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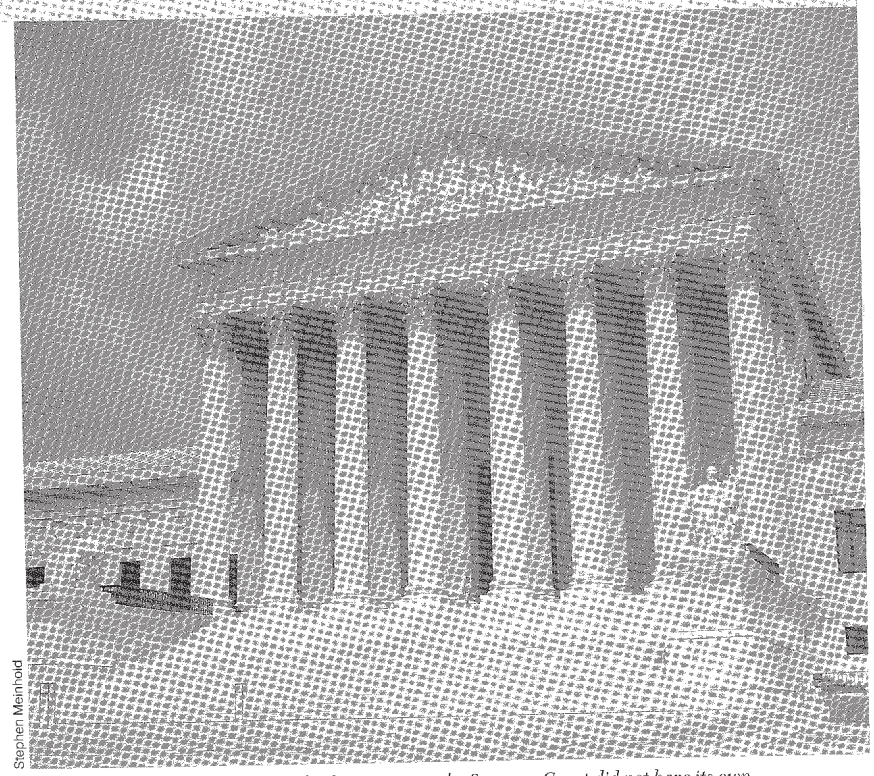
CHAPTER

THE SUPREME COURT: DECIDING WHAT TO DECIDE



Stephen Meinhold

Despite its role as a co-equal branch of government, the Supreme Court did not have its own building until 1935. After oral argument, lawyers often hold press conferences on these steps predicting victory in their case.

Jane Roe was a pregnant, homeless, twenty-one-year-old Dallas waitress. Because an 1856 Texas law made abortion illegal, Jane Roe confronted the option either of traveling to another state to obtain a safe, but expensive, abortion or of seeking an illegal and potentially life-threatening back-alley procedure. An adoption lawyer introduced her to two young female lawyers who were looking for plaintiffs to challenge state laws restricting abortion. Thus, on March 3, 1970, Jane Roe was listed as the lead plaintiff in a class action lawsuit filed in U.S. District Court for the Northern District of Texas. Named as defendant was Henry Wade, the district attorney of Dallas County, Texas. Three years later, the Supreme Court ruled in Jane Roe's favor. Surprisingly, the initial reaction to *Roe v. Wade* was muted; former president Lyndon Johnson had died the day before, thus banishing to the back pages comments about the Court's expansion of the right to privacy to include a woman's right to an abortion. But, over the years, the controversy has mounted, focusing unprecedented attention on the nation's highest court.

Since deciding *Roe v. Wade* in 1973, the justices of the Supreme Court have been faced with numerous opportunities to decide abortion-related issues. Most of the time, they have refused to decide the cases, but thirty-three times the Court has said "yes" (most recently in *Gonzales v. Carhart* [2007]), thereby intentionally putting itself in the maelstrom of this contentious social, political, and legal issue. *Roe v. Wade* (1973) did not end either the legal or the political battle over abortion. Why do the justices decide to hear cases such as *Roe*? Why would the justices regularly vote to hear cases that deal with one of the most contentious issues—abortion—ever decided by the Court? Especially when fewer than 100 cases in any year are given the full attention of the Court? The answer to those questions is found in the unique position of the Supreme Court in our society, the ideological preferences of the justices, and the legal activities of interest groups and plaintiffs in the lower courts.

This chapter begins by discussing the Supreme Court's jurisdiction and the types of petitions litigants must file if they wish one last review of their case. Through doctrines of access, the Supreme Court decides what types of cases the federal courts will or will not hear, thus effectively limiting some disputes that litigants might wish decided but the Court chooses to ignore. Next, attention shifts to the lawyers and litigants who mobilize the law by seeking Supreme Court review. The Court's procedures and the criteria employed receive considerable attention. Finally, the chapter explores the types of cases on the Court's docket and examines tensions between the Court and Congress over which branch of government should choose what types of cases the Supreme Court should decide. (See Courts in Comparative Perspective: The International Court of Justice.)

Jurisdiction of the Supreme Court

Which cases the Supreme Court can hear—whether federal or state—is specified, ever so briefly, in the Constitution and further fleshed out by federal statutes and decisions of the Court itself. As discussed in Chapter 3, debates over the jurisdiction of the federal judiciary are as old as the nation itself, and this long-standing controversy continues.

COURTS IN COMPARATIVE PERSPECTIVE

■ *The International Court of Justice*

The sight of Slobodan Milosevic standing before a court of law answering charges of war crimes was something many thought they would never see. The Yugoslav leader was blamed for starting four Balkan wars and was charged with crimes against humanity for the 1999 expulsion of hundreds of thousands of Kosovo Albanians from their homes as well as the massacre of civilians in villages such as Racak and Bela Crkva. He was the first former head of state delivered by a government to face an international war crimes court.

The specifics of Milosevic's alleged crimes aside, his prosecution raises two important questions: Who should decide who tries international criminals? And should a permanent world criminal court be created? Past efforts at establishing international tribunals have largely been ad hoc. The International Criminal Tribunal for the Former Yugoslavia was established by Resolution 827 of the United Nations (UN) Security Council in May 1993. Based in The Hague, Netherlands, it was the first international body convened for the prosecution of war crimes since the Nuremberg and Tokyo trials held in the aftermath of World War II. Currently, the tribunal has 1,146 employees, and its 2008 budget was $311 million. The tribunal may not try suspects in absentia, and it may not impose the death penalty. The maximum sentence is life imprisonment. To date, 161 people have been indicted; 115 of these proceedings have concluded: 56 people were sentenced, 10 were acquitted, 13 were referred to national jurisdiction, and 36 had their indictments withdrawn or are deceased. An additional forty-six proceedings are ongoing, with twenty-one of those currently at trial. Two individuals indicted for war crimes remain at large. The longest sentence was that of forty years given to Goran Jelisic, a Bosnian Serb prison camp guard.

The creation of this tribunal reflects a broader trend of international justice. The oldest and most far reaching of these bodies is the International Court of Justice, also based in The Hague, Netherlands. It is the principal judicial organ of the UN and superseded the Permanent Court of International Justice established after World War I. The court consists of fifteen judges, chosen by the UN General Assembly and the Security Council. No two judges may be from the same country. All members of the UN are automatically members of the court. The court's jurisdiction is limited to deciding disputes arising over interpretations of treaties, questions of international law, and breaches of international obligation.

Several factors limit the effectiveness of the International Court of Justice. Chief among them is the lack of enforcement power. If a member nation fails to comply with a judgment of the court, an appeal for assistance may be made to the Security Council. Moreover, the United States excludes all its own domestic matters from the court's jurisdiction and reserves the right to decide what constitutes domestic matters. Thus, the United States has refused to accept decisions of the World Court and, in any event, could block enforcement by casting a veto in the Security Council.

After the creation of the International Criminal Tribunal for the Former Yugoslavia, the next logical step was the establishment of an International Criminal Court to prosecute serious violations of humanitarian law. On July 1, 2002, the International Criminal Court was established pursuant to the Rome Statute, a treaty signed by 106 states that participated in the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. In 2000, President Clinton signed that treaty on behalf of the United States, but it has never been ratified by the U.S. Senate, and George Bush continues to signal his opposition to the court. In an unusual move, in 2002, President Bush notified the UN that the United States was officially withdrawing its name from the treaty. Conservative Republicans are vehemently opposed to such a body, fearing loss of U.S. sovereignty and the possibility that military personnel would be prosecuted, making it very unlikely the Senate will ratify the document.

As for Slobodan Milosevic, he defiantly denied the right of the International Court to try him. He angrily shouted at the judges during court proceedings and even refused to read some of the documents handed to him in court. His trial dragged on for four years before he died in prison. In comparison, another recent high-profile state leader accused of war crimes—Saddam Hussein—was tried by a court created by his own nation, not an international tribunal. He was convicted of war crimes against humanity, sentenced to death, and hanged on December 30, 2006.

Original Jurisdiction

A very small fraction of the cases decided by the Supreme Court arise under its original jurisdiction. Article III of the Constitution specifies that the Court has **original jurisdiction** in all cases affecting ambassadors, other public ministers, and consuls, and cases in which a state is a party. Original jurisdiction cases typically involve suits between two or more states concerning matters such as ownership of offshore oil deposits, territorial disputes caused by shifting river boundaries, and controversies over water rights when a river flows through or between two or more states (Zimmerman 2006). Original jurisdiction cases go directly to the Supreme Court without first being considered by a lower court; in essence, the nation's highest tribunal sits as a trial court from which there is no appeal. Those cases are a very minor part of the work of the Court. In an earlier era, the justices sat as a trial court listening at length to the presentation of evidence and the arguments of lawyers, but no longer. Now the Court appoints a **special master**, who makes recommendations.

Appellate Jurisdiction

The vast majority of cases that come to the Supreme Court arise under its **appellate jurisdiction**, which Congress defines and can alter at any time. Since the passage of the Judiciary Act of 1925, the Supreme Court has functioned, for all intents and purposes, as a court of discretionary jurisdiction. The Court has not been expected to take on the function of primarily correcting errors committed by other courts. Rather, the intent of the 1925 act was that, after a decision in a trial court and after at least one review in federal or state appellate court, further appeal to the Supreme Court should be permitted only if the case presents important issues of federal law (Brennan 1983). In the words of Justice John Paul Stevens (1982, 180), "It is far better to allow the state supreme courts and federal courts of appeal to have the final say on almost all litigation than to embark on the hopeless task of attempting to correct every judicial error that can be found." Against that historical understanding, many litigants petition for Supreme Court review, but only a handful are successful. Appellate jurisdiction cases come to the Supreme Court by three methods: appeal, certiorari, and certification.

Appeal Appeals review lower-court decisions that have declared a state or federal law unconstitutional. Until 1988, **appeals** could be filed from adverse decisions in U.S. courts of appeals, U.S. district courts, three-judge district courts, or state supreme courts (the source of most appeals). According to the statutes, the Supreme Court has an obligation to decide appeals, but, in practice, the Court treats them in approximately the same discretionary manner as the writ of certiorari. Nonetheless, according to Justice William Brennan (1983, 232):

> Cases on appeal consume a disproportionate amount of the limited time available for oral argument. That's because time and again a justice who would conscientiously deny review of an issue presented on certiorari cannot conscientiously say that when presented on appeal the issue is insubstantial. Policy considerations that give rise to the distinction between review by appeal and review by writ of certiorari have long since lost their force, and abandonment of our appellate jurisdiction (leaving a writ of certiorari as the only means of obtaining Supreme Court review) is simply recognition of reality.

Those views have been unanimously shared by the justices, and, after two decades of lobbying, Congress narrowed the Court's mandatory appeal jurisdiction in 1988 to include only the small number of cases decided by three-judge district courts (see Chapter 3).

Certiorari If a case does not fall under the limited criteria of appeal, the losing party in the lower court has no statutory right to appeal. But discretionary review by the writ of certiorari may be sought. From the Latin, **certiorari** means "to make sure." Thus, a request for certiorari (or "cert" for short) is like an appeal, but one that the high court is not required by law to accept for decision. It is literally a writ from the higher court asking the lower court for the record of the case. Most cases reviewed by the Supreme Court come via the writ of certiorari, and, of those, most come from the U.S. courts of appeals.

Certification Although most cases come to the Court as appeals or writs of certiorari, Congress also provides that appellate courts (not the losing party) may submit a writ of certification requesting the justices to clarify or "make certain" a point of federal law. **Certification** is rarely used, and it is rarer still for the Court to decide important cases in this way.

Doctrines of Access

The broad provisions of Article III of the Constitution outlining the jurisdiction of the Supreme Court and the slightly more detailed congressional legislation specifying appellate jurisdiction are, at best, only imperfect guides to understanding how the Court decides to decide. The Court's own interpretations of Article III and its rulings on congressional legislation play a major role in shaping what types of cases the Supreme Court will hear.

The cases that the judiciary may decide are governed by **doctrines of access**. Although courts are passive and reactive governmental institutions, they are not required to hear all disputes brought to them. Before deciding a case's substantive issues (termed a decision "on the merits"), a judge must be satisfied that a number of prerequisites have been met. These procedural and substantive requirements function as gatekeeping devices, allowing access to the judiciary to some types of cases (and litigants) but denying access to other types of cases (and litigants). These restrictions have been developed primarily by the courts themselves and, therefore, represent self-imposed limits on judicial power. For that reason, doctrines of access are also referred to as "rules of judicial self-restraint," because they reflect the concern of the judiciary that some disputes are best handled elsewhere (*United States v. Butler* 1936). Viewed from that perspective, doctrines of access lie at the heart of defining the powers of the three separate branches of government.

Questions concerning doctrines of access rarely arise in the average suit, in which one private party sues another private party. In suits for breaching a contract or causing a tort, these matters are self-evident. Rather, these questions are more likely to arise in policy lawsuits, particularly public policy cases concerning the environment,

reapportionment, abortion, civil rights, and affirmative action. Hence, rules governing access primarily concern the federal courts. The Supreme Court justices play a major role in crafting doctrines of access (Taggart and DeZee 1985). Indeed, these issues are the basis of a substantial number of the Court's formally decided cases (Rathjen and Spaeth 1979).

The Court has considerable discretion over which public matters will be adjudicated and which will not (Orren 1976). The justices may simply decide that they do not want to decide certain issues. For that reason, doctrines of access change, depending on which justices interpret them. The Warren Court, seeing the judiciary as an instrument for correcting or preventing injustices, expanded the scope of litigants who could bring suit in federal court. More recently, the Burger and Rehnquist Courts, articulating a more restrictive role of the judiciary, limited and narrowed the range of litigants who could sue. For example, during the Burger Court, denials of access almost always allowed conservative decisions in the lower courts to stand. Moreover, justices often voted for or against granting access, depending on the ideological result of the lower-court decision (Cameron, Segal, and Songer 2000). It is too early to tell, but the Roberts Court appears to be continuing the recent traditions of limiting access to the nation's highest court.

Doctrines of access are closely tied to the justices on the Court at a particular time, thus leading Adamany (1991) to conclude that they are used largely to achieve policy results. Indeed, from the perspective of the formal law, they have been characterized as "inconsistent, contradictory, even chaotic, and enshrouded by mysteries analogous to those of theology" (Harris 1983, 360). The legal dimensions of doctrines of access can best be discussed under the headings of justiciability, standing, ripeness and mootness, and political questions.

Justiciability

A **justiciable** (pronounced jus-*tish*-able) case is defined as a case that is proper to be decided by a court. That rather bare-bones definition is usually fleshed out with additional requirements that the court must have standards on which to make a decision and that the court must also possess a remedy to correct the problem. Cases that fail to meet those standards are said to be nonjusticiable.

One component of the concept of justiciability is the prohibition against an **advisory opinion**, which is a formal decision by a court about a question of law submitted by the legislature or by an executive officer but not actually presented to the court in a concrete lawsuit. For the federal courts, this prohibition dates to 1793, when President Washington addressed the Supreme Court, asking the justices to define his constitutional authority to decide certain questions relating to the U.S. policy of neutrality with respect to the ongoing war in Europe. Chief Justice John Jay responded that the Court would not and could not provide legal advice, because its role was confined to deciding cases that arose in the course of bona fide litigation. More than a century later, that position was reaffirmed in *Muskrat v. United States* (1911). The rationale is that the courts cannot accept advisory opinions because they present hypothetical situations that lack the liveliness found in actual disputes. Most states follow the federal lead in prohibiting advisory opinions, although a handful allow the state supreme court to issue advisory opinions if requested by the governor or the attorney general.

Standing

Standing is the legal analogue to the question "Who are you to complain?" and refers to a person's right to bring or join a lawsuit. Although the concept of standing is among the most amorphous in the entire domain of public law, three basic components provide some degree of specificity.

The first element of standing is the requirement that the case involve an actual dispute and not merely a theoretical one. Article III of the Constitution limits federal judicial power to cases and controversies. That simple phrase has been interpreted by the Supreme Court to require that the controversy be "definite and concrete." "It must be a real and substantial controversy" (*Aetna Life Insurance Co. v. Haworth* 1937). The case-or-controversy doctrine states a fundamental principle of the adversary system: Courts will hear only concrete disputes and not abstract issues.

A second element of standing to sue incorporates the requirement of adversity. The courts require that the parties in the lawsuit have something to lose and, therefore, will argue and present issues with an intensity and vigor not found in a disinterested litigant who has no personal stake in the case outcome. Today, the requirement of adversity rules out friendly lawsuits, but that was not always true. In 1936, for example, a company president sued his own company to prevent its compliance with a major New Deal statute, and the Court held the law to be unconstitutional (*Carter v. Carter Coal Company* 1936). Under contemporary standards, that case would be denied standing to sue because it was a "friendly" suit lacking true adversity.

The final element of standing is the requirement that the legal injury suffered by the plaintiff be direct. The litigant must have a substantial and immediate interest in the litigation. Stated another way, one may not bring a lawsuit solely on behalf of a third party (except in the case of a legal guardian or next of kin). Thus, a neighbor cannot sue for an injury suffered by another neighbor, and a doctor cannot sue for a legal injury suffered by a patient. But a parent can file suit on behalf of a minor child, a surviving spouse can assert a legal injury suffered by the deceased, and a group can sue on behalf of its members.

Taxpayer Lawsuits One of the most vexing problem areas concerning standing to sue centers on suits brought by citizens against the government. An individual brings a **taxpayer lawsuit** to challenge the spending of public money for a particular purpose. In 1923, the Supreme Court held that a taxpayer's stake in how public money is spent is so minute and uncertain that it did not satisfy the requirement of standing to sue. The Court eased that limitation somewhat in 1968 (*Flast v. Cohen* 1968). By 1982, however, as the Supreme Court and the country had grown more conservative, taxpayer lawsuits were once again relegated to the "dubious"—if not prohibited—category (*Valley Forge Christian College v. Americans United for Separation of Church and State* 1982).

Class Actions Standing requirements are particularly important considerations in group use of the courts. In particular, there are four prerequisites in **class action** lawsuits:

- There must be so many people in the class (group) that it would be impractical to name them all as individual parties.
- The class must be clearly recognizable by virtue of its well-defined interest that raises the same questions of law and fact.

- The representative parties' claims must be typical of the class's claims.
- The representative parties must fairly and adequately protect the interests of the class.

If all four requirements are met, the court will certify that the class may maintain the lawsuit.

The Supreme Court, however, has erected some important barriers to those activities, holding that, in order to meet requirements of standing to sue, the members of the class must have suffered a specific harm rather than have an abstract "public interest." For example, in *Sierra Club v. Morton* (1972), the Court held that purely ideological interests in the environment are not enough to establish standing to challenge governmental action that a litigant believes will be environmentally harmful. Whereas the Warren Court tended to expand the grounds on which interest groups could file class actions, the Burger, Rehnquist, and, most recently, Roberts Courts have tended to slow down or even roll back concepts of standing, particularly for class actions.

Ripeness and Mootness

Under the ripeness doctrine, a case must have matured from a theoretical dispute to a live one. Thus, a case is said to be **ripe** for adjudication if the legal issues involved have evolved to the point that a clear decision can be reached. An example of how courts apply the ripeness doctrine is the litigation contesting Connecticut's law prohibiting the sale of birth control devices and also the dissemination of information about birth control. To clear away legal obstacles to the opening of a birth control clinic in New Haven, the law was challenged, but the Court dismissed the case on the grounds that the law had never been enforced (*Poe v. Ullman* 1961). After the clinic opened anyway, its president was arrested and convicted of a misdemeanor. This new case reached the Court in *Griswold v. Connecticut* (1965). The issue could no longer be dismissed for lack of ripeness, and the Court overturned the Connecticut law as a violation of the newly discovered constitutional right to privacy.

A legal cousin of the concept of ripeness is the doctrine of **exhaustion of remedies**. A plaintiff lacks standing to sue if he or she has not exhausted all other available remedies before coming to court. The underlying principle is that courts should be the last resort in resolving disputes. A failure to exhaust all administrative remedies will result in dismissal of the court case because it is not ripe for adjudication.

If ripeness involves a plaintiff filing a premature claim, mootness represents the opposite situation—a plaintiff being too late to seek relief from the courts. Simply stated, courts do not decide dead issues. The passage of time or a change in circumstances may make an issue **moot**. Mootness standards are, however, flexible, as the two following cases illustrate.

By the time her challenge to Texas's abortion law reached the high court, Jane Roe was no longer pregnant. Because there was no active controversy, the case appeared to be moot. But the Supreme Court elected to hear the case, noting that few, if any, cases of pregnancy, abortion, or childbirth would ever be reviewed by appellate courts before the end of the biological period of gestation. Based on pressing concerns of public policy, the Court carved out an exception to the mootness doctrine. (See Case Close-Up: *Roe v. Wade* 1973.)

CASE CLOSE-UP

■ Roe v. Wade *(1973)*

Abortion Rights

Over a pizza in a small Dallas restaurant, Jane Roe poured out her troubled history to the two women she had just met. She was unemployed, was virtually homeless, and already had a five-year-old daughter living with someone else. During the summer, she had worked selling tickets in a traveling carnival when she was raped. The doctor who diagnosed her pregnancy curtly told her she could travel to other states such as California or Colorado, where abortions were legal and safe (but neglected to say that abortions were also cumbersome and expensive). Also left unsaid was the common knowledge that a quick trip to Mexico could easily procure a cheap, but potentially life-threatening, back-alley abortion.

As she told her story, Jane Roe (the female version of John Doe) decided that she trusted Sarah Weddington and Linda Coffee. That trust was of critical importance, because the two were young lawyers who were searching for a plaintiff who was willing to challenge Texas's abortion law. Jane Roe explained that she was very angry when she learned she could not get an abortion and would be forced to bear a child whom she did not want and could not care for. Sarah Weddington was also angry, but for different reasons. Her anger stemmed not from personal experience with an unwanted pregnancy and potential risks of illegal abortion but from an ideological commitment—she wanted to change the law to improve the plight of women. Sarah Weddington (who would become lead counsel) was one of a new breed—women were just beginning to graduate from law school in appreciable numbers. Indeed, Weddington was the first woman hired by Fort Worth as an assistant city attorney (Faux 1989). Although there was no chance that a lawsuit would directly benefit Jane Roe, Roe agreed to serve as plaintiff in a test case (Chapter 7).

Because the lawsuit challenged the constitutionality of a state law, it was heard by a three-judge panel of the U.S. District Court for the Northern District of Texas, located in Dallas. One of the judges was Sarah Hughes, a Lyndon Johnson appointee and one of the few female judges on the federal bench at the time. The three-judge panel declared the Texas law unconstitutional but refused to issue an injunction prohibiting its enforcement (*Roe v. Wade*, 314 F. Supp. 1217 [N.D. Tex., 1970]). That "mixed" holding left neither side satisfied, and, therefore, both sides appealed to the U.S. Supreme Court. (To preserve standing, Jane Roe carried the baby to term and gave the infant up for adoption immediately after birth.)

On May 3, 1971, the Court noted probable jurisdiction and preparations began for oral argument. But, by the time the Court heard oral argument on December 13, 1971, the Court consisted of only seven justices. In September 1971, a gravely ill Justice Hugo Black had resigned. A few days later, Justice John Harlan likewise resigned because of declining health. President Nixon's nominations of Lewis Powell and William Rehnquist to fill those vacancies had been confirmed by the Senate in early December, but swearing in was not scheduled until after Christmas.

Chief Justice Warren Burger opened the Court's oral argument session with the traditional announcement: "We will hear arguments in No. 18, *Roe against Wade*." Sarah Weddington began her allotted thirty minutes by reviewing the lower-court decisions but was interrupted by the chief justice, who asked whether a previous decision had decided the matter. "No," she replied and went on to detail that, for poor women like Jane Roe for whom abortions were not necessary to save their lives, Texas law offered no real choice; they faced either unwanted childbirth or medically unsafe self-abortions. At that point, White interrupted to comment, "So far on the merits, you've told us about the important impact of the law, and you make a very eloquent policy argument against it." But he added that the Court could not simply be involved with matters of policy and wanted to know the constitutional basis of her argument (Craig and O'Brien 1993).

Jay Floyd, the assistant attorney general of Texas, next strode to the lectern and argued that this controversy was not one for the courts. Arguments about freedom of choice were misleading, he continued, but one of the justices interrupted with a statement, "Maybe she makes her choice when she decides to live in Texas." In the same vein, Justice Thurgood Marshall demanded to know, "What is Texas' interest in the statute?" (Craig and O'Brien 1993).

Following oral argument, the Court met in conference; the discussions were inconclusive and the actual

(continued)

vote in dispute. A few days later, the chief justice assigned Blackmun to write the opinion, but Douglas strongly objected, stating that Burger had voted in the minority and, therefore, as the most senior justice in the majority, he (Douglas) was entitled to assign. Douglas then defused the controversy by noting that he chose to assign Blackmun. The task proved daunting. In May, Blackmun circulated a draft that met with little enthusiasm. Troubled that such a major decision might be decided by a shorthanded court, the Court (in a highly unusual move) set *Roe v. Wade* (1973) for reargument in the fall (Craig and O'Brien 1993).

Roe v. Wade (1973) was reargued on October 10, 1972, and discussed in conference on October 12, 1972. The tentative vote was 6–3 to rule the abortion laws unconstitutional. Blackmun's opinion, which had been in preparation for almost a year, was circulated, and each of the justices in the presumed majority offered suggestions, most of which Blackmun incorporated into his draft opinion. At the Court's conference on January 12, 1973, Burger unexpectedly announced he was joining the majority (Barnum 1993).

On January 22, 1973, Justice Blackmun delivered the opinion of the Court. The first part dealt with matters of justiciability and standing. Because Jane Roe had already given birth to the child, the case was theoretically moot; the Court observed, however, that pregnancy would rarely outlast the litigation process. Therefore, the law should not be so rigid and should support a finding of "nonmootness."

The heart of the opinion struck down state abortion laws because they denied women the constitutional right to privacy. In support, Blackmun cited *Griswold v. Connecticut* (1965), which declared that, although the phrase *right to privacy* is not found in the Constitution, its spirit pervades the document. Blackmun's opinion clearly reflects a compromise, because he wrote that, whatever the source, "this right . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." But this right was a qualified one. The state's "important interests in safeguarding health, maintaining medical standards, and protecting life" were "sufficiently compelling" to justify government regulation. The opinion established a controversial "trimester analysis" that barred any regulation of abortion during the first three months of pregnancy; allowed limited restrictions to protect the woman's health and safety during the second three months; and permitted the government to ban abortion only during the final trimester—when the fetus was thought capable of living on its own.

In dissent, Justice Byron White (a Kennedy appointee) said the decision allowed for abortion to satisfy "the convenience, whim, or caprice of the putative mother." And, in a separate dissent, Rehnquist (a recent Nixon appointee) said the ruling "partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment."

Challenges to abortion laws and the *Roe* decision itself have repeatedly returned to the Supreme Court. In 1989, the Court, by a 5–4 vote, gave the states greater authority for limiting abortions (*Webster v. Reproductive Health Services* 1989). In 1992, the Court barely reaffirmed the centerpiece of *Roe*. Chief Justice Rehnquist and Byron White, who had dissented in *Roe*, were joined by two Reagan appointees—Scalia and Thomas—in voting to overturn *Roe*. But a majority, including three nominees of Republican presidents opposed to abortion—O'Connor, Kennedy, and Souter—reaffirmed the concept of the right to privacy, stressing the importance of precedent and the need to preserve the integrity of the Court. At the same time, the joint opinion (joined by Blackmun and Stevens) upheld state restrictions, including parental consent for minors, a twenty-four-hour waiting period, and notification of husbands (*Planned Parenthood of Southeastern Pennsylvania v. Casey* 1992).

In a controversial decision, the Court issued an opinion on what is often referred to as "partial birth" abortion. In *Stenberg v. Carhart* (2000), the Court declared (5–4) unconstitutional a Nebraska law making the practice illegal on the grounds that it placed an undue burden on women and because it did not provide an exception for the health of the mother. However, in 2003, the Congress passed and President Bush signed into law the Federal Abortion Ban, which placed limitations on access to certain medical procedures. Interest groups immediately filed lawsuits. The lower court ruled the federal law unconstitutional; but, in 2007, the Supreme Court in *Gonzales v. Carhart* reversed the lower-court decision and upheld the law. The court's 5–4 decision argued that the law did not place an undue burden on women, while the dissent of justice Ginsburg argued that the law violated the privacy rights of women. The decision demonstrated that President Bush's appointees Chief Justice Roberts and Samuel Alito will likely adopt a conservative position on the issue of abortion.

In essence, the high court is as profoundly divided over abortion as the American people are. The Court's views mirror public opinion polls indicating that most Americans favor abortion rights but oppose making abortion easy to obtain.

Whereas *Brown v. Board of Education* (1954) reflected the concerted efforts of an interest group,

Roe v. Wade (1973) began as a case involving two lawyers who were vitally interested in women's issues. But, over the years, abortion has attracted attention from a variety of interest groups. *Webster* (1989), for example, attracted an unprecedented number of amicus curiae briefs: A total of seventy-eight were filed: forty-six on behalf of the appellants (pro-life) and thirty-two for the appellees (pro-choice). Altogether, more than 400 organizations signed on as co-sponsors, and thousands of individuals joined in one form or another. Both sides directed their arguments to garnering the vote of Justice Sandra Day O'Connor, who was perceived as the pivotal vote in a likely 4–1–4 voting alignment. There is little doubt that the amicus briefs had an impact, shaping the opinions. O'Connor's concurring opinion, for example, cited the appellees' briefs three times and, on several occasions, referred to the briefs containing medical and scientific information (Behuniak-Long 1991). Amicus briefs were numerous in *Gonzales v. Carhart* (2007), and the case, along with a companion case, was supported by NARAL Pro-Choice America and Planned Parenthood.

Beyond efforts in the courts to overturn *Roe*, there have been many attempts by legislatures to dismantle the decision. Numerous constitutional amendments to overturn *Roe* have been proposed, but none has passed Congress. Legislation has narrowed the impact, however, by refusing to require public financing of abortions for poor women and restricting certain medical procedures. And the Court has upheld many laws that make abortions more difficult to obtain.

The Court, conversely, was not willing to make an exception to mootness in a case involving an adult bookstore. City News & Novelty, Inc., challenged the policy of Waukesha, Wisconsin, that required sellers of sexually explicit material to obtain and annually renew a license. The city denied the permit, and City News mounted a long-running legal battle to secure its permit. Probably because of its extensive legal expenses, City News eventually closed its business, at which point the U.S. Supreme Court declared the case moot, perhaps finding a convenient way not to decide this controversial matter (*City News & Novelty, Inc. v. City of Waukesha* 2001).

Political Questions

The most interesting—and also the most ambiguous—component of doctrines of access concerns **political questions**, under which the justices refuse to decide questions they think should properly be decided by other branches of government. The political questions doctrine has little to do with whether politics or controversy is involved in a case. Rather, it is closer to the notion of separation of powers, which emphasizes that each branch of government has its own arena, wherein that branch is the most appropriate decision maker.

The inherent flexibility of the political questions doctrine is underscored by its uneven history. The term was first mentioned in 1803 by Chief Justice John Marshall in *Marbury v. Madison* (1803), but the Court made no attempt to elaborate on its meaning until 1849. In a case arising from the Dorr Rebellion, the Court held that what constitutes a republican form of government under Article IV of the Constitution was a "political question" best left to Congress and the president to decide (*Luther v. Borden* 1849).

Over the course of its history, the Court has considered a variety of issues to be political questions, including ratification of constitutional amendments, federal policies regarding aliens, and many practices of political parties. Because the justices have considerable discretion in identifying such questions, no clear-cut definition exists that will allow the rapid identification of a political question. Indeed, definitions of

political questions have proved to be contradictory and do not necessarily square with the Court's practices (Peltason 1955).

Clearly, what constitutes a political question depends on the perceptions of the justices who are sitting at the time the case comes into the federal judicial system. "Political questions are those which judges choose not to decide and a question becomes political by the judge's refusal to decide it" (Peltason 1955, 10). Thus, the political questions doctrine has been called a carefully crafted cop-out or an escape hatch. In essence, a court identifies a political question when the judges sense they lack capacity to resolve the issue before them (Bickel 1962).

Whatever the rule was before 1960, the political questions doctrine has been narrowed since then. Following the reasoning in *Baker v. Carr* (1962), the Warren Court drastically reduced the content of the political questions doctrine in other areas (Wasby 1993). It is still applicable, however, in matters relating to foreign affairs or national defense. The validity of treaties under international law and the recognition of foreign governments are still considered political questions, meaning that the Court will not interfere with decisions reached by the executive branch (Franck 1992). The federal courts also used the political questions doctrine as the basis for refusing to decide the validity of the Vietnam War.

Mobilizing the Law to Reach the Supreme Court

Cases do not arrive at the Supreme Court's doorstep "like abandoned orphans in the night" (Cortner 1975, vi). Rather, working within the jurisdictional powers of the Supreme Court, litigants, lawyers, and interest groups often engage in major efforts to have their cases decided by the nation's highest judicial body. Along the way, some litigants have become celebrities (Irons 1988). But, mainly, litigants, either individuals or organizations, contribute their names to the lawsuit. Taking a case to the Supreme Court requires most litigants to obtain financial support; only corporations, the government, and some wealthy individuals can afford the lengthy process of litigation and appeals on their own. Thus, the actions of lawyers, interest groups, and the solicitor general primarily determine which cases the Court will be asked to hear.

Lawyers

For most lawyers, arguing a case before the Supreme Court is a once-in-a-lifetime opportunity: Having tried the case in the lower court, they doggedly pursue their clients' interests all the way to the top. Other lawyers who argue before the Supreme Court, however, are retained just for that purpose—other lawyers try the case in the lower court and argue the initial appeals, but, when the decision is made to appeal to the Supreme Court, lawyers particularly knowledgeable in Supreme Court practice are hired. Former law clerks to the justices are twice as likely to later serve as counsel or amicus as are lawyers with similar education who have not clerked (O'Connor and Hermann 1995).

In *The Supreme Court Bar: Legal Elites in the Washington Community*, Kevin McGuire (1993) explores which lawyers argue before the nation's highest court, finding two distinct groups. One group consists of a social network of notable lawyers who practice before the Court, strongly anchored in Washington, D.C. These lawyers have a good many common ties, including graduating from an elite law school, being former law clerks to the justices and/or alumni of the solicitor general's office, and practicing in leading law firms in Washington. They are primarily counsel to business interests. Although these lawyers practice most often in Washington, D.C., other members of the elite Supreme Court bar can be found in Chicago and New York. Beyond this inner circle of regular Supreme Court practitioners is the second group: a larger outer circle of relatively inexperienced litigators. These lawyers do not practice in D.C. and often appear in noncommercial cases. Thus, this group handles the problems of individuals arguing civil liberties and criminal cases. In many ways, the contrasting groups of lawyers who appear before the Supreme Court reflect the two hemispheres of legal practice (discussed in Chapter 5). Moreover, there is evidence that, as repeat players, the Supreme Court bar enjoys more success in winning their cases than lawyers who are less experienced (McGuire 1995).

Interest Groups

Interest groups regularly bring cases to court to facilitate the development of legal doctrines useful to their cause (Epstein 1985). Besides directly sponsoring cases, interest groups may also participate in Supreme Court litigation by filing **amicus curiae** ("friend of the court") briefs in cases in which they are not direct parties. Initially, friend of the court briefs were used to provide the court with neutral information about the case at hand, but, today, amicus briefs (often shortened to plural *amici*) are used to advocate a particular position (Krislov 1963). A longitudinal study of interest groups' participation as amici curiae revealed that they participated in 53 percent of the noncommercial cases decided by the Supreme Court between 1970 and 1980 (O'Connor and Epstein 1984). Who are these groups? The Supreme Court is remarkably accessible to a wide array of organized interests. Participation is not restricted to corporations, governments, or public or private law firms. More than 40 percent of the amicus briefs were filed by citizen or advocacy groups; business, trade, or professional associations; and unions. Thus, the groups filing amicus briefs reflect not only groups with narrow interests but also general-membership organizations (Caldeira and Wright 1990a). Indeed, social scientists have become increasingly involved in the submission of amicus curiae briefs to the courts (Roesch et al. 1991).

The legal arguments contained in amicus briefs may parallel those offered by the direct parties but more often adopt a different perspective, stressing positions the principal litigants do not wish to emphasize. Thus, amicus briefs present the Court with a range of viewpoints about the legal question presented in the case. For that reason, they appear to be important to the Supreme Court's decision-making process. Indeed, one study found that amici were directly mentioned in 18 percent of the opinions written by the justices, a statistic that probably underestimates how important the briefs are (O'Connor and Epstein 1983).

How successful have interest groups been in achieving their objectives? Through the years, liberal interest groups have enjoyed a high rate of success in court. The National Association for the Advancement of Colored People (NAACP) Legal Defense Fund has used the courts with far greater continued success than any other organization, gaining victories in lawsuits involving school desegregation, the death penalty, and employment

LAW AND POPULAR CULTURE

■ The Cider House Rules *(1999)*

"All I said was, I don't wanna perform abortions. I have no argument with you performing them," says Homer Wells (Tobey Maguire) to Dr. Wilbur Larch (Michael Caine) when asked whether he wants to perform an abortion. *The Cider House Rules* is the Academy Award–winning adaptation of John Irving's best-selling novel of the same name. The central character in the film—Homer Wells—is an orphan who develops a bond with Dr. Larch, the orphanage doctor. Larch teaches Homer everything he knows, including how to perform abortions.

Dr. Larch views a woman's right to abortion as her choice and preferable to unwanted childbirth or unsafe attempts to terminate a pregnancy. But his efforts to change Wells's views are rebuffed. At one point he asks Homer, "You know how to help these women. How can you not feel obligated to help them when they can't get help anywhere else?" Homer replies, "One: It's illegal. Two: I didn't ask how to do it. You just showed me." Not long after this exchange, Homer leaves the orphanage to explore the world, only to find that he cannot escape his past.

Homer takes a job as an apple picker at an orchard where cider is made. He soon learns that his male supervisor is sleeping with his own daughter Rose (Erykah Badu), and Rose is now pregnant. His reluctance to perform abortions at the orphanage is soon replaced by a tempered willingness to help this victim of incest. When Rose decides to have an abortion, Homer performs it himself.

The Cider House Rules confronts the complex issue of abortion head on and presents many of the dimensions to this important policy debate. These are the same issues the Court faced in *Roe v. Wade* (1973) and has continued to face ever since. John Irving does not deny that abortion and a woman's right to choose are at the center of the film. He is a noted supporter of Planned Parenthood and says that he was affected by something his grandfather, an obstetrician and professor of obstetrics, wrote: "As for abortion, Grandfather was wise to observe that 'as long as there are unwanted pregnancies, women will attempt to rid themselves of them'" (Irving 1999).

Regardless of your view on abortion, the film captures much of the debate around this contentious issue remarkably well. Among the issues it examines are (1) the legal availability of abortion and the consequences if it were made illegal (the specter of unsafe abortions), (2) what to do with the children of unwanted pregnancies (orphanages), and (3) the availability of abortion providers (at first, Homer is reluctant to employ the medical procedure he knows how to perform). Indeed, David Bruce, an online film reviewer, wrote that *The Cider House Rules* provides "every university class on ethics, law, religion, and civics a noteworthy story to discuss and ponder" (2000).

Chapter 1 argued that courts are important policy makers. In no area of law is that more evident than in abortion. When the Supreme Court hears cases dealing with abortion and women's reproductive rights, the themes appearing in *The Cider House Rules* are on trial. Who should decide the availability of abortion: Doctors like Larch—without regard for society's expectation or the law? Or legislatures—such as the Texas legislature, which passed the law restricting abortion that ultimately led to *Roe v. Wade*? Or courts—as the Supreme Court did in deciding *Roe* and the thirty-one cases thereafter, clarifying that decision? Or society as a whole—perhaps allowing a majority or even a plurality to decide the issue for everyone? *The Cider House Rules* lays bare the difficulty of solving this issue to everyone's satisfaction.

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

1. How does *The Cider House Rules* portray the rule of law?
2. Do films such as this contribute to or detract from a debate by society about contentious issues?
3. Are the courts the right institution to settle issues such as abortion? Why or why not?
4. In what way is Homer's concern about performing abortions similar to or different from pharmacists' refusal to fill prescriptions for the contraceptive known as the "morning-after pill"?

discrimination. It is too early to tell if conservative interest groups will enjoy similar long-term success. Older groups are more successful in litigation, but only a few were in existence before 1970. Lee Epstein (1985, 156) concludes, "Many of the newer groups, including the National Chamber Litigation Center and the conservative public interest law firms, wish to sponsor more cases and to otherwise increase their litigation activities. Doing so would increase their proficiency in litigation and allow them to attain repeat-player status, but their ability to achieve such goals depends upon their ability to attract adequate funding." Assuming that such resources will be available, conservative interest group litigation will become an increasingly important phenomenon. Overall, scholars have focused on successful litigation campaigns. Examining losers indicates that the conventional wisdom concerning the efficacy of group use of the courts may be misplaced (Epstein and Rowland 1991). (See Law and Popular Culture: *The Cider House Rules*.)

The Solicitor General

The **solicitor general** is the chief litigator for the executive branch and an important player in determining which cases the U.S. Supreme Court decides to hear (Pacelle 2003). He or she is appointed by the president and is the third-ranking official in the Department of Justice but also has an office on the first floor of the Supreme Court building. Usage of these dual offices underscores the job's special role: The solicitor general's principal task is to represent the executive branch in the Supreme Court. At the same time, the justices depend on the solicitor general to look beyond the government's narrow interest. Because of the solicitor general's "dual responsibility" to the judicial and executive branches, the officeholder is sometimes called the "tenth justice," an informal title that underlines the special relationship with the Supreme Court (Caplan 1988).

The office of the solicitor general functions like a small, elite, very influential law firm whose client is the U.S. government. The staff consists of fewer than two dozen of the most able attorneys found anywhere. Indeed, three former solicitors general—William Howard Taft, Robert Jackson, and Thurgood Marshall—were later appointed to the Supreme Court; another—Robert Bork—was nominated but not confirmed; and a number of others have been appointed to the U.S. courts of appeals. The solicitor general's most visible responsibility is to represent the United States in litigation before the Supreme Court. As such, the office argues all government cases before the nation's highest tribunal. But the influence of the office extends farther.

Roughly half of the work of the solicitor general's office involves coordinating and controlling appeals by the federal government. With few exceptions, all governmental agencies must first receive authorization from the solicitor general to appeal an adverse lower-court ruling to the courts of appeals or to the Supreme Court. Without that control, the Supreme Court would receive a variety of views on the same issue from different governmental agencies. The office requests Supreme Court review only in cases with a high degree of policy significance and in which the government has a reasonable legal argument. During the 1998 term, the solicitor general filed twenty-one petitions requesting that the Court review adverse lower-court decisions involving the government, whereas lawyers for losing parties in cases involving the government filed 2,682 petitions (Baum 2001). Thus, the solicitor general rejects many cases from governmental agencies because they are not viewed as "cert. worthy" (Puro 1981). This winnowing

of cases that will be appealed to the Supreme Court becomes very important because (as will be shown in Chapter 15) the solicitor general is very successful in those cases pushed forward by that office (Salokar 1992).

The influence of the solicitor general at the Court goes beyond helping the justices set their docket. The Court also turns to the solicitor general for help on legal problems that appear especially vexing. Two or three dozen times a year, the justices invite the office to submit briefs in cases in which the government is not a party. In essence, the justices treat the office as a counselor to the Court, advising it about the meaning of federal statutes and of the Constitution (Caplan 1988).

Another of the solicitor general's principal functions is to decide when the government will appear as an amicus curiae to urge executive branch policies on the courts in cases in which the federal government is not a direct party (Segal 1988, 1990). By Supreme Court rule, the solicitor general can file a "friend of the court" brief without the permission of the parties to the suit, and the solicitor general is the only amicus regularly given time to argue a case before the Court. Those discretionary opportunities allow maximum flexibility for the solicitor general to advocate the policy positions of the president before the Supreme Court. When the solicitor general chooses to enter an amicus brief, the position argued is consistent with the preferences of the president (Meinhold and Shull 1998; Salokar 1992). Furthermore, recent evidence finds that the solicitor general is frequently successful when he files as an amicus and that success is enhanced when the justices are ideologically close to the president (Bailey, Kamoie, and Maltzman 2005; Deen, Ignagni, and Meernik 2003). Thus, the solicitor general not only provides legal views on cases but also offers the justices political signals about how the administration would prefer that a case be resolved.

Because of the staff's long-term stability, the solicitor general is a classic instance of a repeat player with all the advantages attendant on that status (Caldeira and Wright 1988). In addition, because of careful selection of cases, expertise in procedure, and consistency in legal argument, the office of solicitor general enjoys tremendous credibility with the justices (McGuire 1998; Puro 1981). For those reasons, the solicitor general has a very high rate of success in petitioning the Supreme Court and in winning cases argued on their merits.

The solicitor general's unique position as attorney for the government and trusted source of legal reasoning for the Supreme Court emphasizes the reality of law and politics. The legal decisions reached by the solicitor general about whether to appeal a case and what position to take are influenced in part by his desire to maintain credibility with the Court but nevertheless still parallel the policy positions and preferences of the president. Thus, the solicitor general represents a unique conduit for the president—chosen by popular election—to influence the agenda and decisions of a nonelected judiciary.

Case Selection

Every year, the Supreme Court is besieged by requests from thousands of disgruntled litigants asking to have the decisions against them reviewed (and reversed). Most are disappointed. Over the course of a full term, some 8,000 litigants think that their cases

should be heard by the Court, but the justices agree with fewer than 100. Those numbers underscore the fact that the Court cannot give careful attention to that many cases, so the justices choose a very small percentage of the total for full review on the merits and deny the remainder.

The process begins with appeals and writs of certiorari being considered by the justices individually. Historically, the justices read only a small portion of the petitions and supporting materials, choosing instead to delegate much of the work of identifying meritorious petitions to their law clerks. In recent years, the justices have combined resources to create a certiorari pool. Under this arrangement, certiorari petitions are randomly assigned to one of the combined clerks from the participating justices' offices; the law clerk then prepares a two- to twenty-five-page memo that is circulated to all participating justices. Some of the justices then have one of their own clerks review the pool memo (Baum 2001). Eight justices currently participate in the pool; only Justice Stevens continues to conduct reviews solely within chambers (Cooper and Ball 1996). Although the clerks make recommendations about which cases should be granted review, the justices sometimes ignore their recommendations. Given that the vast majority of all cases reviewed by the clerks would likely be rejected anyway, it is doubtful that many important cases are overlooked because a clerk failed to recommend granting certiorari.

The Rule of Four

After individual review, the Court conducts a collective review of all the requests. At a weekly conference, the justices discuss and vote on the petitions. In the earliest years of certiorari review, the justices discussed every petition during conference. But caseload pressures no longer allow that luxury. Before each weekly conference, the chief justice circulates a discuss list containing the cases deemed worthy of conference time. All other requests are automatically denied, unless a justice specifically requests that a case be put on the conference agenda (Caldeira and Wright 1990b; Cooper and Ball 1996; Perry 1991).

By custom, the Supreme Court will not agree to hear a case unless at least four of the Court's nine justices vote to review the lower-court ruling. This procedure is commonly referred to as the **rule of four**. A denial of certiorari leaves the ruling of the lower court undisturbed and formally means only that the Court has decided not to decide the case (Brenner 1993). Thus, a denial of review does not mean that the Court agrees with the outcome of the case in the lower court and, therefore, carries no significance as a legal precedent. As Justice Felix Frankfurter explained, "It simply means that fewer than four members of the Court deemed it desirable to review a decision of the lower court as a matter 'of sound judicial discretion'" (*State v. Baltimore Radio Show* 1950). Such statements about the nonmeaning of certiorari denials are not accepted by many Court observers, however. And some infer consideration of the merits when the Court consistently leaves undisturbed lower-court decisions seemingly at variance with past Court rulings. Lawyers sometimes cite certiorari denials in their briefs to suggest that a legal issue is not settled (Wasby 1993). In particular, the media are notorious for reporting denials of certiorari as if the Court were agreeing with (affirming) the lower-court decision (Slotnick and Segal 1998). An important feature of the initial review process is that the law clerks and the justices have considerable discretion in determining which of the cases will be decided by the Court.

EXHIBIT 14.1 Rule 10: Considerations Governing Review on Certiorari

1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
   a. When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual court or judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
   b. When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a United States court of appeals.
   c. When a state court or United States court of appeals has an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Source: U.S. Supreme Court Rule 10, effective January 1, 1990.

Screening Criteria

Why do the justices grant a select few litigants the right to be heard on the merits but deny most such requests? In trying to answer that important question, scholars face two principal difficulties. First, the Court provides only general guidance on its handling of petitions for review. Rule 10 (shown in Exhibit 14.1) states the technical criteria for acceptance of a case, but this official statement of the legal factors the Court considers in deciding whether to grant certiorari only establishes a starting point for the justices. Working within the broad framework of Rule 10, the Court grants review only if the case involves a substantial **federal question**. A large proportion of petitions do not meet those standards, resulting in the dismissal of many cases "for want of a substantial federal question." But the Court only rarely gives any reasons for granting or denying. Thus, no body of case law exists on what constitutes a "substantial federal question." A second difficulty is that the Court rarely publicly announces certiorari votes. Thus, scholars are forced to work indirectly by statistically comparing cases granted certiorari with those denied. Fortunately, some justices leave behind very detailed notes on conference votes that can be used by scholars to reconstruct the behind-the-scenes dynamics of the Court.

One of the earliest attempts to explain the exercise of the Supreme Court's discretion to grant certiorari was developed by Joseph Tanenhaus and his associates (1963). Their cue theory hypothesizes that the Supreme Court justices are concerned with reducing their workload and therefore "employ cues as a means of separating those petitions worthy of scrutiny from those that may be discarded without further study" (p. 123). More specifically, cue theory proposes that certiorari is more likely to be granted when one or more cues are present. Cue theory says that the justices tend to accept cases they think are important. But these cues are effective only to the extent that they select the issues the justices consider salient. Given that the cues are, in fact,

surrogates for salient issues, they must be constantly updated (Teger and Kosinski 1980). Researchers have proposed a number of theoretical explanations for the behavior of appellate courts in case selection. Current research identifies five criteria the Supreme Court appears to use in selecting cases for review: the federal government as petitioner, conflicting interpretations of the law, ideological preferences of the justices, amicus curiae activity, and the presence of certain issue areas.

Federal Government as Petitioner When the federal government petitions for a hearing, the Supreme Court is significantly more likely to grant certiorari (Caldeira and Wright 1988; Tanenhaus et al. 1963; Ulmer 1984). Descriptive data drive this point home. In recent years, 50–70 percent of the solicitor general's certiorari requests have been granted. Other petitioners were successful less than 5 percent of the time (Baum 2001; Salokar 1992). These empirical findings dovetail with the earlier discussion about the care the solicitor general demonstrates in screening agency requests for certiorari, eliminating those that are not a good vehicle for Supreme Court litigation and picking those with a higher degree of policy significance. However, the reason for that success is somewhat elusive. The solicitor general is clearly the ultimate "repeat player" (Galanter 1974), functioning with a skilled team of lawyers who are in a unique position to influence the Court. Yet, some have suggested that the difference between the solicitor general and most of the other legal elites who appear before the Supreme Court is really one of degree and not kind (McGuire 1998). Thus, it is not legal experience but something else—perhaps institutional deference—that explains the tremendous advantage the solicitor general enjoys in getting on the Court's docket.

Conflict Over the Law The Supreme Court is also more likely to grant certiorari in cases involving conflicting interpretations of the law (Tanenhaus et al. 1963). One indicator of conflict in the law is a reversal of the trial court by the appellate court. Another is a dissenting opinion written by an appellate court judge. A third is contrasting interpretations of the same law reached by different circuits of the U.S. courts of appeals. Those factors—reversal, dissent, and conflicting circuit court interpretations—signal ferment in the lower courts and suggest issues worthy of a closer look. All other factors being equal, the Supreme Court has shown a greater willingness to grant a hearing. Law clerk after law clerk interviewed by H. W. Perry (1991) said that "first you look for" conflict in the law. The appearance of conflict is apparently so important that when Ulmer (1984) randomly sampled all paid cases on the Court's docket for a thirty-year period (1947–1976), he found that lawyers often padded or puffed claims of a conflict. Furthermore, although many cases in which conflict is present are not heard, the presence of conflict is one of the most important variables predicting whether the Court will grant certiorari (Caldeira and Wright 1988).

The Justices' Ideological Preferences Studies consistently find that case selection decisions are related to the ideological preferences of the justices. In essence, disagreements over case selection reflect "the first battleground on the merits" (Linzer 1979). Justices are more likely to vote to hear cases in which the lower-court decision ran contrary to their basic liberal or conservative stance. Liberals, for instance, are more inclined to hear cases brought by criminal defendants than are conservatives

(Ulmer 1972). In economic cases, the liberal Warren Court granted certiorari more frequently to petitions that involved conservative lower-court decisions. Conversely, the more conservative Burger Court consistently accepted more petitions involving liberal lower-court decisions than those involving conservative lower-court decisions (Armstrong and Johnson 1982).

Justices can also use their positions and current cases to send signals to interest groups and other policy leaders that they would like to decide cases in a particular area. In a recent study, Baird (2007) shows that justices' policy preferences do have an impact on the Court's agenda and that there is a lag period of a few years between when the Court sends the signal and when the "policy entrepreneurs" respond.

However, justices must also consider the ideological positions of their colleagues on the Court. Recent research shows that justices act strategically—in that they are more likely to vote to hear cases in which they think the ultimate decision of the Court will reflect their own ideological preferences (Caldeira, Wright, and Zorn 1999). In contrast, it is common for justices to exercise a "defensive denial" of certiorari by voting not to hear a case when they think the final decision on the merits would be contrary to their preferred outcome (Boucher and Segal 1995; Krol and Brenner 1990; Perry 1991).

Acting ideologically and strategically makes the Court more prone to reverse the cases it hears. A lower-court decision consistent with the policy preferences of the Court is best left undisturbed. During the Court's 2006 term, just eighteen cases (or 26 percent of the cases decided) granted full review were affirmed; the other 74 percent were reversed or vacated ("Statistics" 2007). The impact of ideology is clearly important in deciding what to decide.

Amicus Curiae Activity The Supreme Court is also more likely to vote to hear a case on the merits if the case involves amicus curiae activity. Although political science has a long and rich tradition of studying interest group activity before the Court in "friend of the court" briefs on decisions on the merits, only recently have researchers systematically investigated the effects of amicus briefs on the decision to decide. Caldeira and Wright (1988) argue that powerful interests are unlikely to stand by passively as the Supreme Court legitimizes literally hundreds of decisions in the lower courts each year and calls many others into question. Rather, interest groups will attempt to influence the Court's agenda by filing amicus curiae briefs in support of granting certiorari. But that activity must be selective. Interest groups rationally file only if the lower-court decision is unfavorable to their position. Moreover, such activity involves a nontrivial expense. Thus, even interest groups with a large budget for litigation cannot and do not file amicus curiae briefs with reckless abandon. The data support that position. The presence of amicus curiae briefs significantly increases the chances that the justices will bind a case over for full treatment. More specifically, 36 percent of cases in which one or more amici were filed were granted certiorari, compared with only 5 percent of the cases without amici.

Overall, Caldeira and Wright (1988) suggest that the justices attempt to select cases for full review with the greatest potential social, economic, or political significance consistent with their own ideological predispositions. The potential significance of Supreme Court decision making is proportional to the demand for adjudication among the interested parties, and the filing of amicus briefs in support of (or in opposition to) granting certiorari provides the justices significant information about the demand for adjudication in that area.

Issue Areas Finally, some studies suggest that the Court is more likely to grant certiorari in certain types of issue areas than in others. One cue that Tanenhaus and his colleagues (1963) found to be important in the granting of certiorari was the presence of civil liberties issues. To the list of important cues, Provine (1980) has added labor disputes, criminal cases, and federalism. Subsequent research found that the relationships discovered by Tanenhaus continued to exist in later terms of the Court (Armstrong and Johnson 1982; Teger and Kosinski 1980). Alas, researchers have been maddeningly inconsistent about which types of cases might interest the Court more and how to define the various categories. Thus, not all studies are in agreement. Ulmer (1984) found no empirical evidence that civil liberties issues act as cues, a negative conclusion shared by Caldeira and Wright (1988).

THE COURT'S DOCKET

The Court formally begins its term on the first Monday in October and recesses in early summer. Officially, the Court's term is identified by calendar year, dated from the opening session. Thus, the October term, 2008, began on October 6, 2008, and includes all cases decided before the summer of 2009. Informally, scholars refer to Court eras according to the chief justice—the Warren Court (1953–1969), the Burger Court (1969–1986), the Rehnquist Court (1986–2005), and now the Roberts Court (which began in 2005).

The Number of Cases

Over 8,000 cases are filed with the Supreme Court during a typical year (Table 14.1). Very few cases involve original jurisdiction (typically just one or two every year). During the 2006 term, slightly less than one-quarter of the filings were paid cases, which require the payment of a $300 filing fee and the printing of forty copies of each brief. These financial obstacles to seeking Supreme Court review are relaxed for indigents, who are not required to pay a filing fee and are asked to submit only the original and ten copies of their petition. **In forma pauperis** ("in the manner of a pauper") petitions come primarily from prison inmates and, typically, lack the polished prose and sophisticated legal analysis characteristic of paid cases. The Court docketed nearly 7,000 unpaid cases during the 2006 term. These unpaid cases seldom raise new and significant constitutional issues and, therefore, are much less likely to be granted certiorari. During the 2006 term, only nine in forma pauperis cases were granted full review, compared with seventy-nine paid cases.

Although less than one-half percent of the in forma pauperis petitions were granted review, some of the Supreme Court's most important decisions have resulted from those filings. This book has highlighted two such groundbreaking decisions: *Gideon v. Wainwright* (1963), which established the constitutional right to court-appointed coun-

TABLE 14.1 Statistical Profile of the U.S. Supreme Court Workload, 2006 Term

Kinds of Cases	Number of Cases Filed
Paid cases	1,729
In forma pauperis cases	7,173
Total	8,902
Disposition of Cases	**Number of Cases**
Denied, dismissed, or withdrawn	8,536
Summarily decided	278
Granted review	88

Source: Data from "The Statistics," *Harvard Law Review* 121: 436–449 (2007).

sel (Chapter 5); and *Miranda v. Arizona* (1966), which imposed constitutional limits on police interrogations (Chapter 8).

The Supreme Court can take one of three actions on a petition for hearing. It can deny the petition altogether, leaving the lower-court decision standing. That is the fate of nearly 99 percent of all requests for review. Alternatively, the Court can accept the case and decide it summarily without oral argument and without a full written opinion (Wasby et al. 1992). During the 2006 term, there were 278 petitions that were summarily decided, sometimes by a **per curiam decision**—a short, unsigned memorandum opinion briefly setting forth the issues, the applicable law, and the Court's decision. Finally, the Court can accept the case for oral argument and decide the matter by a full, signed opinion. During the 1990s, the Court began accepting fewer and fewer cases for review and argument. On average, the Court now hears substantially fewer than 100 cases each term.

The Kinds of Cases

The Court's discretionary jurisdiction to decide what to decide entails more than merely selecting a manageable number of cases for oral argument and written opinion. The Court also sets its own substantive agenda, functioning much like a roving commission responding to social and political forces (O'Brien 2000). In written opinions, the justices structure litigation patterns by setting forth legal doctrines that indicate what kinds of claims have a good chance of winning and what types of issues are no longer welcome (Baird 2004; Goldstein and Stech 1995). Landmark decisions are particularly important tools that justices utilize to encourage the filing of certain types of cases. Many of the Case Close-Ups in this book clearly fall into this category, including *McCreary v. ACLU* (2005), which indicated a willingness on the part of the nation's highest court to consider the role of religion in American life (Chapter 2); *Brown v. Board of Education* (1954), which put the issue of race on the nation's (and the Court's) agenda (Chapter 7); and *Roe v. Wade* (1973), which ushered in subsequent lawsuits concerning not only reproductive freedom but also the right to privacy (this chapter).

Richard Pacelle (1991) provides a detailed examination of those factors in his book *The Transformation of the Supreme Court's Agenda*, which explores major changes over a fifty-six-year period in the kinds of cases the Supreme Court decides. During the 1930s and 1940s, the Court heard numerous lawsuits dealing with economic, federalism, and regulatory issues. Today, however, those issues have been replaced by due process, substantive rights, civil liberties, and equality issues. Overall, these changes reflect a shift from a jurisprudence of "property" to a jurisprudence of "status" (Grossman and Wells 1988). In particular, the Court now hears a number of cases dealing with criminal justice, a subject matter largely absent from the docket before the 1960s.

Although the Court is most associated with decisions interpreting the Constitution, that image is only partially accurate. Each year, less than half the Court's docket consists of constitutional cases. The majority involve the interpretation of federal statutes and administrative rules. In recent years, for example, the Court has decided cases stemming from the Environmental Protection Act, Clean Water Act, Illegal Immigration Reform and Responsibility Act, National Labor Relations Act, Controlled Substances Act, Freedom of Information Act, Americans with Disabilities Act, and Securities Exchange Act.

Caseload Growth

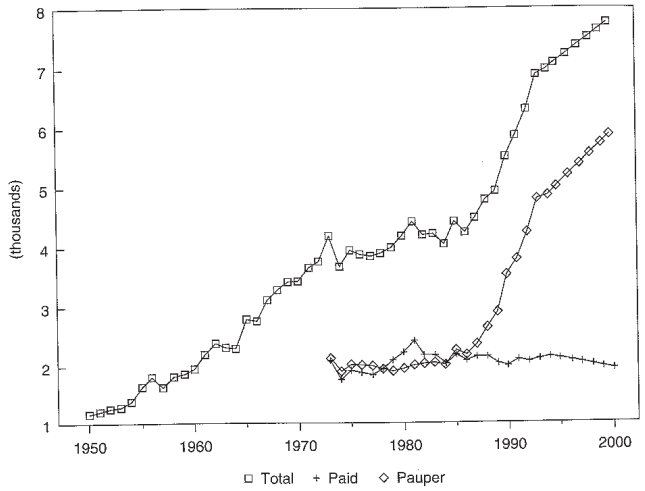
With so many cases filed each year, it is easy to forget that, in the early years of the country, the Supreme Court had little to do. Not a single case was filed during the Court's first two terms, and only five were filed in 1793. As a result, the first chief justice, John Jay, spent much of his tenure abroad on diplomatic assignments and resigned in 1795 to assume a position he considered much more important: governor of New York. The Court did not begin to emerge as a significant branch of the government until John Marshall became chief justice. Despite the growing importance of its decisions, however, the Court still received relatively few requests for review. Over a 100-year period, annual changes were relatively erratic: During some decades (the 1920s and the 1940s, in particular), increases in caseload were dramatic, but, during others, caseload growth was gradual (McLauchlan 1980). Thus, it was not until World War II that the Court received more than 1,000 filings per year. Beginning in the 1950s, however, filings have increased dramatically, as Figure 14.1 illustrates.

A closer look shows that the increasing caseload of the Supreme Court is directly tied to a dramatic surge in petitions filed by prisoners. Until the mid-1980s, in forma pauperis petitions constituted less than half the cases filed; today, they contribute 75 percent. By contrast, paid cases have remained remarkably stable over the last decade, fluctuating slightly with no apparent trend. Thus, the same political and social forces that have filled U.S. prisons to overflowing (Chapter 9) are also clogging the docket of the U.S. Supreme Court.

An Overburdened Supreme Court, Not?

At one time, concerns about the ability of the Supreme Court to handle rapidly rising caseloads were frequently voiced and calls for reform were made. In the late nineteenth century, mounting backlogs led to the creation of the U.S. courts of appeals. And, in the

FIGURE 14.1
Cases Filed in the U.S. Supreme Court Since 1950



Source: Data from Gerhard Casper and Richard Posner, *The Workload of the Supreme Court* (Chicago: American Bar Foundation, 1976), p.3; "Statistical Recap of Supreme Court's Workload During Last Three Terms," *United States Law Week*, vols. 44–65; "The Statistics," *Harvard Law Review* 115, no. 1 (November 2001), pp. 539–550.

early twentieth century, growing caseloads resulted in the passage of the Judiciary Act of 1925. Although jurisdictional reforms occasionally bring relief, Supreme Court dockets have invariably continued upward (Jucewicz and Baum 1990; Stewart and Heck 1987).

Occasionally, the chief justice has complained, as did Chief Justice Warren Burger when he referred to the "overburdened" Supreme Court. In his first State of the Federal Judiciary Message, he declared that "we cannot keep up with the volume of work" brought before the Court (Burger 1971, 859). The perceived problem is that receiving (and thereby having to review) too many cases undermines the Court's capacity to do its job effectively. Thus, to some observers, the Court—because of **caseload** growth—is unable to give careful consideration to the cases decided by opinion and to bring about uniformity and consistency in the law. According to then–Chief Justice William Rehnquist, "Today we decline to review cases involving important questions of federal law not previously decided by our Court, cases which the Court would have unquestionably heard and decided as little as 30 years ago. [W]e are simply unable to take and decide many cases which raise important and undecided issues under the Constitution and the statutes of the United States" ("Chief Justice" 1987, 1). Of particular concern is that the growing caseload prevents the Court from resolving some important intercircuit conflicts (Hellman 1995).

DEBATING LAW, COURTS, AND POLITICS

Should Congress or the Court Decide Who Decides?

When a state passes a law that requires a woman to get permission from the biological father of her baby before getting an abortion, should the Supreme Court be required to consider the constitutionality of the law? Currently, the Court does not have to, and some people think that is bad. Over time, Congress has required the Supreme Court to hear fewer and fewer appeals from lower-court decisions. Those changes culminated in 1988, when the Supreme Court's appellate jurisdiction became almost entirely discretionary. That means that the Court has the complete power to pick and choose which cases it will hear. The Constitution grants Congress, not the Court, the power to determine its appellate jurisdiction. When Congress passed the Judiciary Act of 1925, nearly 80 percent of the Court's docket consisted of cases Congress had mandated that the Court hear (O'Brien 2000). Today, however, less than 1 percent of the cases heard by the Court in a typical year are mandatory. For all intents and purposes, Congress has given to the Court the very important power to decide for itself who will get a hearing before the Supreme Court. Congress has given the Court more power over its docket several times, but rarely have they taken that power away.

Only once has Congress successfully passed legislation limiting (as opposed to expanding) the Court's discretionary jurisdiction. After the Civil War, Congress took away the Court's power to hear appeals in habeas corpus cases (Baum 2001). And several times since then, Congress has considered legislation to remove from the Court's discretion controversial cases such as legislative reapportionment, school busing, school prayer, and abortion. But none of those efforts has passed. Even though the Constitution's grant of power over the types of cases the Court hears was given to Congress, they have mostly handed it over to the Court. To some critics, this is problematic, because they fear the possibility of an unchecked Supreme Court that uses illegitimate criteria to decide which cases to hear, thereby restricting access from individuals and groups the Court deems unworthy of consideration.

Changing the Court's discretionary jurisdiction is not the only means by which Congress can try to influence what the Court decides to decide. Congress sets the Court's budget and confirms justices. It can also impeach justices, enact legislation directly affecting the Court's decisions, and pass constitutional amendments. Throughout the history of the Court, however, only a handful of proposals have been advanced to reduce its budget, and no justices have ever been impeached. Each year, the Court makes a number of statutory decisions, and, on occasion, Congress rejects the Court's interpretation of those statutes. Hausegger and Baum (1998) find that only 5 percent of the Court's statutory decisions made between 1978 and 1989 were overturned by Congress. Even fewer of the Court's constitutional decisions are overturned by congressional acts. Recently, Congress reacted to the Court's decision in *Reno v. American Civil Liberties Union* (1997), overturning sections of an act to protect children from pornography on the Internet by passing another law that tried to avoid the problems the Court noted in its decision. But the Court again found the law unconstitutional.

The final and perhaps most dramatic avenue available to Congress is passing a constitutional amendment that overturns a Court decision. Baum (2001) points out that, during the 106th Congress, amendments were introduced that would overturn Supreme Court decisions dealing with congressional term limits, campaign spending, prayer in school, flag desecration, and abortion. However, since the Constitution was ratified in 1789, there have only been five occasions where Congress has successfully passed an amendment that reacted to a Supreme Court decision (and one of those was not ratified by the states).

It appears the question posed in the title of this debate is irrelevant. Regardless of who you think should decide which cases the Supreme Court gets to hear, one thing is clear—the Court has asserted its power to determine its docket, and Congress has acquiesced. As one observer notes, it "is striking how little use Congress actually made of its enormous powers over the Court during the twentieth century" (Baum 2001, 248).

What do you think? Should Congress or the Court decide which cases will get a hearing in the highest court in the land? Has Congress given up too much of its power to control the Supreme Court's docket?

Discussions about workload have persisted because, in the face of increasing requests for review, the Court is hearing a smaller and smaller percentage of those cases. Whereas in the 1960s and 1970s the Court would routinely hear and decide more than 100 cases a year, today the number is closer to 80. To some, that reflects not an overburdened Supreme Court but one that is not working hard enough. Political science professor Beverly Cook (1994) finds that the Court selects cases that are of significance to different constituencies. In essence, the justices engage in a selective response to external social and political pressures—a theme highlighted in many places in this book. Today, the battles over caseloads typically reflect not procedural but substantive concerns. (See Debating Law, Courts, and Politics: Should Congress or the Court Decide Who Decides?)

Conclusion

For years, Norma McCorvey (known to most people only by the legal pseudonym of Jane Roe) was the pro-choice poster child. By agreeing to challenge Texas's antiabortion law, she set in motion legal and political discussions that continue unabated more than a quarter of a century later. Starting about 1984, she began to acknowledge she was Jane Roe and also admitted that she fabricated the story of a rape to make people more sympathetic to her plight. In 1991, she decided to put herself on the front lines, taking a job at a Dallas abortion clinic. In 1994, she wrote a book titled *I Am Roe*, chronicling, among other matters, being a lesbian, having abused drugs and alcohol, being raped as a teenager, and spending years in reform school in Texas. Then, in 1995, she apparently reversed course. She joined Operation Rescue, a conservative religious organization strongly opposed to abortion. Sarah Weddington now says that if she had it to do over again, she wouldn't use McCorvey as the plaintiff (Waldman and Carroll 1995). Norma McCorvey was merely a Roe of convenience. Like many of the immediate parties profiled in our Case Close-Ups, McCorvey merely lent her name to a broader movement and then disappeared—to be remembered only in legal footnotes and textbooks.

Thirty years after *Roe v. Wade*, rulings on abortion continue to play a prominent role on the Supreme Court's docket. In deciding the most recent case—*Gonzales v. Carhart* (2007)—the justices undoubtedly knew that it was not the last time they would have to face this thorny issue. In *Gonzales*, decided 5–4, the Court upheld the Federal Abortion Ban, reversing the lower court and restricting certain forms of medical procedures in the second trimester of a pregnancy. The decisions of the justices (at least four) to hear the case illustrate the continuing pressure on the Court to decide important legal, social, and political questions.

The Court enjoys virtually complete discretion in deciding what to decide. In exercising that important authority, the Court does not seek to correct every injustice that may have occurred in the lower courts but, rather, confines itself to deciding a select group of important cases. Out of the thousands of requests for review, the Court selects fewer than 100 for full consideration. Most of those cases involve issues over which the lower courts have reached conflicting results. All are tough cases, and good arguments

can be made on both sides. This power to decide what to decide enables the Court to set its own agenda, determining which issues will be the subject of Court output. How the Court disposes of that agenda is the subject of Chapter 15.

Critical Thinking Questions

1. In defining jurisdiction, justices and commentators have often expressed concern that the Court is the only major branch of government whose leaders are not directly elected by the people. Would the jurisdiction of the Court be different if the justices were popularly elected? Might the jurisdiction be more expansive in some areas but more restrictive in others?
2. Popular rhetoric often stresses a simple formula—liberals want to expand the jurisdiction of the Court, and conservatives want to restrict it. But political and legal reality is more complicated. In what areas might liberals wish to restrict the Court's jurisdiction? In what areas might conservatives wish to expand the Court's jurisdiction? How might these assessments change across time?
3. Public discussions of the Court stress procedural concerns, such as excessive caseloads and lengthy delay in deciding cases. To what extent do those voicing those concerns really have a substantive agenda? Why do critics of some Court decisions choose to stress procedural matters rather than substantive disagreements?

World Wide Web Resources

Web Guides

http://dir.yahoo.com/Government/U_S__Government/Judicial_Branch/Supreme_Court

http://dir.yahoo.com/Government/U_S__Government/Judicial_Branch/Supreme_Court/Court_Decisions

http://dir.yahoo.com/Health/Reproductive_Health/Abortion

http://dir.yahoo.com/Government/U_S__Government/Politics/Interest_Groups

Search Terms

abortion
abortion rights debate
Roe v. Wade
U.S. Supreme Court

Useful URLs

http://www.supremecourtus.gov

The official website of the Supreme Court of the United States contains information on the current docket.

http://www.supremecourthistory.org

The Supreme Court Historical Society is dedicated to the collection and preservation of the history of the Supreme Court of the United States. The site features a digital library of articles and books and legal and constitutional history.

http://www.usdoj.gov/osg

This is the official website of the Office of the United States Solicitor General.

http://www.lexsite.com/services/network/scba/history.shtml

The Supreme Court Bar Association involves lawyers who regularly practice before the Court.

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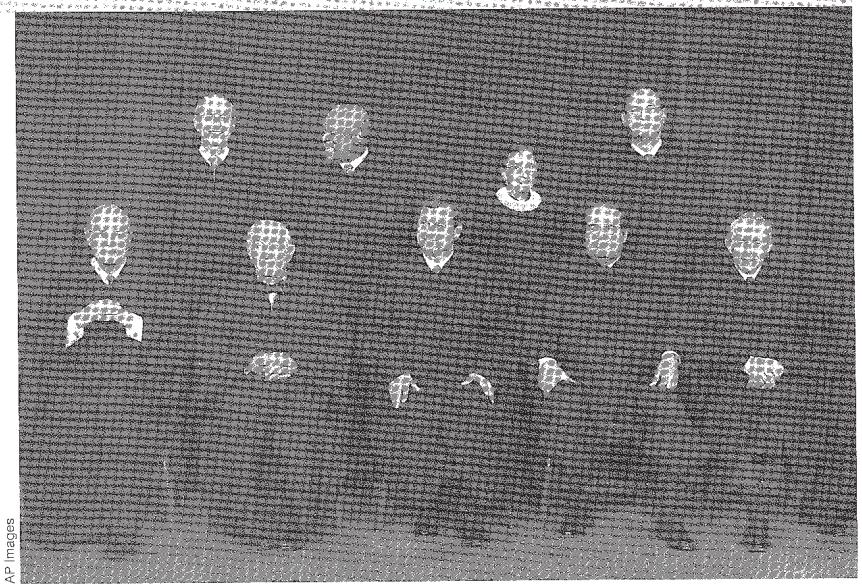
CHAPTER

The Supreme Court: The Justices and Their Decisions



AP Images

With the addition of the Supreme Court's newest member, the high court sits for a class photo in 2006. Front row (from left to right): Anthony Kennedy, John Paul Stevens, John Roberts, Antonin Scalia, and David Souter. Back row: Stephen Breyer, Clarence Thomas, Ruth Bader Ginsburg, and Samuel A. Alito Jr.