coalition, the justice closest to the dissenters may be selected, because he or she is viewed as the person most capable of writing an opinion that will maintain the initial coalition (Rhode 1972; Rhode and Spaeth 1976). Others, however, have found that this strategy may not work as well as previously believed (Brenner and Spaeth 1988).

Specialization Issue specialization is another factor influencing opinion assignment. Justice Blackmun's selection by Chief Justice Burger to write the Court's 1973 abortion decision was made, in part, because of his medical law expertise. (He had previously served as chief counsel for the Mayo Clinic in Rochester, Minnesota.) Assigning the majority opinion on the basis of issue specialization was a commonplace occurrence on the Warren Court. Chief Justice Warren, for example, wrote a disproportionate number of opinions on reapportionment and voting rights, Black on racial discrimination matters, and Brennan on cases dealing with censorship and obscenity. Just as important, Warren tended to select as issue specialists justices who had the same ideological views as he, or similar ones (Brenner 1984). Chief Justice Burger likewise used issue specialization as a criterion in assigning opinions (Brenner and Spaeth 1986).

Self-Assignment Self-assignment is a final consideration in choosing a justice to speak for the Court. Since Marshall, there has been a tradition on the Court of the chief justice assigning himself the task of writing decisions in important cases. Slotnick's data (1979) bear out that proposition: Chief justices self-assigned 25 percent of important cases, a figure matched by Warren Burger (Spaeth 1984) and, more recently, by William Rehnquist (Davis 1990). Thus, it appears far from a statistical accident that Warren assigned himself to write the Court's opinion desegregating public schools (*Brown v. Board of Education* 1954) and that Burger also assigned himself the task of writing the first important school desegregation case of his tenure (*Swann v. Charlotte-Mecklenburg* 1971).

Opinion Writing

Writing opinions is the justices' most difficult and time-consuming task. Opinion writing—especially majority opinion writing—provides justices with the most obvious opportunity to influence the direction of the law. Maltzman, Spriggs, and Wahlbeck (2000) show that justices act strategically as they prepare their majority opinions so that they will attract sufficient justices to determine the outcome of the case (at least four others) and the future of law in a particular area. The justice assigned to write for the Court typically begins by giving the law clerk a summary of the conference discussion, a description of the result reached by the majority during conference, and views on how a written opinion can best be prepared expressing that reasoning (Rehnquist 1987). Law clerks' views are presumed to reflect those of the justices who chose them (Brenner 1992). Over the years, law clerks have taken on more responsibility in opinion writing,

but their role has been important since they were first made available to the justices back in 1886. Justices vary tremendously in their delegation of responsibility for writing opinions to their law clerks. Wahlbeck, Spriggs, and Sigelman (2002) find the "fingerprints" of law clerks in the opinions of both Thurgood Marshall and Lewis F. Powell Jr. but note that "Powell's clerks displayed less autonomy than Marshall's." The increasing role of the law clerk points to the future importance of Supreme Court scholars knowing and revealing more about these individuals and their policy preferences.

When the law clerk's rough draft is ready, the justice revises and edits; only after the justice is satisfied with the draft opinion is it circulated to the other justices for their reactions. If a justice agrees with the draft opinion, he or she writes a letter expressing a desire to join the opinion. If a justice agrees with the essential points of the opinion but wishes changes to be made in it before joining, he or she sends a letter to that effect. At other times, however, justices urge major substantive alterations before they will agree to have their names attached to the opinion. Justice Brennan, for example, sent a twenty-one-page list of revisions on Earl Warren's initial draft of *Miranda v. Arizona* (1966) (O'Brien 2003). Factors such as the size of the winning majority coalition, their ideological heterogeneity, their positions taken, the author's workload, and the complexity of the case have all been shown to affect the willingness of the author to accommodate others (Rehnquist 1987; Wahlbeck, Spriggs, and Maltzman 1998).

During opinion writing, the justices exchange ideas and suggest changes in approach and emphasis. Those exchanges can and do change justices' votes. As Justice Jackson once announced from the bench, "I myself have changed my opinion after reading the opinions of the members of the Court. And I am as stubborn as most. But I sometimes wind up not voting the way I voted in conference because the reasons of the majority didn't satisfy me" (Westin 1958, 123). These group interactions account for what J. Woodford Howard (1968) has called the "fluidity of judicial choice" (compare Brenner 1980; Dorff and Brenner 1992; Maltzman and Wahlbeck 1996). One analysis of the period 1946–1975 found that justices changed their votes about 7 percent of the time (Dorff and Brenner 1992). Maltzman and Wahlbeck (1996) suggest three reasons justices might change their votes between the conference and the final resolution of the case: (1) their initial view may not be firmly held, (2) changes have occurred in the winning coalition during opinion-drafting exchanges, and (3) there are unrelated institutional considerations (for example, desire to assign the majority opinion, loyalty to the institution, or avoidance of being in the minority). Compromise is inevitable but never easy. Multiple drafts are not unheard of. In one case, Brennan circulated ten printed drafts before one was approved as the Court's opinion. Moreover, on some occasions, the direction of the decision itself may change, which necessitates reassignment of the majority opinion (Brenner 1986). But the justices stress that votes are not interchangeable: Bargaining—as in "I'll vote for you on the abortion case if you'll vote with me on the capital punishment decision"—does not occur.

Opinion writing reflects not only fluidity of judicial choice but also issue fluidity. In roughly half of the full-opinion cases, there is a divergence between the questions presented by the parties and the questions ultimately decided by the justices. On some occasions, the final opinion provides an authoritative answer to questions that have not been asked and, on other occasions, disregards issues that the parties have presented (McGuire and Palmer 1995). Issue fluidity reflects the fact that the justices search for

cases that permit them to expand their preferences and that present opportunities to accommodate conflicting approaches to deciding the outcome.

Announcement of Opinion

By a self-imposed rule, the Court decides every case argued that term, although, on rare occasions, cases have been held over to the next term, sometimes for reargument. When the opinion is ready, it is announced from the bench, and copies are made available to the public. And, to add a modern wrinkle, the Court now makes its decisions instantly available on the Internet. Particularly toward the end of the term, the Court hands down a flurry of decisions, sometimes as many as six a day.

Like all appellate court decisions, those of the Supreme Court operate at two levels: results and reasons. First, the result settles the dispute between the immediate parties by announcing the Court's decision on how to resolve the controversy. This announcement is always found in the last few lines of the opinion. Second, the opinion explains the reasons the Court reached the decision it did. Through such reasons, the justices develop the law, providing directions for how the lower courts should decide similar cases in the future. But the reasons do not always command the support of five or more justices. In an **opinion of the Court**, a majority of the justices agree not only on the result but also on the legal reasons for that outcome. At times, however, no single opinion is joined by five or more justices. In that event, the opinion is known as the **plurality opinion** of "Justice ____" and whatever justices join with him or her. A plurality opinion, although decisive for the parties, is usually not regarded as having strong precedential value. The Court's first death penalty decision (*Furman v. Georgia* 1972) is a case in point. Some decisions include **concurring opinions**, whereby a justice agrees with the results reached by the majority but disagrees with the reasoning used to reach that conclusion. Concurring opinions argue that the Court went too far or didn't go far enough or that the law would have been better served by proceeding on a totally different legal theory.

Finally, of course, justices may disagree with the Court's decision and write a **dissenting opinion**. If nothing else, dissents serve to keep the majority honest. They point out the weaknesses of the decision and, even if the decision is not later reversed, may dissuade future courts from extending the argument made in the case.

The Justices' Policy Preferences

The Supreme Court is characterized by division rather than consensus, with unanimous opinions rare and getting rarer. But it wasn't always this way. From John Marshall's appointment as chief justice in 1801 to the end of the Charles Evans Hughes era in 1941, the Court exhibited relatively stable, cohesive behavior (Haynie 1992). Through turbulent periods of war, rebellion, economic depression, and political cleavage, the high court maintained the "norm of consensus." But that "norm" masked serious disagreement about how cases should be decided. Even during the early "consensual" eras, when public disagreement was rare, privately the justices disagreed about many legal issues

(Epstein, Segal, and Spaeth 2001). The pattern of consensus radically changed in the early 1940s (Walker, Epstein, and Dixon 1988). The Court's most recent term (2007–2008) continued the trend of frequent dissents, with nearly as many dissenting opinions (59) as majority opinions (71) (SCOTUSblog.com). Moreover, twenty of the seventy-one cases (nearly 30 percent) were decided 5–4, meaning that a change in a single vote would have altered the outcome (SCOTUSblog.com).

Skyrocketing rates of dissent "radically changed the way scholars viewed the judiciary. Before 1941, traditional legal approaches provided satisfactory explanations for a Supreme Court whose institutional practices led to consensus decisions with relatively low levels of expressed disagreement" (Walker, Epstein, and Dixon 1988, 362). But some researchers felt that focusing exclusively on stability and change in constitutional doctrine using the tools of legal and historical analysis was too limiting (Epstein, Walker, and Dixon 1989).

C. Herman Pritchett was the first to recognize the scholarly implications of the Court's abandonment of a norm of consensus (Chapter 13). As he argued, "It is precisely because the Court's institutional ethos has become so weak that we must examine the thinking of the individual justices" (1954, 22). That rethinking propelled the field of public law into the era of judicial behavior, a theoretical perspective that continues to dominate scholarly perceptions of the U.S. legal system. The central question is, Why do justices vote the way they do? Most of the cases coming to the Court present the justices "with an effective choice situation which gave them the perceived freedom to decide the case in a manner consistent with their policy values" (Goldman 1969, 219–220). This view is commonly referred to as the "attitudinal model" (Segal and Spaeth 1989).

Political scientists have come to consider it axiomatic that justices decide cases on the basis of policy preferences. Before nomination, justices have developed firm ideas about many of the issues they will be called on to decide. Their attitudes are further refined while serving on the Court, when justices confront actual cases presenting specific dimensions of those issues. Their policy preferences mold how justices approach cases and structure choices among alternative policies. Thus, like policy makers in the legislative and executive branches of government, Supreme Court justices "make decisions largely in terms of their personal attitudes toward policy" (Baum 1995). A common technique used by scholars to analyze the ideological divisions on the Court is bloc analysis.

Bloc Analysis

Bloc analysis is one way of examining the ideological divisions on the Court. Table 15.3 shows the percentage of cases in which pairs of justices supported the same opinion during the 2007 term. Clearly, some groups of justices vote together much more often than other groups. The justices who most often voted together were Chief Justice Roberts and Justice Scalia (88 percent); Chief Justice Roberts and Justice Alito, the two newest members of the Court and both appointed by President Bush (88 percent); followed closely by Justices Ginsburg and Souter (87 percent) and Justices Stevens and Souter (87 percent). High levels of agreement are found on both the conservative *and* the liberal wings of the Court. The most frequent disagreements occurred between Justice Thomas and his colleague Justice Ginsburg: As Table 15.3 shows, they agreed

TABLE 15.3 Percentage of Agreement in Votes Between U.S. Supreme Court Justices, 2007 Term

	JR	JS	AS	AK	DS	CT	RG	SB	SA
Roberts (JR)		72	88	84	72	79	69	75	88
Stevens (JS)	72		64	77	87	57	84	86	71
Scalia (AS)	88	64		77	64	87	65	64	82
Kennedy (AK)	84	77	77		74	62	72	85	82
Souter (DS)	72	87	64	74		59	87	83	69
Thomas (CT)	79	57	87	62	59		55	57	79
Ginsburg (RG)	69	84	65	72	87	55		80	68
Breyer (SB)	75	86	64	85	83	57	80		72
Alito (SA)	88	72	82	82	69	79	68	72	

Note: The numbers are percentages of cases in which a pair of justices agreed on an opinion. Both unanimous and nonunanimous cases are included.
Source: Data from SCOTUSblog.com. Available online at http://www.scotusblog.com.

with each other in only 55 percent of decisions. Disagreement between Justice Thomas and Justices Stevens, Souter, and Breyer was also substantial: In just over 50 percent of the cases did Justice Thomas agree on the outcome with these justices. Across the wide range of issues presented in cases before the Court during their 2007 term, some justices voted together more often than others.

Another way to examine bloc voting is to look at coalitions. Because 5–4 decisions are so important, scholars often consider which groups of five justices make up the majority in those decisions. Roberts, Scalia, Kennedy, Thomas, and Alito (the five most conservative members of the Court) voted together in four cases that were decided 5–4 during the 2007 term (SCOTUSblog.com). However, there is also a liberal voting bloc of Stevens, Kennedy, Souter, Ginsburg, and Breyer, which also voted together in four 5–4 decisions. No other combination of five justices voted together more than once in a 5–4 decision. The appearance of Kennedy in eight of the 5–4 decisions makes him a central figure in the Court's modern jurisprudence.

Those patterns, and the lack of patterns, suggest two principal qualifications of bloc analysis. First, the justices do not always vote together in predictable ways. Cases that cut across usual policy preferences are most likely to produce atypical voting patterns. (See Law and Popular Culture: *The People vs. Larry Flynt.*) Second, just because justices cast similar votes, it does not signify that the justices consulted one another or even tried to exert influence on one another. Thus, voting agreements seem to reflect justices who hold similar policy preferences and, for that reason, come to cast identical votes.

The Attitudinal Model

As we noted in Chapter 13, the attitudinal model is the prevailing method of studying the votes of Supreme Court justices. It assumes that justices' votes are a function of their policy preferences (Segal and Spaeth 1992, 2002). The model is remarkably elegant. Justices are policy makers, and they vote the way they do because they are interested in see-

LAW AND POPULAR CULTURE

The People vs. Larry Flynt *(1996)*

"If the First Amendment will protect a scumbag like me, it will protect all of you." Those words from Larry Flynt (portrayed by Woody Harrelson) perhaps best summarize both popular reactions to pornography and the difficulty the Supreme Court has in applying the First Amendment to this emotional area. Flynt is referring to the Supreme Court case *Hustler Magazine v. Falwell* (1988), which considered whether the First Amendment protects speech aimed at public officials that is offensive and causes emotional distress. The case involved a parody of an ad campaign for Campari (an alcoholic beverage) implying that evangelist Jerry Falwell and his mother had been involved in an incestuous relationship. Larry Flynt published the parody in his *Hustler* magazine. Two aspects to the film are noteworthy: One is the treatment of the Supreme Court and its institutional dynamics; the second is the expectation by Flynt and his lawyers that he will not win.

According to the website of film critic and law professor Rob Waring, director Milos Forman and producer Oliver Stone went to great lengths to recreate the interior of the Supreme Court and to hire actors who were similar in appearance and dialect to the justices on the Court when Flynt's case was heard. Such efforts are unusual in Hollywood and are particularly interesting in this situation, because one can listen to the actual oral argument on the Internet (http://www.oyez.org) and compare it with the dramatized version in the film. Your own experience at the Court or pictures of the Court can be compared with the stylized version presented by Forman and Stone.

Another reason this film is interesting is the expectation by Flynt and his lawyer, Alan Isaacman (played by Edward Norton), that the Court will not look favorably upon Flynt or his cause. Isaacman even shows some reluctance to appeal the case to the Supreme Court for fear of the way his client will behave—Flynt had become notorious for his outrageous courtroom conduct. But the Court ruled 8–0 in his favor.

This chapter's discussion of judicial decision making might have led to a different prediction. The Court in 1988 was ideologically divided and becoming more and more conservative in its decision making after the addition of justices nominated by President Ronald Reagan. Indeed, Larry Flynt himself even said in an interview with Larry King when the film opened, "I knew they didn't like me." If one considered ideology or party affiliation alone, a unanimous decision in favor of *Hustler* would appear very unlikely. Thus, this film—and this case—present an opportunity to consider the complexity of predicting Supreme Court justices' votes. The experience is made all the more interesting because of the ability to view the film version of the events, listen to the oral argument, and read the decision.

Regardless of one's opinions of Larry Flynt and *Hustler*, the film does represent a rare example of Hollywood treating a real Supreme Court case in an unorthodox manner, providing both visual images of the Court's chambers and footage of a re-enacted oral argument that affords us the opportunity to contrast the film version with what really happened.

After watching this movie, be prepared to discuss the following questions:

1. How realistic is the film in depicting the Supreme Court? After viewing the Supreme Court scenes in the film and listening to the actual oral argument in the case of *Hustler Magazine v. Falwell* (1988), discuss the level of realism in the film.
2. Consider the justices on the Court at the time of the case, their political ideology and party identification, and the issues presented in the case. On the basis of that information, predict how each justice would vote. Why was the outcome in the case different from what you predicted?
3. In what ways does *The People vs. Larry Flynt* characterize the Supreme Court differently than the other court proceedings shown in the film?

To learn more about the film, visit these websites:

http://medialibel.org/cases-conflicts
http://www.usfca.edu/pj/articles/larry_flynt.htm

ing their policy views made into law. About the only challenge in the attitudinal model is how to measure the ideology of the justices (Segal and Cover 1989). Once we can agree that Scalia is politically conservative (and agree on how to measure Scalia's ideology), it is easy to predict that he will vote in a conservative direction in cases before the Court. Indeed, Scalia votes in a conservative direction nearly 70 percent of the time, whereas Stevens (the most reliably liberal justice on the current Court) votes conservatively just 36 percent of the time (Segal and Spaeth 2002). Study after study has reaffirmed the value of the attitudinal model. But it cannot be the entire explanation for Supreme Court voting. Some of the votes that are consistent with the ideology of the justice may have been cast for a different reason (for example, commitment to precedent), and some votes are not consistent with the attitudinal model (for example, a liberal vote cast by Scalia). To fill out the explanation, we look to the strategic and legal models.

The Strategic Model

The strategic model assumes that justices are policy makers who act strategically to achieve their most preferred outcome (Epstein and Knight 1998). That sometimes means that they cast votes that appear to be contrary to the attitudinal model but that are designed to further their goals. Consider the following scenario: Acting solely on attitudes, Justice A ends up with his or her least preferred outcome (say, a reversal of a lower-court decision he or she agrees with). However, by being willing to moderate his or her views, Justice A may be able to put together a coalition of judges to achieve his or her second most preferred outcome (say, a reversal of the lower-court decision but on narrow legal grounds). Or maybe it is in Justice A's best interest to vote against his or her stated attitudes because the case is important to Justice B and Justice B may be inclined to vote with him or her on a subsequent case about which Justice A feels more strongly than he or she does about the current one before the Court.

The strategic model is very intuitive because it appears to describe much of the behavior we witness on the Court (Maltzman, Spriggs, and Wahlbeck 2000), but it also adds substantial complexity to efforts to explain Supreme Court voting. Critics charge the additional complexity is unnecessary because Supreme Court justices are relatively unconstrained and can vote as they wish with few consequences. Thus, the additional complexity and difficulty of assessing the strategic model empirically make it inferior to the elegant power of the attitudinal model. Nevertheless, the strategic model is gaining attention and is proving useful for explaining Supreme Court behavior, especially in the areas of coalition building and voting to grant certiorari (see Chapter 14).

The Legal Model

Many law professors and political scientists start with the legal model in their efforts to explain the behavior of Supreme Court justices. The legal model asserts that justices' decisions are the product of the legal statutes involved in the case, their meaning and precedent. Political scientists for the most part long ago abandoned a simple application of the legal model, recognizing that there was too much disagreement among the justices about the meaning of the law, precedent, and so on, to make this a useful explanatory or predictive model. The abandonment may be premature, though, because

scholars have begun to reconsider the importance of the legal and political context of cases (Gillman and Clayton 1999).

In a more nuanced effort to describe the effects of legal factors on Supreme Court voting, Richards and Kritzer (2002) argue that there is support for "jurisprudential regimes," which are defined as "a key precedent, or a set of related precedents, that structures the way in which the Supreme Court justices evaluate key elements of cases in arriving at decisions in a particular legal arena" (308). They have found evidence for the "jurisprudential regime" model in cases dealing with free expression and the Establishment Clause.

The purpose of our brief discussion of each of the prevailing paradigms used to explain Supreme Court justice voting is to encourage the reader to consider the sophisticated methods political scientists employ in their work and to offer directions for further analysis. Each of the models has passionate supporters and vocal detractors, but the common element is that they all contribute to an improved understanding of the politics of the Court.

From Warren to Roberts

Scholars and journalists frequently refer to the Court by the name of the chief justice who leads it. Although the chief justice is just one of nine votes, the position does carry significant opportunity to shape the Court and its decisions. The chief justice assigns the opinion if he is in the majority, which happened nearly 80 percent of the time between 1953 and 1990 (Maltzman and Wahlbeck 1996). He also begins the discussion in conference and is responsible for the administrative functioning of the Court. There have been just seventeen chief justices in the Court's history; the most recent four are Warren, Burger, Rehnquist, and Roberts.

The Warren Court

Although it is now almost forty years since Chief Justice Earl Warren stepped down, the **Warren Court** (1953–1969) continues to command our attention because, in the areas of civil liberties and civil rights, it remains the benchmark against which subsequent periods of the Supreme Court will be measured. The Warren Court revolutionized constitutional law and U.S. society as well, handing minorities victories they had not been able to obtain from reluctant legislatures and disinclined chief executives.

The Warren Court first captured national attention with its highly controversial 1954 decision in *Brown v. Board of Education* that invalidated racial segregation and struck down the legal doctrine of "separate but equal" (Chapter 7). Moreover, the Court first confronted the difficult problem of defining obscenity and considerably narrowed the grounds for prosecution of obscene material (*Roth v. United States* 1957). But the Court's liberal heritage did not firmly emerge until President Kennedy's appointment of Justice Arthur Goldberg in 1962 (Baum 1995). In 1962, the Warren Court began the reapportionment revolution in *Baker v. Carr* (1962), eventually holding that legislative districts must be drawn on the basis of population—"one man, one vote" (*Reynolds v. Sims*

1964). Another controversial decision banned prayers in public schools (*Engel v. Vitale* 1962). But what produced the greatest controversy was the adoption of a series of broad rules protecting criminal defendants, including the right to counsel (*Gideon v. Wainwright* 1963) (Chapter 5), the exclusionary rule (*Mapp v. Ohio* 1961), and limits on police interrogations (*Miranda v. Arizona* 1966) (Chapter 8). The Warren Court put the issues of civil liberties and civil rights on its docket and eventually on the nation's agenda as well. The number of civil liberties cases heard increased every term, as did the number of civil liberties cases decided in a liberal direction (Segal and Spaeth 1989). It was no surprise when Richard Nixon, in his 1968 presidential campaign, made the Warren Court decisions on criminal procedure a major issue and indirectly suggested that the Court had gone too far, too fast in civil rights.

The Burger Court

With his four appointments, Nixon achieved remarkable success in influencing the Court. After Burger, Blackmun, Powell, and Rehnquist took the bench, support for civil liberties quickly began to diminish, dropping from 80 percent in 1968 to only 34 percent in 1985 (Segal and Spaeth 1989). The undercutting of and withdrawal from Warren Court decisions was most apparent in criminal cases. *Miranda* was weakened but not overturned. Similarly, despite clamor by conservatives, *Mapp* was not overruled, although the Court began creating "good faith" exceptions to the exclusionary rule (see Chapter 8). Although support for civil liberties did decline, the Burger Court did not cut back on Warren Court criminal procedure rulings as much as some had expected.

On balance, the **Burger Court** (1969–1986) was more conservative than its predecessor, but there was no constitutional counterrevolution, only modest adjustments. In establishment-of-religion disputes, for example, the Court moved from a separationist to an accommodationist posture. Nonetheless, state aid to elementary and secondary religious schools was struck down (*Lemon v. Kurtzman* 1971), and the posting of the Ten Commandments in classrooms was prohibited (*Stone v. Graham* 1980). Just as important, the Burger Court began to tackle new sets of issues not previously treated. In gender discrimination, women were not given the same amount of legal protection as had been given to racial minorities, but the tone of opinions was moderate to liberal, not conservative (Wasby 1993). Similarly, in the burning area of reverse discrimination, racial quotas were rejected, but some forms of affirmative action were upheld (*Board of Regents v. Bakke* 1978). During the early years of the Burger Court, the death penalty was struck down but later reinstated (Chapter 9). And, in one of the most controversial decisions ever issued, the Burger Court struck down a variety of requirements that interfered with a woman's right to obtain an abortion (*Roe v. Wade* 1973) (Chapter 14).

Amid that diversity, it is hard to capture the essence of the Burger Court. Indeed, the Burger Court is probably best characterized by the headline "Burger Court Leaves an Unclear Legacy," because the Court was marked by pragmatism and compromise, and, therefore, its tricky track record was harder to categorize than pundits predicted (Wasby 1993, 17). In reality, the Burger Court in the 1980s was dominated by a four-judge center bloc—Blackmun, Powell, Stevens, and White—that needed only one additional vote to carry the day. Powell was the most centrist of the centrist justices on most other matters and, for that reason, was often called on to craft the majority opinion when the Court was split 5–4. Thus, the late Burger Court was dominated by a middle group of justices composed primarily of Republicans.

The Rehnquist Court

The **Rehnquist Court** (1986–2005) officially began when William Rehnquist was elevated from associate justice to chief justice. To replace Rehnquist, Ronald Reagan chose Antonin Scalia, known for his conservative intellectual firepower. Some date the beginning of the Rehnquist Court with the 1988 appointment of Anthony Kennedy, who has provided a conservative vote far more dependably than did his predecessor Lewis Powell. And, as the number of liberals on the Court has been depleted by advancing age, the ranks of the conservatives have swollen. David Souter was tapped by President George H. W. Bush to take the seat occupied by William Brennan, and Clarence Thomas replaced Thurgood Marshall, thus removing two of the most recognized liberals from the Warren Court. Despite the Reagan and Bush appointments, the shift to the right has not been as rapid and consistent as some hoped and others feared.

During Rehnquist's tenure as associate justice and, later, chief justice, he watched the Court move toward him ideologically. A firm voting bloc of five conservative justices included Scalia, Thomas, Kennedy, O'Connor, and Rehnquist. However, it was apparent that the conservatives did not always agree among themselves. O'Connor's deference to legislatures, for example, was at times at odds with Scalia's bold libertarian brand of conservatism. As a result, the conservative Rehnquist Court was not consistently conservative, and voting alliances could not be neatly divided into liberal and conservative camps. On the solid right were the three consistently conservative judges—Rehnquist, Scalia, and Thomas. In the middle were two cautious judges who often held the balance of power—Kennedy and O'Connor. That left Stevens, Breyer, Souter, and Ginsburg to hold down the more liberal wing of the Court. It was that rough alignment that accounts for the fact that decisions were often made by slim margins, with the moderates on the Court making prediction difficult. Thus, the two centrist conservatives—O'Connor and Kennedy—often controlled the direction of the Court in cases dealing with posting the Ten Commandments in public places (Chapter 2), affirmative action, and raising the minimum age for execution to eighteen (Chapter 8).

The conservative drift overseen by Rehnquist can be summarized this way: "His 30 years have coincided with a national political turn toward the right and have produced a clear break from a time when the Court was an engine of social change" (Biskupic 2002). When the Rehnquist era ended, he was known as a congenial and well-liked chief justice who presided over a Court that was "characterized by its zeal to curb federal power and to leave the problems of society—its poor, weak and disadvantaged—to the states" (Biskupic 2002).

The Roberts Court

The **Roberts Court** (2005–) began on the first Monday in October 2005, when John Roberts officially assumed his duties as the nation's seventeenth chief justice. In selecting Roberts, President George W. Bush clearly stated his desire to place his conservative imprint on the Supreme Court (Neubauer and Meinhold 2006). And the fact that

Roberts was relatively young, fifty at age of appointment, suggests that he might have a truly long-term impact on the Court.

Roberts came to the Court with impeccable legal credentials. He showed his mastery of complex constitutional issues during the Senate Judiciary Committee hearings, setting a high bar for future nominees. But, beyond his legal credentials, which made it difficult for many senators to vote against him, Roberts came to the Court with a reputation for being a conservative in the Rehnquist mold. Indeed, Roberts had earlier clerked for Rehnquist.

It is, of course, still too early to tell if Roberts will be as conservative as his supporters hope and his critics fear. After all, the lawyer is not always the father of the judge. Just as important, the future direction of the Court will also be shaped by the next few appointments. President Bush moved to fill the O'Connor vacancy by nominating Samuel Alito, who was confirmed by a narrow vote of 58–42. Already the Roberts and Alito nominations are having an impact, with the two of them voting together as much as any other combination of justices on the bench (and universally in a conservative direction). The advancing age and health problems of several of the other justices on the Court would suggest the winner of the 2008 presidential election will likely get one or two vacancies to fill—a result that is likely to affect the ideological balance of the Court and Justice Kennedy's position at its fulcrum.

Impact and Implementation

The Supreme Court affects U.S. political life in fundamental and often controversial ways. As the discussion of the Supreme Court from Warren to Roberts illustrates, few areas of U.S. law and politics remain untouched by its decisions. But what goes on after the Court renders a decision? Impact and implementation are far from automatic. Consider, for example, the Court's decision protecting pornography on the Internet. (See Case Close-Up: *Reno v. American Civil Liberties Union* 1997.)

Reactions and Responses

Reactions to Supreme Court decisions vary from strong support to loud condemnation. To be sure, some rulings attract little interest beyond the legal community. But, as the Court has increasingly decided disputes with widespread public policy ramifications, reactions from an array of lawyers and law professors, elected officials, and interest groups have become a common media staple. In turn, an occasional decision strikes a deep nerve in the body politic, prompting public outrage. Decisions about public displays of the Ten Commandments and striking down state laws prohibiting homosexual conduct elicit strong emotional reactions.

At times, implementation is almost complete and immediate. In the years following *Roe v. Wade* (1973), for example, several million women ended their pregnancies with legal abortions. By contrast, the events following *Brown v. Board of Education* in 1954 demonstrate that the implementation of other rulings may be prolonged. It was not until 1970 that the vast majority of southern school systems were truly integrated. The

CASE CLOSE-UP

■ Reno v. American Civil Liberties Union *(1997)*

Pornography on the Internet

On February 1, 1996, Congress passed the Communications Decency Act of 1996 (CDA), and President Clinton quickly signed the bill into law. Almost as quickly, the American Civil Liberties Union and other interest groups filed a lawsuit seeking to declare the law unconstitutional. From the beginning, the case was destined for the Supreme Court because it had all the elements of a landmark case: First Amendment issues, the emergence of a new technology (the Internet), pornography, civil liberties, and congressional action. Thus, the stage was set from the day the bill became law for an eventual Supreme Court battle that would become *Reno v. American Civil Liberties Union* (1997).

The two provisions that led to the controversy in this case are referred to by the Court as "indecent transmission" and "patently offensive display." The first one criminalizes the "knowing transmission of obscene or indecent messages to any recipient under 18 years of age." The second provision "prohibits the knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age." The Court ruled 7–2 that those provisions violated the First Amendment to the Constitution. Justice Stevens, the author of the majority opinion, wrote for the Court: "We are persuaded that the CDA lacks the precision that the First Amendment requires when a statute regulates the content of the speech. To deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another." He concluded, "The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship."

The reactions were swift. President Clinton issued a statement the day of the decision, saying, "We can and must develop a solution for the Internet that is as powerful for the computer as the V-chip will be for television, and that protects children in ways that are consistent with America's free-speech values. . . . With the right technology and ratings systems . . . we can help ensure that our children don't end up in the red-light districts of cyberspace" (Broder 1997). Members of Congress got in on the action, too. Senator Dan Coats (R-Ind.) said the decision showed that "a judicial elite is undermining democratic attempts to address pressing social problems. The Supreme Court is purposely disarming the Congress in the most important conflicts of our time" (Broder 1997). The ACLU and other free-speech proponents were thrilled with the decision and spoke approvingly of the Court's handling of First Amendment rights and the Internet.

For many Supreme Court cases and controversies, that would have been the end of the story, but not for this one. Congress was determined to regulate online pornography aimed at children. The Court would not get the last word—or would they? As a direct response to the Court decision, Congress passed the Child Online Protection Act (COPA) in 1998. President Clinton signed this law, too. And it has become clear in public opinion polls about Internet issues that child protection from pornography is important to parents. This law (COPA) "narrowed the scope of the original CDA by targeting commercial materials on the Internet that are deemed harmful to minors" (Schwartz 1998). As one assistant to Representative Michael Oxley (R-Ohio) put it, "We read the Supreme Court decision (on the original CDA) closely and rewrote (the proposed legislation) to apply the principles of pornography law to the Web." But opponents of the bill, such as Barry Steinhardt of the Electronic Frontier Foundation, counter that "at first glance . . . they appear relatively benign in that they are supposedly limited to commercial pornographers who market their sites to minors, but when you look beneath that veneer, you quickly discover that they apply to any Web site that has a commercial component and material that some community could consider harmful to minors" (Schwartz 1998). Once again, the American Civil Liberties Union and others filed a lawsuit. This time, in *Ashcroft v. American Civil Liberties Union* (2004), the Court held that the CDA likely violated the First Amendment. Congress had already reacted by passing the PROTECT Act in 2003. This time, however, the key elements of the law would be upheld in *United States v. Williams* (2008), with Scalia reasoning that child pornography, of any kind, and its trafficking whether real or alleged is not protected by the First Amendment.

But pornography on the Internet continues to flourish, and the political debate about how to curtail or

(continued)

stop it continues. Congress passes a law, the Court declares it unconstitutional on First Amendment grounds, the legislative and executive branches, along with the public, react negatively, they revise the law and pass it again, and then the Court finds once again that the First Amendment has been violated. This issue is interesting because it brings to bear all the forces described in this book—including political, economic, social, and legal. Parents have a stake in protecting their children, government has a stake in limiting obscene speech, businesses have an economic stake in promoting the Internet, interest groups have a stake in both more and less pornography on the Internet, the legislative and executive branches have an interest in passing and implementing laws that are popular with the public, the courts have an interest in protecting the Constitution. Everyone has an interest and a perspective, and, somehow, the Court has to balance those competing demands. These cases illustrate the complexity of Supreme Court decision making and the difficulty of balancing the intersection of law, courts, and politics.

Court's 1963 decision in *Abington v. Schempp*, declaring prayers in public schools unconstitutional, is an example of a decision that has been implemented in varying degrees across the nation.

Those reactions and responses illustrate that Supreme Court decisions are rarely the final word in disputes that have public policy ramifications. Rather, rulings of the nation's highest court interact with those of other governmental agencies and lower courts. A major body of political science literature explores why judicial policies often experience implementation setbacks (Canon and Johnson 1998).

Political Institutions

Impact and implementation of Supreme Court decisions are affected first and foremost by how the core institutions of the legal system change the law. More than any other public agency, Congress tends to be the focal point of public reaction to judicial policies. What Congress can do in response to a Court decision depends, in large part, on the nature of that decision. If the decision involves a statutory interpretation, Congress can attempt to "reverse" the Court by rewriting the statute and thereby changing the meaning given by the judiciary. For example, in 1984, the Supreme Court ruled that, when an institution receives federal aid, only the program or activity that actually got the aid, not the entire institution, is covered by four federal civil rights laws (*Grove City College v. Bell* 1984). In 1988, Congress passed a new law specifying that the entire institution would be affected. Congress, however, does not often reverse statutory interpretations. Between 1954 and 1990, the Supreme Court declared a total of 562 state and federal laws and 7 executive orders unconstitutional. But Congress was successful in passing remedial legislation only 7 percent of the time (Meernik and Ignagni 1997). Factors related to a successful response by Congress include the involvement of the executive branch, interest groups, and public opinion (Eskridge 1991; Meernik and Ignagni 1997).

If the decision involves an interpretation of the U.S. Constitution, however, it is considerably more difficult for Congress to reverse the Court. Amending the Constitution is a difficult and complicated task, requiring a two-thirds vote in both houses of Congress and ratification by three-quarters of the states (Vile 1991). Only four Supreme Court decisions have been overruled by constitutional amendments in U.S. history. The most

recent was the Twenty-Sixth Amendment, passed in 1971, which lowered the voting age to eighteen. In *Oregon v. Mitchell* (1970), the Court had lowered the voting age to eighteen in federal, but not state, elections. That decision was widely viewed as both unwise and unworkable. The situation was resolved by the Twenty-Sixth Amendment, which granted eighteen-year-olds the right to vote in all levels of elections. However, the amendment route can be used only when there is considerable agreement that the policy inherent in the Court's decision ought to be altered. And even then, it's far from a sure thing. In a very unpopular decision, the Court ruled a Texas statute that banned flag burning unconstitutional (*Texas v. Johnson* 1989). Congress moved to pass a constitutional amendment, but even with significant public support, it was difficult to mobilize enough votes to pass the proposed amendment. Nonetheless, elected officials are fond of recommending this approach in issue areas such as religion, abortion, and same-sex marriages (Stumpf 1965). Similar unsuccessful activity occurs in every Congress (Baum 2001).

Congress can also respond to Supreme Court decisions by engaging in general retaliation. At times, Congress has refused to appropriate sufficient funds for the Court's operation. At other times, Congress has been more pointed. Article III prohibits Congress from reducing judges' salaries and was intended to prevent fiscal punishment for unpopular decisions. In an inflationary era, however, the failure to increase salaries is tantamount to a reduction in salary. In 1964, Congress raised the salaries of all federal judges except those on the Supreme Court by $7,000; the justices received only a $4,500 raise. During the debate, several representatives made it clear that dissatisfaction with the Supreme Court's reapportionment decisions motivated their actions (Canon and Johnson 1998).

Interpreters of Law

Impact and implementation of Supreme Court decisions are also affected by how those rulings are interpreted by judges and lawyers. Important policy announcements almost always require interpretation by someone other than the policy maker (Canon and Johnson 1998). Some Court decisions are ambiguous because the issue is complex or the subject matter is difficult to resolve in a judicial opinion. Sometimes, the judges may even be vague intentionally—to potentially give other members of the legal system greater discretion (Staton and Vanberg 2008). In obscenity cases, for example, it has proved difficult to fashion a precise definition of prohibited material. Justice Potter Stewart once remarked that he could not define hard-core pornography but he "knew it when he saw it" (*Jacobellis v. Ohio* 1964). Court decrees may also be unclear because the justices are sharply divided in their reasoning. Court opinions, after all, are often the product of the writing justice, who crafts a compromise document that will garner five votes. The result can be opinions that are ambiguous because they contain a lot of conflicting language.

Part of the interpreting population consists of lawyers who hold elected public office—attorneys general and district attorneys—and who represent public agencies, such as school boards and local governments. Their interpretations are the first link in the chain of events that gives a judicial decision its impact. Others look to the interpreting population for guidance on the meaning of the decision and possible responses. Although not official, their legal advice shapes how their clients respond.

Judges are also a critical part of the interpreting population. Charles Johnson and Bradley Canon suggest that a judge's response reflects his or her overall enthusiasm for the higher court's policy. Most reactions fall within "the zone of indifference," which means the judge has a neutral reaction to the policy. At other times, the judge is very enthusiastic about the policy and will interpret it broadly, pushing its logic to the limit and praising it in the opinion. On the other side of the zone of indifference are the judges who refuse to accept a higher-court policy. They have three basic options: defiance, avoidance, and limitation of the policy's application. Defiance means that the judge simply does not apply the policy in cases coming before the court. Desegregation brought out considerable trial court defiance by many state and some federal district court judges. The effects of such defiance can be overcome only by a long and often expensive appellate court process. But, overall, defiance is relatively rare. A more common response is avoidance. Judges can avoid interpreting and applying an unacceptable higher-court policy by disposing of the case on procedural or technical grounds, thus obviating the need to consider the Supreme Court ruling on its merits. Finally, a lower-court judge who does not accept a higher court's decision can limit its application. A common technique is distinguishing the precedent. By stressing certain facts in the case, the lower-court judge may find a way to hold that the offensive Supreme Court decision is not applicable to the case at hand.

Consumers of Law

Impact and implementation of Supreme Court decisions are also affected by the users of the legal system. Canon and Johnson (1998) call one set of users the "implementing population." In many of the controversial Supreme Court rulings, implementation is a group effort by bureaucratic organizations. Police departments, for example, were openly hostile to *Miranda*, but after considerable initial resistance, many eventually adopted interrogation practices that met Supreme Court mandates and accommodated the needs of law enforcement officers (Milner 1971).

Also found in the outer ring of the legal system are interest groups to whom a favorable Court decision is a valuable resource because it declares the law in favor of one side and against the other. Stuart Scheingold (1974) suggests that judicial decisions create rights that are best understood as political resources and, therefore, are best viewed as the beginning (and not the end) of a political process.

Ultimately, a Court decision merely serves as another tool for persuading others to behave as certain interests want. Thus, Supreme Court rulings frequently motivate proponents and opponents to take political action. The clearest example involves *Roe v. Wade* (1973). Antiabortion groups, flying the banner of pro-life, mobilized to lobby for restrictive state and federal legislation. More quietly, pro-abortion groups, calling themselves pro-choice, supported *Roe*. But, in the aftermath of *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), pro-choice groups have become much more politically visible and active in lobbying to protect the political resources they had won earlier in the Supreme Court.

One way that interest groups affect impact and implementation is by sponsoring follow-up litigation. Given that Court decisions are often somewhat vague, cases are filed to test the limits. Another common technique is to expand the scope of the conflict.

Losers in the judicial arena are often quick to turn to the legislature for redress, pressuring elected representatives to pass corrective legislation in their favor. Conversely, winning groups seek to protect their hard-fought court victories.

Political, Social, and Economic Forces

Political, social, and economic forces also affect the impact and implementation of Supreme Court decisions. The role of the outer ring of the legal system is best examined in relation to public opinion. As Peter Finley Dunne's (1949) turn-of-the century barroom philosopher, Mr. Dooley, cynically remarked, "The Supreme Court follows the election returns." More eloquently, Justice Felix Frankfurter wrote, "The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction" (*Baker v. Carr* 1962). Indeed, much evidence points to the fact that the Court strives mightily to improve and maintain its positive public image—including, among other things, refusing to televise its oral arguments (Perry 1999). And its actions appear to have worked. No other American political institution enjoys such a high level of public goodwill (Caldeira and Gibson 1992; Gibson and Caldeira 1992). This reservoir of public support is sometimes referred to as "legitimacy" or "diffuse support." It is argued that the Court's legitimacy gives it the latitude to hand down unpopular decisions and still achieve compliance.

Supreme Court decisions rarely arouse public interest (Caldeira 1991). When they do, however, it has been shown that people's reactions to those decisions may influence their views of the Court (Franklin and Kosaki 1989; Grosskopf and Mondak 1998; Hoekstra 2000; Hoekstra and Segal 1996; Mondak 1991, 1992). Public perceptions of *Bush v. Gore* (2000) were heavily charged with political ideology: The decision was applauded by Republicans and rejected by Democrats (Kritzer 2001). However, despite being the most widely publicized case ever, it does not appear to have resulted in any deleterious consequences for the Court's public support and, therefore, its legitimacy (Gibson, Caldeira, and Spence 2003; Kritzer 2001). Is *Bush v. Gore* (2000) an anomaly? Does the public ever change its views of the Court? And, if so, do such changes get translated into Supreme Court decisions? (See Courts in Comparative Perspective: Japan.)

There is little disagreement about the contention that public opinion affects the Supreme Court—but how? One line of thinking is that voters express their preferences by electing presidents who then appoint justices to the Court, thereby bringing the Court into line with the political climate of the day—albeit with some delay (Norpoth and Segal 1994). Another line of thinking posits that the effect is direct, that the Court responds directly and independently to the public mood (Mishler and Sheehan 1993, 1994). Both sides make convincing arguments, and it is entirely possible that both sides are right. That is, as the political, economic, and social forces converge, sometimes it is the appointment power that translates the public will into Supreme Court policy direction; at other times, it is a more immediate and direct transference of the public's desires. For example, on many issues the Court addresses each year, public sentiment is likely to be nonexistent. But, in high-profile, highly salient cases—such as those dealing with abortion, religion, same-sex marriages, and the death penalty—we find it hard to believe that the Court does not take a more nuanced look at the landscape of public opinion before reaching its decisions. Thus, the evidence for both sides may be

COURTS IN COMPARATIVE PERSPECTIVE

Japan

Article 9 of the Japanese constitution (imposed by General Douglas MacArthur in 1947) explicitly banned all military forces in Japan. But, by 1955, conservative politicians, eager to reassert national independence, decreed that Article 9 applied only to offensive forces. When the creation of the Japanese defensive forces was challenged in court, Judge Shigeo Fukushima (a member of the leftist Young Jurists League) decided that Article 9 meant what it said and declared the new military unconstitutional. His decision was reversed on appeal, and he was subsequently reassigned to a minor provincial court, his once-promising judicial career over (Ramseyer and Rasmusen 2000).

Japan is a major world economic power; politically, it is a staunch ally of the United States. Its 127 million people occupy a geographical area slightly smaller than California. It is one of the most homogeneous countries in the world, with 99 percent of its people being native Japanese.

Modern Japan emerged after devastating defeat during World War II with heavy damage to the economy and high loss of life. Although the emperor retains his throne as a symbol of national unity, actual power rests in networks of powerful politicians, bureaucrats, and business executives. The legislative branch, known as the Diet, includes the House of Representatives and the House of Councilors. The executive branch consists of the prime minister and a cabinet appointed by the prime minister.

The Japanese legal system is based on Buddhist ethical principles, a U.S.-style constitution imposed after World War II, a continental-style civil law, and a German-inspired criminal code. But, in sharp contrast to the situation in the United States, lawyers are a rare breed—only 700 pass the bar in a given year. Moreover, the nation has very few judges. People who wish to become judges major in law as undergraduates and then apply to the Legal Research and Training Institute (LRTI), the only national law school in the nation. The pass rate averages about 3 percent a year. LRTI graduates become lawyers, and every year some 70 to 130 lawyers become judges. They are selected and promoted by the Supreme Court Secretariat—the body that effectively ended Judge Fukushima's judicial career.

The judicial branch is headed by the Supreme Court, whose members are appointed by the cabinet. The highest court consists of fifteen judges, typically five of whom were practicing lawyers, five were lower-court judges, and five were bureaucrats. Although the court has the power of judicial review, it has rarely used that power. Indeed, it has held legislation unconstitutional only about half a dozen times in its entire history (Ramseyer and Rasmusen 2001). Several factors explain why the Japanese Supreme Court, unlike other such bodies around the world, has failed to become a major political actor in its nation (Ledbetter 2001).

For one, the short tenure of justices does not allow them to carve out a policy-making role. Justices are typically appointed in their early sixties, and, given that they must retire by the age of seventy, they serve only short terms.

Another factor is the limited role of law in Japanese society. The culture emphasizes private reconciliation of disputes rather than public confrontation. Thus, few lawsuits are filed; when they are filed, they take years to resolve, thus further weakening the independent role of courts in the nation.

But perhaps most important, Japan is not a nation that values independence. The political style tends toward consensus building. For most of the postwar era, the nation's politics have been controlled by the Liberal Democratic Party (LDP), which is conservative and business oriented. Governmental bureaucracies are very powerful. Thus, in the long run, the judges of Japan reflect the dominant political forces—conservative and largely faceless bureaucrats. Such a system allows little room for wayward judges, such as Fukushima, whose political views are out of step.

correct—the public influence is both direct and indirect. And recent evidence suggests that, when the Court deviates too far from the ideological norm of the public, its support erodes (Durr, Martin, and Wolbrecht 2000).

Overall, legislatures, bureaucracies, lawyers, judges, interest groups, and the public are all interested parties in Supreme Court litigation. The Court is pressured by each of those actors but, in the end, possesses a legitimacy that allows it to make decisions that will inevitably upset a number of interests. That legitimacy allows the Court to move freely in matters of major social consequence and still achieve compliance with its decisions.

CONCLUSION

United States v. Williams (2008) is just one in a long line of cases in which the Supreme Court has had to decide how to balance the First Amendment protections of freedom of speech with the role of government in protecting people. It illustrates the complexity of the issues the Court faces and the unique role it plays in our government and society. Regulation of access to pornography on the Internet by children is popular with the public, legislators, and presidents, and the Court currently contains a majority of ideologically conservative justices. Yet, it took nearly twenty years before the Court would uphold a law that was aimed at limiting child pornography on the Internet.

Analyzing this case, along with its predecessor *Reno v. American Civil Liberties Union* (1997), where the Court struck down a similar effort by Congress, will challenge you to use the understanding of institutional and individual behavior gained in this chapter to separate the broad trends from the anomalous outliers. Does *Reno v. American Civil Liberties Union* (1997) or *United States v. Williams* (2008) reflect the expected direction and the way the current Court will handle issues relating to pornography and the Internet?

In addition to these controversial decisions, this chapter also examined the more mundane workings of the Court: the process by which its members are chosen, its organization and decision-making apparatus, and the influence of the most recent chief justices. Lower-court methods of implementing and of defying Supreme Court decisions were discussed, as were various analyses of justices' voting habits. Rigorous analysis notwithstanding, Supreme Court decisions remain unpredictable, largely because of the fluid and interrelated forces—political, social, economic, and individual—that affect them. That unpredictability is perhaps the most telling characteristic of our nation's highest court. Students of the complexities of the law and of the Supreme Court that applies it gain a unique perspective on these powerful—yet ultimately human—institutions.

CRITICAL THINKING QUESTIONS

1. The next president will likely have one or more vacancies to fill on the Supreme Court. To what extent will the political decisions by the next president be similar to or different from those of President Bush in nominating Chief Justice Roberts and Justice Alito?