Once the Supreme Court determines which cases to hear, the justices get to the heart of their work: reaching decisions in those cases. This chapter examines how and why the Court makes its decisions.

COMPONENTS OF THE COURT’S DECISION

A Supreme Court decision on the merits, one in which the Court decides the legal issues in a case, has two components: the immediate outcome for the parties to the case and a statement of general legal rules. In cases that the Court fully considers, it nearly always presents the two components in an opinion. In the great majority of cases, at least five justices subscribe to this opinion. As a result, it constitutes an authoritative statement by the Court.

Except in the few cases the Court hears under its original jurisdiction, the Court describes the outcome in relation to the lower-court decision it is reviewing. The Court can affirm the lower-court decision, leaving that court’s treatment of the parties undisturbed. Alternatively, it can reverse or vacate the lower-court decision. According to the Court’s Style Manual, “The Court should reverse if it deems the judgment below to be absolutely wrong, but vacate if the judgment is less than absolutely wrong.”

When the Court does disturb a lower-court decision, it sometimes makes a final judgment in the case. More often, it remands the case to the lower court, sending it back for reconsideration. The Court’s opinion provides guidance on how the case should be reconsidered. For example, the opinion in a tax case may say that a court of appeals adopted the wrong interpretation of the federal tax laws and that this court should reexamine the case on the basis of a different interpretation. The Court’s opinion in a 2017 case used typical language: “For the reasons stated, we vacate the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.”

In most cases, the outcome has little impact beyond the parties themselves. Rather, what makes most decisions consequential is the statement in the Court’s
opinion of legal rules that apply to the nation as a whole. Any court must follow those rules in a case to which they apply, and the rules often shape the behavior of people outside of court. As a result, a decision frequently affects thousands or millions of people who were not parties in the case.

The Court chooses which legal rules it establishes in a case, just as it chooses the outcome for the parties. A ruling for one of the parties often could be based on any of several different rules or sets of rules. That reality is underlined when the Court affirms a lower-court decision on a legal ground that differs from the one that the lower court used. The rules chosen by the Court largely determine the long-term impact of its decision. If the Court overturns the death sentence for a particular defendant, it might base that decision on an unusual error in the defendant’s trial, and the decision would affect few other defendants. Alternatively, the Court could declare that the death penalty is unconstitutional under all circumstances and thereby make a fundamental policy change.

THE DECISION-MAKING PROCESS

When the Court accepts a case for a decision on the merits, it initiates the decision-making process for that case. This process varies from case to case, but it typically involves several stages.

Presentation of Cases to the Court

The written briefs that the Court receives when it considers whether to hear a case usually give some attention to the merits of the case. Once a case has been accepted for oral argument and decision, attorneys for the parties submit new briefs that address only the merits. In the preponderance of cases that reach this stage, amicus curiae briefs are submitted with their own arguments on the merits.

Most of the material in these briefs concerns legal issues. The parties muster evidence to support their interpretations of relevant constitutional provisions and statutes. In their briefs, they frequently offer arguments about policy as well, seeking to persuade the justices that support for their position constitutes not only good law but good public policy.

Material in the briefs is supplemented by attorneys’ presentations in oral argument before the Court. Attorneys for the parties sometimes share their time with the lawyer for an amicus—usually the federal government. In most cases, each side is provided a half hour for its argument. When a lawyer’s time expires, a red light goes on at the lectern. Chief Justice William Rehnquist enforced the time limit strictly. As Ruth Bader Ginsburg explained, Rehnquist’s successor, John Roberts, “is a bit more flexible at oral argument: He won’t stop a lawyer or a justice in mid-sentence when the red light goes on.”

In the current era, the justices are quite vocal during the arguments, usually leaving lawyers with only short stretches of time to speak in between questions and
comments from the bench. In a 2011 argument, one of the lawyers got only part-way through the ritual opening, “Mr. Chief Justice, and may it please the Court,” before Elena Kagan asked the first question. Most of the justices are such active questioners that they frequently interrupt each other. One study found that it is especially likely for male justices to interrupt female colleagues and for justices to interrupt colleagues who are ideologically distant from themselves. There are some cases that do not pique the justices’ interest, and one 2016 argument ended sixteen minutes early because of a dearth of questions. But those cases are uncommon.

Chief Justice Roberts is sensitive to the effects of the justices’ active questioning. In one case, when a lawyer ran out of time, Roberts granted him (and the opposing lawyer) an extra five minutes because, “to an extent that’s unusual even in this Court, you have been listening rather than talking.” In doing so, he implicitly chastised the justices who had been especially vocal during the argument.

The most vocal justices on the 2017–2018 Court, measured by numbers of questions and comments in recent terms, were Stephen Breyer, Sonia Sotomayor, and Roberts himself. The least vocal justice by far is Clarence Thomas, who went ten years without asking any questions between 2006 and 2016. Thomas has said, “I just think there are too many questions. I think that we have capable advocates and we should let the capable advocates talk.”

For the justices, oral argument has two broad functions. First, it allows them to gather information about the strengths and weaknesses of the parties’ positions and about other aspects of the case that interest them. Second, and probably more important, the argument gives them an opportunity to shape their colleagues’ perceptions of a case. Justice Anthony Kennedy reported that “we do not talk to each other about the cases before oral argument.” As a result, the argument provides justices with their only opportunity to persuade each other before the Court meets to reach its tentative decision at conference. Thus, many of their questions and comments to lawyers are implicitly directed at other justices. As one leading Supreme Court advocate put it, “The Justices are actually trying to make points with other Justices more than anything else.”

This is one reason for a pattern in which justices tend to ask more questions of the side they ultimately vote against and their questions to that side tend to be more negative in tone. When justices ask questions of the lawyer whose position they favor, the questions are often designed to shore up the lawyer’s case. In Moore v. Texas (2017), for instance, justices who were sympathetic to the position of the lawyer for a criminal defendant used their questions to help defend him against challenges to that position from less sympathetic colleagues. Sometimes the questions and comments from justices express so much support for one side that they provide a clear sign of the likely outcome. This was true of Maslenjak v. United States, a 2017 immigration case in which several justices expressed great skepticism about the position of the federal government, and ultimately the government lost by a unanimous vote.

For at least some justices, oral argument serves a third function. As two scholars put it, “the Justices sometimes seem to regard oral argument not as a serious or important part of the decisional process, but as an opportunity to demonstrate
their quickness or cleverness.”¹⁴ That demonstration is often at the expense of the lawyers, who have no choice but to accept it with good grace.

There is disagreement among justices and observers of the Court about how often oral argument shapes the justices’ perceptions of cases. But there certainly are cases in which effective arguments by lawyers or questions and comments by colleagues sway justices’ thinking, sometimes decisively. A study based on the papers of two justices who served in the 1970s and 1980s compared their pre-argument tentative votes with the votes to affirm or reverse that they cast in conference a few days after the argument. The votes of Lewis Powell shifted 7 percent of the time; for Harry Blackmun, it was 10 percent of the time. Patterns in these shifts suggest that at least a large portion of them resulted from the influence of the oral argument itself.¹⁵

Still, Powell and Blackmun (and, almost surely, other justices) maintained their preexisting positions in the great majority of cases. That is understandable. Justices often bring strong preconceptions to the cases they decide, and they get far more information from the briefs and other written case materials than they do from oral argument. As Elena Kagan put it, “if you’re going to have to choose between having a great brief and making a great oral argument, you should always choose to write the great brief.”¹⁶ On the other hand, as Samuel Alito has pointed out, the argument may affect the justices’ specific positions on the issues in a case even when their tentative votes are unchanged.¹⁷

### Tentative Decisions

After oral argument, the Court discusses each case in one of its conferences later the same week. The chief justice begins the discussion of a case, which continues with the other justices from most senior to most junior. As the justices speak, they indicate their votes in the case and the reasons for their positions. By the time the discussion gets to the most junior justice, the Court’s collective decision may be so clear that the other justices pay little attention. “But when it’s four to four,” Chief Justice Roberts said during the time that Elena Kagan was the junior justice, “we listen closely to what she has to say.”¹⁸

Once each justice has spoken, there is often little or no further discussion. This reflects the fact that, as Antonin Scalia put it, the discussion of a case in conference “is not really an exercise in persuading each other, it’s an exercise in stating your views while the rest of us take notes.”¹⁹ Scalia would have preferred more extensive discussion of cases; he once noted that “I thrash out the cases with my law clerks much more than with my colleagues.”²⁰ Kagan recalled that at her first conference to decide cases, the justices spent only ten minutes or so discussing a high-profile case because the justices’ positions were firmly set and “the only thing that we would have accomplished is to get a little bit annoyed at each other.” But the other case considered at that conference, which involved a procedural issue on which the justices did not feel as strongly, received about forty minutes of discussion.²¹

After each two-week sitting, the writing of the Court’s opinion in each case is assigned to a justice. If the chief justice voted with the majority, the chief assigns the
opinion. In other cases, the most senior associate justice in the majority makes the assignment.

**Reaching Final Decisions**

The justice who was assigned the Court’s opinion writes an initial draft, guided by the views that were expressed in conference. The justice’s clerks usually do most of the drafting. Once this opinion is completed and circulated, most of the time a justice who was in the majority at conference signs on to it. This sometimes means that the opinion gets majority support with no difficulty. But justices often hold back rather than sign on, either because they have developed doubts about their original vote or because they disagree with some of the language in the draft opinion. The language is important because justices are reluctant to join an opinion when they disagree with its reasoning. Members of the original minority also read the draft opinion for the Court, and they sometimes sign on to the opinion because their view of the case has changed.

Justices who do not immediately sign on may indicate fundamental disagreement with the opinion. Exaggerating somewhat, Clarence Thomas has described such responses: “Dear Clarence, I disagree with everything in your opinion except your name. Cheers.” But justices often indicate that they would be willing to join an opinion if certain changes are made. Justices who had voted with the majority are especially likely to ask for changes. Their memos initiate a process of explicit or implicit negotiation in which the assigned justice tries to gain the support of as many colleagues as possible. At the least, the assigned justice wants to maintain the original majority for the outcome supported by the opinion and to win a majority for the language of the opinion so that it becomes the official statement of the Court. This negotiation process operates primarily through written memos, sent on paper rather than by e-mail. But the justices sometimes interact directly, and law clerks often gather information from clerks for other justices to help identify what revisions are needed to gain a colleague’s support for an opinion.

In this effort, the justice who was assigned the Court’s opinion often competes with other justices, who write alternative opinions supporting the opposite outcome or arguing for the same outcome with a different rationale. Most of the time, assigned justices succeed in winning a majority for their opinions, though sometimes with substantial alterations. Ruth Bader Ginsburg has said that “I had many first drafts written the way they’d be written if I were queen,” in contrast with the final drafts that reflected compromises needed to win the support of colleagues.

More often than not, however, justices who were assigned the Court’s opinion fail to win unanimous support for their opinion. As shown in Table 4-1, which summarizes attributes of the Court’s decisions in the 2015 and 2016 terms, unanimity for a single opinion was achieved only 35 percent of the time.

Occasionally, no opinion gains the support of a majority. That occurred once in the 2015 and 2016 terms, along with four decisions in which there was majority support for only part of an opinion. But in most terms, decisions without full majority
support for any opinion occur with greater frequency. In the 2012 and 2013 terms, for instance, that happened 7 percent of the time. Without a majority opinion, there is no authoritative statement of the Court’s position on the legal issues in the case. But the opinion on the winning side with the greatest support—the “plurality opinion”—may specify the points for which majority support exists.

On rare occasions, the justices find themselves unable to reach a final decision in a case before the term ends. They then schedule the case for a second set of oral arguments, usually in the following term. The Court took this route in two landmark cases, *Brown v. Board of Education* (1954) and *Roe v. Wade* (1973). Two cases

<table>
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<tr>
<th>Characteristic</th>
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<tr>
<td>Vote for Court’s decision(^a)</td>
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<tr>
<td>Unanimous</td>
<td>48.8</td>
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<tr>
<td>Nonunanimous</td>
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<td>Support for Court’s opinion</td>
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<tr>
<td>Unanimous for whole opinion</td>
<td>35.2</td>
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<tr>
<td>Unanimous for part of opinion</td>
<td>7.2</td>
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<tr>
<td>Majority but not unanimous</td>
<td>53.6</td>
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<tr>
<td>Majority for only part of opinion</td>
<td>3.2</td>
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<tr>
<td>No majority for opinion</td>
<td>0.8</td>
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<tr>
<td>One or more concurring opinions(^b)</td>
<td>36.8</td>
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<tr>
<td>One or more dissenting opinions(^c)</td>
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<td>Two or more concurring opinions</td>
<td>12.0</td>
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<tr>
<td>Two or more dissenting opinions</td>
<td>11.2</td>
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Source: The decisions included are those decided with opinions after oral argument. Cases in which the Court divided 4–4 and did not issue an opinion are not counted. In a case in which the Court divided 4–4 on one issue, the decision is classified on the basis of the decision on the other issue.

\(^a\) “Decision” refers to the outcome for the parties. Partial dissents are not counted as votes for the decision.

\(^b\) Some concurring opinions are in full agreement with the Court’s opinion.

\(^c\) Opinions labeled “concurring and dissenting” are treated as dissenting opinions.
that the Court heard in its 2016 term were reargued in the 2017 term, almost surely because the original vote in the cases was 4–4 and most justices wanted to resolve the cases once the Court had nine justices.\textsuperscript{26}

**Concurring and Dissenting Opinions**

In most cases, an opinion gains a majority but lacks unanimous support. Disagreement with the majority opinion can take two forms. First, a justice may cast a dissenting vote, which disagrees with the result reached by the Court as it affects the parties to a case. If a criminal conviction is reversed, for example, a justice who believes it should have been affirmed will dissent. Second, a justice may concur with the Court’s decision, agreeing with the result in the specific case but differing with the rationale expressed in the Court’s opinion. Both kinds of disagreement are common.

Ordinarily, a justice who disagrees with the majority opinion writes or joins in a dissenting or concurring opinion. The main exception is justices who simply indicate that they join the majority opinion except for one portion, sometimes a single footnote. When the conference vote is not unanimous, the senior dissenting justice assigns the dissenting opinion. This opinion is written at the same time as the assigned opinion for the majority, and often one goal is to persuade enough colleagues to change their positions that a minority becomes a majority.

That goal is no longer relevant after the Court reaches its final decision, but issuing a dissenting opinion can serve several other purposes. For one thing, dissenting opinions give justices the satisfaction of expressing unhappiness with the result in a case and justifying their disagreement. Dissenting opinions sometimes have more concrete purposes as well. Through their arguments, dissents may try to set the stage for a later Court to adopt their view. In the short term, a dissenting opinion may be intended to subvert the Court’s decision by pointing out how lower courts can interpret it narrowly or by urging Congress to overturn the Court’s reading of a statute.

When more than one justice dissents, the dissenters usually join in a single opinion—most likely the one originally assigned. But often there are multiple dissenting opinions, each expressing the particular view of the justice who wrote it but sometimes indicating agreement with another opinion.

A concurring opinion that disagrees with the majority opinion on the legal rationale for a decision is labeled a special concurrence. In some cases, the disagreement is limited. In some other cases, the majority and concurring opinions offer fundamentally different rationales for the outcome they favor. In *Reed v. Town of Gilbert* (2015), the justices agreed that a town ordinance regulating outdoor signs violated the First Amendment because of the distinctions it made between signs used for different purposes. But Justice Kagan wrote a concurring opinion to argue that the Court’s opinion had too broad a sweep because it would lead to the invalidation of “entirely reasonable” rules for signs.\textsuperscript{27}

Another type of concurring opinion, a regular concurrence, is written by justices who join the majority opinion. Authors of regular concurrences agree with
both the outcome for the litigants and the legal rules that the Court establishes. Under those circumstances, why would justices write separate opinions? Most often, they offer their own interpretation of the majority opinion as a means to influence lower courts and other readers, as well as the Court itself in future cases. A justice may say, as Justice Ginsburg did in a 2017 decision, “I join the Court’s opinion on the understanding that” it has a particular meaning or implication. Regular concurrences can have other purposes, such as refuting the arguments in a dissenting opinion.

**Content and Style of Opinions**

Majority opinions vary in form, but they usually begin with a description of the background of the case before it reached the Court. The opinion then turns to the legal issues, discussing the opposing views on those issues and describing the Court’s conclusions about them. The opinion ends with a summary of the outcome for the parties.

Concurring and dissenting opinions do not need to be comprehensive, so they often focus on specific aspects of the case, and some are brief. There is also a difference in style, as Justice Alito has explained. “If you’re writing a majority opinion, where you have to have at least four people agree with you, you’re limited in what you can say. In my dissents I’m writing for myself, so they’re more freewheeling.” Alito noted that among the opinions he has written, all of his favorites were concurring and dissenting opinions. Dissents sometimes include strong language criticizing the Court’s decision. In a 2017 opinion, Justice Thomas wrote, “Having settled on a desired outcome, the Court bulldozes procedural obstacles and misapplies settled law to justify it.” A year earlier, Justice Sotomayor said that one reason offered by the Court for its conclusion was “a straw man, and a poorly constructed one at that,” and the other reason was “even flimsier.”

Especially in concurring and dissenting opinions, justices seem to have moved toward a less formal style of writing. Responding to a passage in the majority opinion in one case, Justice Breyer’s dissent said, “Good reply. But no cigar.” This more colloquial style may reflect justices’ awareness that their opinions are now readily available to a wide audience, including interested nonlawyers. That awareness may also help to explain Justice Kagan’s opinion for the Court in a 2015 dispute about a patent for a Spider-Man-themed toy. Her opinion contained several direct and indirect references to Spider-Man, including a line about “a whole web of precedents.”

Both majority opinions and dissents are usually written as arguments for the conclusion they reach rather than presenting the considerations on both sides in an even-handed way. They typically treat their conclusion as clearly correct, even if an opinion on the other side makes strong arguments for its own conclusion. As part of that style, opinions emphasize evidence about the law and other aspects of cases that are favorable to their conclusion. They draw that evidence primarily from the briefs and other materials in the case. But in the Internet era justices’ opinions frequently cite facts related to cases that the justices have drawn from their own research or that of Court
staff members. Neither the factual information that the justices take from briefs nor the information they gather independently is always well founded.34

The Decision Announcement and Later Events

The decision-making process for a case ends when all the opinions have been put in final form and all justices have determined which opinions they will join. The Supreme Court is unusual in that it announces its decisions in a Court session. Typically, the justice who wrote the majority opinion reads a portion of the opinion. Occasionally—on average, about three times a term in the 2014–2016 terms—the authors of dissenting opinions also read portions of their opinions. As Justice Ginsburg has said in describing her own practice, justices do so when they think the Court’s decision is “egregiously” wrong.35 In a few cases late in his career, Antonin Scalia took the unusual step of reading from his concurring opinion. In one of those cases, Glossip v. Gross (2015), two dissenters also read from their opinions, so that four different opinions were announced from the bench.

The length of time required for a case to go through all the stages from filing in the Court to the announcement of a decision varies a good deal. Of the cases that the Court decided in its 2015 term, the time from the grant of certiorari to oral argument varied from three to more than eight months, and the time from oral argument to decision varied from nineteen days to nearly seven months.36 The Court’s decision often comes many years after the incident that triggered the case.
After the Court decides a case—or declines to hear it—the losing party may petition for a rehearing. These petitions are rarely granted.

The language of the “slip opinions” that the Court issues when it hands down a decision is sometimes revised in the period of several years before an opinion is officially published in final form. Some revisions correct typographical errors, but others make more substantive changes. Until 2015, those revisions were simply made without any announcement that they had occurred. Now revisions are shown on the Court’s website.

INFLUENCES ON DECISIONS: INTRODUCTION

Of all the questions that might be asked about the Supreme Court, the one that has intrigued people most is how the Court’s decisions are best explained. Cases present the justices with choices: which litigant to support, what rules of law to establish. On what bases do they make their choices?

This question is difficult to answer. Like policymakers elsewhere in government, Supreme Court justices act on multiple considerations, those considerations are intermixed, and their relative importance varies among justices and cases. In part because of these complexities, people who study the Court disagree a good deal about how best to explain the Court’s decisions.

Those disagreements are primarily about two issues. The first is the goals that drive the justices’ choices, either consciously or unconsciously. Some scholars think that justices act overwhelmingly on the basis of their conceptions of good policy: When choosing between alternatives in a case, their choice is based on which alternative accords better with what they think is desirable public policy. Other scholars think that policy considerations are important to the justices, but so are legal considerations because justices want to interpret the law as accurately as possible.

The second issue is the extent to which justices are influenced by their colleagues and by people and institutions outside the Court. According to what is called the attitudinal model, justices are policy oriented and largely autonomous from other people and institutions. As a result, the justices’ choices as decision makers are driven by the goal of making good policy without much regard for the positions of other justices or the Court’s political and social environment.

In contrast, some observers think that the justices are subject to substantial influence from others inside and outside the Court. Justices might be influenced by their colleagues or by people and institutions outside the Court for a variety of reasons. However, such influence is often thought to result from strategic considerations. When making choices in order to achieve their goals, strategic justices take into account the potential reactions of others to those choices. From this perspective, a policy-oriented justice might compromise with colleagues on the wording of an opinion in order to move the Court as a whole to the best possible collective decision from the justice’s perspective. To take another example, a justice who thinks in strategic terms also takes into account the potential reactions of Congress to the
Court's decisions, trying to avoid reaching decisions that would arouse a negative reaction from the legislative branch.

These issues are the primary concern of the rest of this chapter. The next section examines the state of the relevant body of law as a factor shaping the Court's decisions. The section that follows does the same for the justices' values, with an emphasis on their policy preferences. The last two sections consider interaction among the justices in decision making and influence from the world outside the Court.

THE STATE OF THE LAW

Every case requires the Supreme Court to interpret the law, usually in the form of constitutional provisions or federal statutes. In this sense, a justice's job differs from that of a legislator: Justices interpret existing law rather than write new law. For this reason, the existing state of the law is a good starting point for explanation of the Court's decisions.

The Law's Significance in Decisions

As a nominee for chief justice in 2005, John Roberts told the Senate Judiciary Committee that "judges and justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules; they apply them."40 His statement received considerable attention because it was vivid, but nominees to the Court and sitting justices often describe their work in similar ways. In doing so, they offer a simple explanation of the justices' choices as decision makers: They apply the relevant body of law to the cases they address.

This depiction of the justices' work may be attractive, but it conflicts with two realities. One reality is what might be called the legal ambiguity of the cases the Court decides. In at least the great majority of cases that the Court agrees to hear, the applicable legal rules do not lead clearly to a decision favoring one side or the other. As a result, a good case can be made for either side on the basis of the constitutional or statutory provision that the Court is interpreting. Justice Sotomayor in 2011 offered her own interpretation of the analogy between justices and umpires:

The baseball rules tell you what the strike zone is, but the umpire has to use judgment about where the ball hit in that strike zone. And for those of you who have ever played umpire, you know a lot of those balls are right on the line, so did it tilt that way or this way?41

The second reality is that justices care about more than the law. Most important, like other people in law and politics, they develop views about which government policies are most desirable. When they decide cases involving issues such as affirmative action, abortion, or the role of government in health care, they will be
happier if their position in a case and the Court's decision are consistent with their conception of good policy on those issues. In other words, Supreme Court justices have rooting interests in the cases they decide.

Because of this reality, some observers of the Court take a position directly opposite to the one that justices usually express, arguing that the state of the law has essentially no impact on justices’ choices.42 Richard Posner, a widely admired judge on a federal court of appeals who served from 1982 to 2017, said that “the outcomes of constitutional cases are driven not by legal jargon but by the justices’ ideological views and a rough balancing of the costs and benefits of alternative outcomes.”43

This position can be defended, but there is good reason to conclude that legal considerations do have an impact on justices’ choices. Even when decisions on either side of a case could be justified under the law, the law often weighs more heavily on one side than on the other. If justices care about making good law, they will be drawn toward the side that seems to have a stronger legal argument.

Surely, most if not all justices do care about making good law. They have been trained in a tradition that emphasizes the law as a basis for judicial decisions. They are evaluated informally by a peer group of judges and legal scholars who assess their ability to reach well-founded interpretations of the law. Perhaps most important, they work in the language of the law. The arguments they receive in written briefs and oral arguments are primarily about the law, and so are the arguments they make to each other in draft opinions and memoranda.44

Indeed, some aspects of justices’ behavior indicate that the state of the law affects their choices in meaningful ways.45 Sometimes, they take positions that conflict with their conceptions of good policy. And occasionally, the justices in the majority are sufficiently unhappy with the effects of their interpretation of a statute that the Court's opinion asks Congress to consider rewriting the statute to override their decision—that is, to establish a policy that the justices feel powerless to adopt themselves because of their reading of the law. While the law is hardly the dominant force in decision making, it exerts a real impact on the Court’s decisions.

Means of Interpretation

The role of the law in the Court’s decisions can be probed further by considering the techniques that justices use to interpret provisions of the law, techniques that are important in themselves. The justices and legal commentators have developed approaches to legal interpretation based on their views about the value of different techniques.

Plain Meaning

Nearly everyone agrees that interpretation of a legal provision should begin with a search for what is called the “plain meaning” of constitutional and statutory provisions—what the words and sets of words in those provisions mean. This is not always an easy task. The plain meaning of a legal provision is sometimes uncertain,
and this is especially true in the cases that the Supreme Court hears. Many of the Court's decisions involve interpretation of the Constitution, and the Constitution is written in broad language whose meaning is often difficult to determine. This is true, for instance, of the Fourteenth Amendment provision that prohibits the states from depriving people “of life, liberty, or property, without due process of law.” Understandably, the justices have had great difficulty in determining what “due process of law” requires.

Federal statutes are typically less vague than the Constitution, but often their provisions have uncertain meanings. The statutory cases that the Court decides tend to involve issues on which Congress has not spoken clearly. In these cases, justices can do their best to ascertain the most reasonable interpretation of the words in a statute, but there may be considerable room for disagreement. In *Lockhart v. United States* (2016), Justice Sotomayor’s majority opinion interpreted an important but ambiguous phrase in a criminal statute according to one guideline for statutory interpretation, the “rule of the last antecedent.” Justice Kagan’s dissenting opinion invoked the “series-qualifier” guideline on behalf of the opposite conclusion. And both opinions argued that their interpretation was consistent with ordinary word usage.

One way to ascertain the meaning of language is to consult dictionaries, and justices have increasingly cited dictionaries in opinions interpreting federal statutes since the 1980s. But dictionaries generally cannot resolve ambiguities. One reason is that dictionaries frequently offer several definitions of a word. Another is that the meaning of a legal provision often depends on combinations of words rather than single words.

In interpreting the Constitution, justices might seek to ascertain the meaning of its language at the time it was written or what that language means to people today. The school of interpretation called originalism, strongly supported by Antonin Scalia and Clarence Thomas, holds that it is the original meaning that counts. Some other justices believe that the current meaning should be taken into account. Thus, while Justice Scalia criticized judges and justices who “have invented this notion of a living Constitution, where the interpretation of the Constitution could change,” Justice Ginsburg argued that “no one would say that the Constitution means today what it meant when it was written.”

Even when a legal provision seems to have a clear meaning, the justices do not always adhere to it. That is especially true in constitutional law. Over time, the Court has adopted several interpretations of the Constitution that seem to depart from the language of its provisions. Although the language of the Fourteenth Amendment’s due process clause requires only that government follow proper procedures in taking “life, liberty, or property,” the Court interprets the clause as a protection of rights that are substantive rather than procedural, such as freedom of expression and freedom of religion. It interprets the same due process language in the Fifth Amendment to prohibit the federal government from some forms of discrimination. And for more than a century, the Court has read the Eleventh Amendment’s prohibition of lawsuits against states “by citizens of another state” to prohibit most lawsuits against a state by the state’s own residents as well.
Why have justices adopted and maintained these seemingly inaccurate interpretations? The primary reason is that doing so advances values that are important to them, values such as protecting freedom of speech. The general acceptance of what can be called constitutional fictions shows that no justice always adheres to the plain meaning of the law.

But the plain meaning of legal provisions can still shape the justices’ conclusions. This is especially true in statutory interpretation, because statutory language is often detailed and specific even if it is not absolutely clear. This may help to explain why statutory decisions are more likely to be unanimous than constitutional decisions: Statutory language as applied to a case is more likely to lead all the justices to the same conclusion.

**Intent of Framers or Legislators**

When the plain meaning of a legal provision is unclear, justices can seek to ascertain the intentions of the people who wrote the provision. Evidence concerning legislative intent can be found in places such as congressional committee reports and the records of debates on the floor of the two houses, which constitute what is called the legislative history of a statute or a constitutional amendment. For provisions of the original Constitution, evidence is found in reports of deliberations at the Constitutional Convention of 1787 and other sources.

Sometimes the intent of Congress or the framers of the Constitution is clear. Frequently, however, it is not. The body that adopted a provision may not have spoken on an issue; the members of Congress who wrote the broad language of the Fourteenth Amendment could hardly indicate their intent about all the issues that have arisen under that amendment; and evidence about intent may be contradictory,
in part because of competing efforts to influence the courts by members of Congress and congressional staff.

Justices disagree about the use of legislative intent in interpreting statutes. Textualists argue that judges should focus on the plain meaning of legal provisions and that they should ignore evidence of legislative intent. Justice Scalia was the most prominent textualist. In his view, it is illegitimate to consult legislative history: We “are governed by what Congress enacted rather than by what it intended.” Further, he saw legislative history as an uncertain and easily distorted guide to congressional intent.

In contrast with textualists, some judges and commentators argue that it is both legitimate and desirable to take evidence of legislative intent into account. One school of thought that takes this view is called purposivism, because it emphasizes the goal of ascertaining the purposes that underlie provisions of law. Justice Breyer is the most visible supporter of purposivism on the Court.

The continuing debate among justices over the use of legislative intent to guide interpretation of the law was reflected in the opinions in *Digital Realty Trust v. Somers* (2018). All the justices agreed on the Court’s interpretation of a statutory provision that protected certain “whistleblowers” from retaliation by their employers. But Clarence Thomas wrote a concurring opinion that strongly disagreed with the majority opinion’s use of legislative history as one basis for the decision; Thomas was joined by Samuel Alito and Neil Gorsuch. Sonia Sotomayor, joined by Stephen Breyer, wrote a concurring opinion in response, arguing for the relevance of legislative history to interpretation of statutes.

As the lineup of justices in *Digital Realty* suggests, to a considerable extent, disagreements between schools of legal interpretation fall along ideological lines: Textualism and originalism, which Justice Scalia described as a “sort of subspecies of textualism,” receive their strongest support from conservatives. In large part, this is because those two philosophies are perceived as favorable to policies that conservatives support. For instance, liberal justices sometimes support departures from the original meaning of constitutional provisions as a means to expand civil liberties. The Court’s decisions prohibiting the death penalty for people who are intellectually disabled (in 2002), for murders committed when the defendant was not yet eighteen years old (in 2005), and for sexual assaults of children (in 2008) were based on the majority’s view that the prohibition of “cruel and unusual punishments” in the Eighth Amendment should be interpreted on the basis of current values. The conservative dissenters in each case focused on the meaning of “cruel and unusual” when the Eighth Amendment was written and strongly criticized the majority for its approach to interpretation of the Constitution.

**Precedent**

The Supreme Court’s past decisions, its precedents, provide another guide to decision making. A basic doctrine of the law is stare decisis (let the decision stand). Under this doctrine, a court is bound to adhere to the rules of law established by
courts that stand above it. No court stands above the Supreme Court, but stare deci-
sis includes an expectation that courts will generally adhere to their own precedents.

Technically, a court is expected to follow not everything stated in a relevant precedent but only the rule of law that is necessary for decision in that case—what is called the holding. In District of Columbia v. Heller (2008), the Court ruled that the Second Amendment protects the right of individuals to possess guns, and it struck down a Washington, D.C., law on the ground that the law infringed that right. That was the holding of the case. The Court’s opinion also described some types of gun regulations that were “presumptively lawful.” Because those regulations were not involved in this case, that part of the Court’s opinion was “dictum,” which has no legal force.

Since dicta in the Court’s opinion represent the majority view in the Court, however, they can have an impact on other policymakers. The dictum in Heller affected responses to the decision by lower courts and legislatures. Awareness of this kind of impact was reflected in Justice Alito’s concurring opinion in Packingham v. North Carolina (2017), a criminal case. Speaking for himself and two colleagues, Alito said that he could not join the Court’s opinion “because of its undisciplined dicta.” He added that “I am troubled by the implications of the Court’s unnecessary rhetoric.”

The practice of adhering to precedent would not eliminate ambiguity in legal interpretation even if the justices always followed that practice. Most cases before the Supreme Court concern issues that are at least marginally different from those decided in past cases, so precedents do not lead directly to a particular outcome. Indeed, justices often “distinguish” a precedent, holding that it does not govern the current case.

Still, the set of precedents that exists in any area of law helps to channel the justices’ judgments about cases in that area. This is especially true of analytic frameworks that were established by past decisions. By establishing standards to apply to individual cases, these frameworks help to determine what conditions are important in answering questions such as whether speech is protected under the First Amend-
ment or whether a police search is illegal.

The Court can maintain a precedent but narrow its reach. This is how subse-
quent Courts have treated some decisions of the Warren Court that expanded the rights of criminal defendants. In some instances, this narrowing effectively under-
cuts the precedent in question. Indeed, dissenting justices sometimes complain that the Court has implicitly overturned a precedent.

The Court does abandon some of its precedents, although its opinions are not always clear about whether a precedent has been abandoned. According to one count, the Court explicitly or implicitly overruled one or more precedents in only two dozen cases during its first century. Since that time, as Figure 4-1 shows, the rate of overrulings has been considerably higher. The rate has also varied a great deal in this period. There is a tendency for the rate to increase after the Court’s ideological posi-
tion shifts substantially, a tendency suggested by the large numbers of overrulings in the 1940s and 1960s. The decline since the 1970s may result in part from the absence
of a strong ideological majority on either the conservative or liberal sides. But even in the period from 2010 to 2017, when the Court rejected precedents in only six cases, three of those overrulings were on issues of major importance involving regulation of campaign funding, gun rights, and same-sex marriage.\textsuperscript{56}

Most overrulings are in constitutional cases. The Court’s special reluctance to overrule statutory precedents is based on a rationale that Justice Kagan described in a 2015 opinion for the Court: “unlike in a constitutional case, critics of our ruling can take their objections across the street, and Congress can correct any mistake it sees.”\textsuperscript{57} The Court has used this rationale to adhere for a century to its position that professional baseball is exempt from the antitrust laws, even though the exemption has been increasingly regarded as an anomaly. However, the justices may also have been motivated by a concern about disturbing the status quo in baseball. (Congress did limit the exemption in one respect in 1998.)\textsuperscript{58}

The number of times the Court overrules precedents is a small fraction of the times when it follows them. The same is true of individual justices. But most of the time when justices follow a precedent, its validity is not in question, or they simply

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**Figure 4-1**  Numbers of Decisions Overruling Supreme Court Precedents Explicitly or Implicitly, 1890–2017

![Chart showing the numbers of decisions overruling Supreme Court precedents from 1890 to 2017](chart_image)

Source: Congressional Research Service, *The Constitution of the United States of America: Analysis and Interpretation* (Washington, D.C.: Government Printing Office, 2017), 2623–2635. This source notes (p. 2623) that a continuing review of the Court’s decisions may result in additions or deletions to the list of overruling decisions. The numbers of decisions in 2010–17 were multiplied by 1.25 to make them equivalent to the numbers for full decades.
agree with it. What do justices do when they confront a precedent with which they strongly disagree?

One way to identify such disagreement is when a justice dissents from a legal rule at the time the Court first establishes it. Most of the time, justices continue to reject that precedent in later cases, engaging in what one legal scholar called “perpetual dissents.” Yet justices sometimes vote to uphold precedents that they originally opposed. More broadly, the Court as a whole adheres to a good many precedents that no longer accord with the views of most justices. Thus, few of the Warren Court’s liberal precedents from the 1960s have been overruled by the more conservative Courts of the post-Warren era.

Justices differ in their willingness to overrule precedents. On the current Court, Justice Thomas stands out for his belief that there is little reason to maintain a specific precedent or a line of Court doctrine if it is faulty. When a questioner asked, “Stare decisis doesn’t hold much force for you?” Thomas responded, “Oh, it sure does. But not enough to keep me from going to the Constitution.” Indeed, in a three-month period in 2016, Thomas wrote seven opinions that strongly criticized precedents and argued that they should be overruled or that the Court should consider overruling them. But Thomas is hardly alone in his willingness to overrule precedents with which he disagrees: All justices advocate doing so on occasion. In one public talk, Justice Alito defined stare decisis in jest as meaning “to leave things decided when it suits our purposes.”

The extent to which precedents actually influence justices is a matter of dispute among commentators. However, they clearly have some effect. The rule of stare decisis does not control the Court’s decisions, but it does structure and shape the justices’ approach to cases.

The same is true of the law in general: It channels justices’ choices, often in subtle ways, but it falls short of dictating the results in the cases that the Court decides. It seems likely that the state of the law has greater impact in some cases than in others. One reason is that the law sometimes leans in favor of one side but sometimes is too ambiguous to lean in either direction. Another reason is that other considerations in the justices’ minds differ among cases in how strong they are. I turn next to the most powerful of those considerations.

JUSTICES’ VALUES

There is considerable room for disagreement about the impact of the law on decision making in the Supreme Court, but it is clear that legal considerations do not fully explain the Court’s decisions. The positions of individual justices and of the Court as a whole have other bases as well.

Of those other bases for choice, the one that appears to have the greatest impact is the justices’ own values. And of those values, justices’ policy preferences are the most powerful, because justices typically hold strong views about most of the policy issues that are bound up in cases. The impact of policy preferences on decisions is
widely recognized. That recognition is reflected in the attention that participants in the selection of justices give to the policy views of potential and actual nominees to the Court. It is also reflected in commentaries on the Court, which regularly emphasize the justices’ policy preferences as a basis for their votes and opinions.

Justices might act consciously to reach decisions that accord with their policy preferences. But even if justices try only to interpret the law properly, they will tend to move toward the interpretation that is most consistent with their preferences. One of Justice Felix Frankfurter’s law clerks described that process well in talking about Frankfurter:

He felt very intensely about lots of things, and sometimes he didn’t realize that his feelings and his deeply felt values were pushing him as a judge relentlessly in one direction rather than another. I’m sure that you can put these things aside consciously, but what’s underneath the consciousness you can’t control.63

The impact of justices’ policy preferences is most visible when justices disagree with each other about the outcome for the litigants, the legal rules to adopt, or both. As I will discuss, the patterns of disagreement among justices strongly suggest that their differing conceptions of good policy are the primary basis for this disagreement. But it is important to keep in mind that explanation of differences among the justices is not the same thing as explanation of what justices do. Other considerations, including the state of the law, may affect all the justices in nearly the same way. If so, their impact is not nearly as visible as the impact of policy preferences.

The Influence of Policy Preferences

It is difficult to ascertain the actual effect of justices’ policy preferences on their behavior as decision makers, simply because their preferences cannot be observed directly. But some evidence strongly suggests that preferences exert a powerful influence on justices’ choices. When future justices take strong positions on policy issues, those positions are usually reflected in their votes and opinions as justices. Similarly, justices who speak about their personal views of issues outside the Court generally take positions that would be predicted from those views in the cases they decide. Both kinds of evidence are abundant for Ruth Bader Ginsburg, to take one example. She was a leading advocate for women’s legal rights before she became a judge, and she has expressed liberal views on that issue and others in speeches and public discussions. In general, her votes and opinions as a justice have been consistent with the views she has expressed elsewhere.

Justices’ attitudes on policy issues result from the same array of influences that shape political attitudes generally, including family socialization, religious training, and career experience. John Paul Stevens described the impact of his military experience in World War II and the criminal conviction of his father for embezzlement (later overturned by the Illinois Supreme Court) on his attitudes toward certain
issues in the Court. Justice Stevens was more conscious of those influences than some other justices, but all of them have perspectives that were shaped by their experiences.

As discussed earlier, justices’ policy preferences could shape their decision making in two different ways. Justices might simply take positions in cases that accord with their views of good policy. Alternatively, they might act strategically, departing from the positions they most prefer when doing so could advance the policies they favor. It is not clear to what extent justices behave strategically and what forms their strategies take. But it appears that strategic considerations seldom move justices very far from the positions they most prefer. For this reason, the impact of justices’ policy preferences can be considered initially without taking strategy into account. In the two sections that follow, I will consider strategy aimed at other justices and at the Court’s political environment.

The Ideological Dimension

To a considerable degree, the policy preferences of people in politics and government are structured by ideology: Those who take what is considered to be a conservative position on one issue are likely to take conservative positions on other issues as well. This is generally true of Supreme Court justices, so the impact of their preferences can be examined largely in ideological terms.

Defining Liberal and Conservative Positions

On most issues that come to the Court, the opposing positions are labeled as liberal and conservative. In civil liberties, with some exceptions such as gun rights, the position more favorable to legal protection for liberties is considered liberal. Thus, the liberal position gives relatively heavy weight to people’s right to equal treatment by government and private institutions, to procedural rights of criminal defendants and others who interact with government, and to substantive rights such as privacy. In contrast, the conservative position gives relatively great weight to values that compete with these rights, such as national security and effective law enforcement.

Liberal and conservative positions on economic issues are less clearly defined. But the liberal position is basically more favorable to economic “underdogs” and to government policies that are intended to benefit underdogs. In contrast, the conservative position is more favorable to businesses in conflicts with labor unions and consumers and less favorable to government regulation of business practices.

People often think of conservative and liberal positions as a product of people’s reasoning from general values to specific issues. But this is not entirely true. To a degree, the labeling of policy positions as conservative or liberal results from a consensus that develops among people who are interested in politics and policy. Further, ideological definitions of positions reflect the attitudes of conservatives and liberals toward various social and political groups rather than values alone. One result is that definitions can change over time. For instance, in American society
as a whole and in the Supreme Court, support for broad protection of freedom of expression was long considered to be a liberal position, but ideological lines on this issue have become much less clear in the past few decades.66

Two other complications should be noted. First, some cases that come before the Supreme Court, such as disputes over state boundaries, have little or no relationship with ideology. Second, some justices have relatively liberal views on some issues and relatively conservative views on others, so any ideological label for them oversimplifies their policy preferences. But with these cautions, the justices’ policy preferences can be examined from an ideological perspective.

**Ideology and the Justices’ Positions**

At the broadest level, the justices’ votes for one side or the other in cases may be summarized in terms of the frequency with which they support what are considered to be liberal or conservative positions. Figure 4-2 shows the ideological patterns of votes on case outcomes for the justices in the 2015 and 2016 terms, based on the

![Figure 4-2 Percentages of Liberal Votes Cast by Justices, 2015–2016 Terms](chart)

**Source:** Analysis of data in The Supreme Court Database (http://scdb.wustl.edu).

**Note:** Cases are included if they were decided after oral argument and if votes could be classified as liberal or conservative. Justices Scalia and Gorsuch are excluded because each participated in only a small proportion of cases decided in the two terms. The Database classifies votes on the basis of a set of criteria described at its website.
definitions of conservative and liberal positions in one source. The figure shows that every justice cast a good many votes in both ideological directions, and the difference in voting between the justice with the most liberal record (Sonia Sotomayor) and the justice who voted in a conservative direction most often (Samuel Alito) was not enormous. But that 23 percentage point difference is still substantial.

The relative positions of the justices on a conservative-to-liberal scale tend to remain fairly stable over time. It would be difficult to explain those stable differences except as a result of differences in the justices’ policy preferences. Thus, to take one example, it seems clear that Justice Alito is distinctly more conservative than Justice Sotomayor.

Justices’ relative ideological positions are reflected in the frequency with which they vote for the same side in a case, shown for the Court’s 2015 and 2016 terms in Table 4-2. Perhaps most striking is the high overall rate of agreement among justices: Every pair of justices voted together more than 60 percent of the time. Still, there was considerable variation in agreement rates. In the Court’s 2015 and 2016 terms the mean rate of agreement on opinions among the four most liberal justices was 88 percent; for the four most conservative justices, the mean rate was 83 percent. In contrast, the mean rate of agreement between the four most liberal justices and the four most conservative justices was 77 percent. In some other recent terms, agreement rates between conservative and liberal justices were considerably

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Table 4-2 Percentages of Cases in Which Pairs of Justices Voted for the Same Side, 2015–2016 Terms

lower. To a small degree, rates of agreement on opinions may reflect self-conscious alliances or personal relationships, but they are primarily the result of similar or differing policy preferences.

The general patterns of agreement and disagreement between the justices are often reflected in the lineups of justices in individual cases. In the 2015 and 2016 terms, for instance, all but one of the Court’s eleven 5–4 and 5–3 decisions found either the four most liberal justices or the three or four most conservative justices dissenting, with Justice Kennedy joining one side or the other to create the majority in each case. Justice Breyer referred to these lineups as “the usual suspects.”

But divisions on the Court often diverge from ideological lines. In Star Athletica v. Varsity Brands (2017), a case involving copyrights for cheerleading uniforms, the two dissenters were Breyer and Kennedy, the justices closest to the Court’s ideological center, with the three justices to their left and the three to their right in the majority. The existence of such divisions, like the frequency of unanimous decisions, makes it clear that justices do not respond to cases simply on the basis of their ideological tendencies.

One reason for disagreements that do not follow ideological lines was noted earlier: Some justices take more liberal or more conservative positions in certain areas of policy than they do in most others. Justice Thomas, for instance, is relatively favorable to some types of legal claims by criminal defendants. Another reason is that some cases do not relate directly to justices’ policy preferences, so the justices disagree with each other on the basis of their approaches to legal interpretation or as a result of idiosyncratic responses to the issues in those cases.

Observers of the Court regularly label justices not just relative to each other but in absolute terms as well: Justice Alito is called a conservative, Justice Sotomayor a liberal. This conclusion does not follow directly from the justices’ votes and opinions. For one thing, their positions in cases are not solely the product of their policy preferences. In addition, the proportions of liberal and conservative votes that a justice casts in a particular period reflect the mix of cases that the Court decides in that period. A justice with a strongly liberal voting record in one era might not have as liberal a record in a different era.

Still, the role of justices’ policy preferences in their votes and opinions is strong enough that the ideological labels that observers assign to them are generally appropriate. A justice who casts a preponderance of votes that can be characterized as conservative almost surely holds conservative views on most issues. Indeed, most justices who were perceived as strongly liberal or strongly conservative at the time of their appointment establish records on the Court that are consistent with those perceptions.

Justices’ Preferences and Policy Change

If the positions of individual justices reflect their policy preferences, the collective decisions of the Court must also reflect the mix of preferences among the justices. When most justices are conservative, for instance, the Court will tend to make conservative decisions and move legal doctrine in a conservative direction.
The proportions of liberal and conservative decisions fluctuate from term to term, and that is even more true of the Court's most visible decisions. Commentators often treat this fluctuation as a sign that the Court has changed, but fluctuation generally reflects the particular mix of cases that the Court decides each term rather than a shift in the Court's collective ideological position. Sometimes the Court's position on a particular issue or its overall ideological position does change, in the sense that the Court decides cases differently from the way it would have decided those cases in an earlier term. Such changes are especially clear when the Court directly overrules one of its precedents.

If the Court's collective positions reflect the policy preferences of its justices more than anything else, the primary source of changes in Court policies must be a shift in the preferences of the justices as a group. These shifts could come from change in the preferences of people already serving on the Court or from change in the Court's membership. In practice, both are significant, but the second is more important.

Changes in Justices' Preferences

Close observers of the Supreme Court often try to predict how the Court will decide a pending case. Typically, they do rather well in their predictions. The primary reason is that individual justices tend to take stable positions on the issues that arise in various policy areas. The views that a justice expressed in past cases about when cars can be searched or when mergers of companies violate the antitrust laws are a good guide to the justice's stance in a future case on those issues. On specific legal questions, one legal scholar has suggested, justices tend to adhere to "personal precedent."71 In turn, the Court's collective position on an issue generally remains stable as long as its membership remains unchanged.

But over time, justices are exposed to new influences and confront issues in new forms. The result may be a change in their thinking about specific legal questions or broader issues. Occasionally, their position on a specific question differs from the position they took in an earlier case, and sometimes justices acknowledge and explain that change.72 Some observers of the Court perceived that in decisions in 2015 and 2016, Anthony Kennedy's positions on two issues involving racial discrimination shifted from earlier decisions in a more subtle way.73 In a speech later in 2016, although Kennedy did not mention those cases, he did say that "to re-examine your premise is not a sign of weakness of your judicial philosophy. It's a sign of fidelity to your judicial oath."74

It is difficult to ascertain whether justices have shifted in their overall ideological positions over time, but it is clear that most justices retain the same basic positions throughout their career. When a justice moves along the Court's ideological spectrum, it is usually because new appointments have altered the Court's ideological composition while the justice has retained the same general views. This seemed to be true of John Paul Stevens, who was initially near the center of the Court but who had the most liberal record of any justice in the second half of his Court career.
Justice Harry Blackmun was one of the few justices whose basic views seemed to change fundamentally. Blackmun was appointed to the Court in 1970 by Republican Richard Nixon, and early in his tenure he aligned himself chiefly with the other conservative justices. He and Chief Justice Warren Burger, boyhood friends from Minnesota, were dubbed the “Minnesota Twins.” In the 1973 term, Blackmun joined the same opinion as Burger in 84 percent of the Court’s decisions but joined with the liberal William Brennan in only 49 percent. Blackmun gradually moved in a leftward direction, and from the 1980 term onward, he usually had higher agreement rates with Brennan than with Burger. In 1985, Burger’s last term, it was 30 percentage points higher. In the last few terms before his 1994 retirement, Blackmun was one of the two most liberal justices on the Court. Although the reasons for this change are uncertain, it appears that his experiences in dealing with cases that came to the Court—especially Roe v. Wade, in which he wrote the Court’s opinion—were important.

Perhaps more common than individual shifts are changes in the collective views of the justices in a particular issue area. These changes typically result from developments in American society that affect the views of the public as a whole. The liberal Warren Court gave unprecedented support to the goal of equality under the law, but it did not strike down legal rules that treated women and men differently. In contrast, the more conservative Burger Court handed down a series of decisions promoting legal equality for men and women. The most fundamental cause of this change was the direct and indirect effect of the feminist movement on justices’ views about women’s social roles. To take another example, in 1972 the Burger Court summarily dismissed a challenge to the Minnesota prohibition of same-sex marriage. But in 2015, the more conservative Roberts Court directly overturned the 1972 decision by striking down state prohibitions of same-sex marriage. That difference can be explained by the impact of the gay rights movement and related changes in society on justices’ attitudes.

Membership Change

In Citizens United v. Federal Election Commission (2010), the Supreme Court overruled two of its precedents that had allowed certain regulations of funding for political campaigns. In his dissenting opinion, Justice Stevens argued that “in the end, the Court’s rejection of Austin and McConnell comes down to nothing more than its disagreement with their results. Virtually every one of its arguments was made and rejected in those cases, and the majority opinion is essentially an amalgamation of resuscitated dissents. The only relevant thing that has changed since Austin and McConnell is the composition of this Court.”

Whether or not Justice Stevens’s criticism of the decision in Citizens United was justified, he was surely right about the reason why the Court overruled the two precedents. In doing so, he underlined the importance of membership change. If the Court’s policies are largely a product of the justices’ preferences, and if those preferences tend to be stable, then the most common source of significant policy change is the arrival of new justices on the Court.
As the *Citizens United* decision illustrates, a change in the Court’s membership sometimes alters its positions on specific issues. The overturning of a recent precedent usually results from the replacement of justices who helped create that precedent with others who disagree with it. Even when the Court maintains a precedent, a shift in membership may result in a narrower interpretation of the precedent. Retired justice Sandra Day O’Connor has said that the law “shouldn’t change just because the faces on the court have changed,” but frequently it does. Indeed, as Justice Ginsburg pointed out, O’Connor’s retirement and the resulting appointment of Samuel Alito in 2006 shifted the Court’s positions on some issues.

More broadly, shifts in the Court’s overall ideological position through new appointments typically lead to change in the general content of its policies. I will consider that process of change in Chapter 5.

**Role Values**

Policy preferences are not the only values that can affect the Court’s decisions. Justices may also act on their role values—their views about what constitutes appropriate behavior for the Supreme Court and its members. In any government body, whether it is a court or a legislature, members’ conceptions of how they should carry out their jobs structure what they do.

A variety of role values might shape justices’ behavior, including their views about the importance of consensus and about the legitimacy of “lobbying” colleagues on decisions. But the role values with the greatest potential impact are justices’ beliefs about the considerations they should take into account in reaching their decisions and about the desirability of intervening in the making of public policy.

It is clear that multiple considerations affect justices’ votes and opinions. The relative weight of these considerations depends in part on what justices think they ought to do. In particular, justices have to balance their strong policy preferences on many issues against the expectation of others (and themselves) that they will seek to interpret the law accurately.

Some evidence suggests that justices differ in the relative weights they give to these legal and policy considerations. However, these differences are not as sharp as they sometimes appear. For example, at any given time, some justices vote more often than others to overrule some of the Court’s precedents. To a degree, this difference reflects differing attitudes toward precedent. But more important are justices’ attitudes toward the policies embodied in particular precedents, attitudes that tend to fall along ideological lines. In *Montejo v. Louisiana* (2009), the five most conservative justices voted to overrule a 1986 precedent that had prohibited police questioning of suspects under certain circumstances. In *Obergefell v. Hodges* (2015), in contrast, the five most liberal justices voted to overrule a 1972 precedent in the process of holding that states could not prohibit same-sex marriage.

The Court’s intervention in policymaking, beyond what is unavoidable, is often viewed negatively. Justices who seem eager to engage in that intervention...
are criticized as “activists,” and those who seem less prone to do so are praised as “restrained.” But activism, like the treatment of precedent, does not seem to differ much among justices.

The most visible form of active intervention in policymaking is striking down federal statutes. The historical patterns are illuminating. During the 1920s and early 1930s, the laws that the Court struck down were primarily government regulations of business practices. Conservative justices were the most willing to strike down such laws, and liberals on the Court and elsewhere argued for judicial restraint. In contrast, in the 1960s and 1970s, the Court struck down primarily laws that conflicted with civil liberties. Liberals were most likely to act against these laws and conservatives to call for judicial restraint.

Since the 1980s, the Court has overturned a wide variety of federal laws. No justice has stood out for a willingness or unwillingness to strike down laws. This is because the statutes that the Court has invalidated were ideologically mixed, and on the whole justices have voted to uphold laws that are consistent with their own conceptions of good policy and to strike down laws that conflict with those views. The same is true of decisions in which the Court strikes down state laws on constitutional grounds.82 In this respect, the justices’ judgments about whether to declare laws unconstitutional are similar to their judgments about whether to overrule precedents.

All this is not to say that justices’ role values have no impact on their behavior. Undoubtedly, such values help to structure the ways in which justices perceive their jobs. But justices’ conceptions of good public policy have a more fundamental impact on their choices.

GROUP INTERACTION

In discussing legal and policy considerations in decision making, I have focused on justices as individuals. But when justices make choices, they do so as part of a Court that makes collective decisions and as part of American government and society. Justices who seek to make good policy might act strategically by taking their colleagues and other institutions into account when they cast votes and write or join opinions. Whether or not justices act strategically, they can be influenced in a variety of ways by other justices and by their political and social environment. This section examines the justices as a decision-making group, and the next section considers the Court’s environment.

The Collective Element in Decision Making

Descriptions of the Supreme Court as a group offer two competing depictions of the Court. In one depiction, the justices work together closely to reach decisions, and their positions in cases frequently shift as arguments made by some justices change colleagues’ minds and as they negotiate over the language of opinions.
This depiction is fostered by historical accounts of major decisions such as Brown v. Board of Education (1954). In the other depiction, the justices mostly work in isolation from other justices, and their judgments are affected little by those colleagues’ views. The reality lies somewhere between these two depictions. There are significant limitations on the influence of justices over each other, but there are also strong bases for influence.

The most fundamental limitation on influence among the justices is their strongly held views on many issues of law and policy. When they apply their general positions on an issue to a specific case, the resulting judgment about that case is often too firm for colleagues to sway. As William Rehnquist wrote, when justices who have prepared themselves “assemble around the conference table on Friday morning to decide an important case presenting constitutional questions that they have all debated and written about before, the outcome may be a foregone conclusion.”

Balanced against that powerful limitation are two powerful incentives for justices to try to influence their colleagues and to accept influence from them. One incentive is institutional: Justices want to achieve opinions that at least five members endorse so that the Court can lay down authoritative legal rules. And to give more weight to the Court’s decisions, they generally would like to reach greater consensus. Justices may operate on this incentive simply because they think that legal clarity is good in itself, but the desire to maximize the impact of the legal policies they favor also plays a part.

A second incentive is more personal: justices’ interest in winning majority support for their positions. Justices want the Court to adopt the legal rules they prefer, and most justices get satisfaction from being on the winning side. As Justice Breyer put it, “Would I prefer to be in the majority? Yeah. Would I prefer that people agree with me all the time? Of course. So would you. So would anyone.”

Thus, justices have good reason to engage in efforts at persuasion. They also have reason to be flexible in the positions they take in cases because flexibility can help them win colleagues’ support for legal rules that are close to the ones they prefer.

One way to gauge the extent of influence among the justices is by comparing the tentative votes they cast on case outcomes with their final votes in the same cases. Information in justices’ papers allows that comparison for the Burger Court (1969–1986). During that time, only 7.5 percent of the justices’ individual votes to reverse or affirm switched from one side to the other. On the other hand, at least one switch occurred in 37 percent of the cases.

Most vote switches increase the size of the majority, as the Court works toward consensus. During the Burger Court, the justices who initially voted with the majority switched their votes 5 percent of the time, but those who initially voted with the minority switched 18 percent of the time. Occasionally, however, shifts of position turn an initial minority into a majority. This occurred in about 7 percent of the cases decided by the Burger Court. Justice Ginsburg spoke in 2018 of one case in which her draft dissenting opinion convinced four colleagues to change their votes and thereby became the majority opinion in a 6–3 decision. “So,” she concluded, “it ain’t over till it’s over.”
Of course, not all vote switches result from influence by other justices. For that matter, a justice’s initial vote may be shaped by what colleagues say at oral argument or in conference. Thus, it is impossible to ascertain the impact of justices on each other’s votes from vote switches alone. But the frequency of those switches does suggest that justices influence colleagues’ votes at least occasionally.

Even if the justices adhere to their original votes, the content of the Court’s opinion can change. The most common course of events in a case is for a justice to write a draft opinion for the Court and then gain the support of a majority for that opinion with no difficulty. But other justices who voted on the majority side in conference frequently ask for changes in the draft opinion, and most of the time justices who make these requests indicate that they cannot join the opinion unless the changes are made. A study of Harry Blackmun’s draft opinions showed that he almost always made the requested changes. Because of this responsiveness, the colleagues who requested changes in the original draft usually joined Blackmun’s final opinion; they wrote concurring opinions in only about 20 percent of those cases. Not surprisingly, Blackmun became much less willing to accommodate colleagues when he had already secured majority support for his opinion.

It is not just the opinion writer who compromises during this process; so do some justices who sign onto majority opinions. As Justice Alito said, “I don’t think any of us would actually sign on to something that we don’t believe in. But we are often required to sign on to something that is not exactly what we would prefer.”

Whether or not colleagues request changes in opinions for the Court, those opinions frequently are revised during the decision process. In the Burger Court, the author of the Court’s opinion circulated at least three drafts of the opinion in slightly more than half of all cases. Although successive drafts usually differ only in minor ways, they sometimes proclaim quite different legal rules. Moreover, the first draft of a majority opinion often reflects the writer’s efforts to take into account the views that colleagues expressed in conference, so those colleagues influence the opinion even if they fully accept that first draft.

The extent to which justices seek and accept influence varies among cases. Justice Kagan has contrasted cases in which justices “just see the law differently” with those “where you can persuade each other.” On the whole, justices are more open to influence when they lack strong feelings about the issues in a case. On the other hand, they may make greater efforts at persuasion in cases they care most about, and more negotiation and compromise may be necessary in those cases to achieve a majority opinion. In Fisher v. University of Texas (2013), in which the Court remanded a challenge to a university’s affirmative action program to a court of appeals for reconsideration, it seemed evident that the justices who signed on to the majority opinion had compromised a good deal to reach agreement. When the case returned to the Court two years later, Justice Breyer noted in oral argument that “that opinion by seven people reflected no one’s views perfectly.”

The interplay among justices that occurs during the decision process has a large element of strategy, in that justices are trying to secure a decision that reflects their judgment about which side should win and an opinion for the Court that is as close
as possible to their view about what the opinion should say. Strategy is not always carried out by individual justices: It is common for like-minded justices to work together to win the results they seek. Justice Ginsburg has reported that after *Bush v. Gore* (2000), in which each of the four liberal dissenters wrote a separate opinion, those justices resolved to try to agree on a single opinion in future cases, whether they were in the majority or in dissent. To a considerable degree, the Court’s liberals have stuck to that goal. In *Obergefell v. Hodges* (2015), in which a 5–4 majority struck down state laws prohibiting same-sex marriage, all four liberal justices joined Justice Kennedy’s opinion for the Court and refrained from writing concurring opinions, even though Ginsburg and some other liberals probably would have preferred to rest the decision on a different rationale from the one that Kennedy offered.95

### Patterns of Influence

To the extent that justices actually influence their colleagues’ choices, inevitably some are more influential than others. Justices might exert influence without directly seeking it because other justices respect them or because what they write in opinions and say to their colleagues in the decision process is persuasive. But to a considerable extent influence rests on deliberate efforts to exert it as the Court collectively works toward decisions. As in other groups, success in achieving influence depends in part on a justice’s interpersonal skills.

It is very difficult to gauge justices’ influence over each other from outside the Court, though scholars have used indicators such as joining of opinions and citation of colleagues’ opinions in later cases as measures of influence.96 But as information about the Court in past eras accumulates, a picture of some justices emerges. Justice William O. Douglas, who served from 1939 to 1975, had relatively little influence with other justices because he made only limited efforts to achieve it. Douglas’s longtime colleague Felix Frankfurter actively sought influence over his colleagues, and his eminence as a legal scholar should have enabled him to shape other justices’ thinking about cases. But Frankfurter’s personal traits, especially his inability to hide his lack of respect for colleagues, worked against him. William Brennan, who served from 1956 to 1990, was far more skilled in working with colleagues. This skill helped Brennan in his efforts to forge a liberal majority for the expansion of civil liberties in the Warren Court and to limit the Court’s conservative shift in the Burger Court.

It is more difficult to assess the influence of justices who have served more recently. Antonin Scalia’s influence has been a subject of interest. Some observers of the Court think that Scalia’s frequent strong criticism of colleagues in his opinions alienated some of them and thus weakened his capacity for persuasion. According to one account, Chief Justice Rehnquist responded to a Scalia opinion attacking Sandra Day O’Connor by calling him to say that he was annoying O’Connor “again. Stop it!”97 But Scalia himself dismissed the possibility that the tone of his opinions ever “cost me a majority.”98 And as Elena Kagan has noted, Scalia had considerable impact on the ways that justices and lower-court judges interpret statutes.
predicted that Scalia would “go down as one of the most important, most historic figures on the Court.”

One source of influence is a justice’s position on the Court’s ideological spectrum. The vote of a “swing” justice at the ideological center of the Court often will determine which side wins in cases that closely divide the Court along ideological lines. In itself, this does not mean that the swing justice is influential, because every justice in a 5–4 majority contributes to that result with one vote. Swing justices have some extra influence, however, because their positions are seen as relatively unpredictable and their support is seen as crucial to the outcome of some cases. Lawyers work to devise arguments that appeal to the swing justice, and colleagues also work hard to win the support of that justice.

Anthony Kennedy was the swing justice in his last dozen years on the Court, because four justices were well to his ideological left and the other four were to his right. On a series of major decisions on issues such as abortion and the death penalty, he created liberal or conservative majorities with his vote. Justice Kagan joked in 2014 that “there are four of us who think one thing. There are four of us who think another thing, and then we wait and see what Justice Kennedy does.” As a result, lawyers and colleagues showed considerable deference to him. Even so, it exaggerates the influence of Kennedy or any other swing justice to say, as one headline did, that “This Is Kennedy’s Court—the Rest of the Justices Just Sit on It.” Nor can any other justice dominate the Court. To the extent that the justices do affect each other’s positions in cases, every justice has considerable influence as one out of only nine members of the Court.

The Chief Justice

Compared with other justices, the chief justice has both advantages and disadvantages in achieving influence over colleagues. The disadvantage is administrative duties, which reduce the time that the chief can spend on cases. The primary advantage is a set of formal powers. The chief presides over the Court in oral argument and in conference. In conference, the chief speaks first on cases, and by doing so the chief can direct discussion and frame alternatives. Aided by clerks, the chief makes up the initial version of the discuss list from the petitions for certiorari. This task gives the chief the largest role in determining which cases are set aside without group discussion. Another power, over opinion assignment, merits more extensive consideration.

Opinion Assignment

The chief justice is usually in the majority in conference votes on decisions and thus assigns the Court’s opinion in the preponderance of cases. In making assignments, chiefs balance different considerations. Administrative considerations relate to spreading the workload and opportunities among the justices. Chief justices generally try to make sure that each colleague
gets about the same number of opinions for the Court. As a result, every justice typically gets at least one case from each of the Court’s two-week sittings. Chief Justice Roberts has been especially careful to mete out assignments evenly. Chiefs may also take into account the workload of opinion writing that a justice already faces at a given time.

Other considerations relate to the substance of the Court’s decisions. Because opinion writers have to take their colleagues’ views into account, scholars disagree about how much difference it makes which justice is assigned the Court’s opinion. But justices perceive that the opinion writer has disproportionate influence over what the Court says, so that opinion assignment is consequential. As a result, chief justices tend to favor themselves and colleagues who are close to them ideologically when assigning opinions in the cases they care about most. According to one study, in his first ten terms Chief Justice Roberts assigned opinions to himself in “salient” cases more often than to any other justice. The Court’s liberals generally received such assignments at a low rate, even taking into account the relatively small numbers of cases in which they joined Roberts in the majority.

The chief can also try to help the conference majority remain a majority. When there is a close vote at conference, the chief often assigns the opinion to a relatively moderate member of that majority. One reason is that a moderate may be in a good position to write an opinion that will maintain the majority and perhaps win over justices who were initially on the other side. Another reason is that if the swing justice gets the assignment, that justice will be more likely to remain on the majority side. That second reason helps to account for the frequency with which Justice Kennedy received assignments from Roberts in important cases.

Because chief justices favor ideological allies in assigning important opinions, in effect they reward the justices who vote with them the most often. They might also use the assignment power more directly to reward and punish colleagues. Roberts said in 2006 that “you can always give all the tax opinions to a justice, if you want to punish them.” He added that he had not yet taken that kind of action. But according to Justice Blackmun, Chief Justice Burger might assign one of the “crud” opinions “that nobody wants to write” to a justice who was “in the doghouse” with Burger.

Chiefs may take into account what they know about their colleagues’ interest in different issues or in a specific case. In an oral argument in 2017, Justice Sotomayor began a question to a lawyer by saying, “So if we go down your route, and I’m writing that opinion—which I hope not. . . .” We do not know whether Chief Justice Roberts took Sotomayor’s indirect lobbying into account, but he did assign the Court’s opinion to another justice.

The associate justice who assigns the Court’s opinion when the chief is in the minority is under fewer constraints. Justice Stevens confessed that when assigning cases as senior associate justice, he sometimes gave himself an interesting case to keep the chief justice from assigning him a case from the same sitting that he wanted to avoid. Justice Kennedy assigned himself opinions in several important cases when he was the most senior justice in the majority. As the most senior of
the Court’s liberals since 2010, Justice Ginsburg assigns many dissenting opinions. She has acknowledged that she probably takes “more than a fair share of the dissenting opinions in the most-watched cases.”110

Variation in Influence

Chief justices have differed considerably in their influence over the Court. These differences reflect the chief’s interest in leading the Court, the chief’s skill as a leader, and the willingness of the associate justices to be led.

Warren Burger sought to be a strong leader. He had some success in securing administrative changes in the federal courts and procedural changes in the Court itself. But he was not especially influential in the decision-making process.

Burger’s limited impact on the Court’s decisions stemmed largely from his own qualities and predilections. Colleagues chafed at what they considered a poor style of leadership in conference, and they disliked Burger’s occasional practice of casting “false” votes so that he could assign the Court’s opinion.111 He was also accused of bullying his colleagues. One scholar concluded that Potter Stewart “loathed” Burger,112 and other colleagues also disliked his leadership style. But Burger also faced obstacles that were beyond his control. Perhaps most important, as a fairly strong conservative he had the disadvantage of standing near one end of the Court’s ideological spectrum.

William Rehnquist became chief justice in 1986 after serving on the Court for fifteen years. He brought important strengths to the position, especially his well-respected intellectual abilities and a pleasant manner of interaction with people. Having served in the Burger Court as an associate justice, Rehnquist learned—in one observer’s words—“how not to be Chief Justice.”113 In any event, Rehnquist was an effective chief justice, and his leadership was widely praised even by justices who did not share his conservative views on most judicial issues.114 Reflecting his preferences, the Court’s discussions of cases at conference were shorter and tighter than they had been in the recent past. Rehnquist’s leadership was one source of the sharp decline in the number of cases accepted by the Court. In decision making, he enhanced his influence by taking strong positions with an affable style.

Both colleagues and observers of the Court have attested to John Roberts’s strengths as leader of the Court. “With regard to all of his special responsibilities” as chief justice, John Paul Stevens said, “John Roberts is an excellent chief justice.”115

As chief justice, Roberts seems to be sensitive to the Court’s standing. In National Federation of Independent Business v. Sebelius (2012), he unexpectedly cast the decisive vote to maintain the requirement in the Affordable Care Act (ACA) that some individuals purchase health insurance. Three years later, in King v. Burwell (2015), he wrote the Court’s opinion that upheld the practice of giving tax credits to certain people in states with federally run “exchanges” under the ACA. Especially in Sebelius, Roberts may have acted to avoid criticism of the Court for reaching a decision that would have been perceived as an attack on a Democratic-sponsored law by Republican justices.
Thus, Roberts appears to have established a strong role as chief justice. Roberts himself has emphasized the limits on the power that he or any other chief justice holds. “I have the same vote as everybody else. I can’t fire them if they disagree with me. I can’t even dock their pay.”116 But the powers that the chief justice does possess, if used effectively, can give the chief disproportionate influence over the Court’s decisions.

Harmony and Conflict

Some personal conflict among the justices is inevitable. Justices with differing points of view vie to achieve decisions that reflect their own views, and those who find themselves in the minority in cases that are important to them are likely to feel some bitterness toward colleagues on the winning side. In itself, the pressure to finalize decisions late in the Court’s term can create tensions among the justices. By the end of the term, Samuel Alito reported, “We tend to be kind of angry with each other.”117 The biting language in some dissenting opinions sometimes reflects those tensions, and it can exacerbate them as well. And when justices interact with each other in Court sessions and conferences, what they say can annoy their colleagues. Several months after Antonin Scalia’s death, Sonia Sotomayor spoke of her fondness for Scalia, but she also reported that “there are things he’s said on the bench where if I had a baseball bat, I might have used it.”118 Ruth Bader Ginsburg, a close friend of Scalia’s, once told a reporter that “I love him, but sometimes I’d like to strangle him.”119

Yet the justices have a strong incentive to maintain good relations with their colleagues because, as Sotomayor has pointed out, “we’re going to be there for a
long time.” Stephen Breyer has reported one indication of efforts to minimize conflict: “I’ve never heard one judge” in the Court’s conference room “say something really mean, even in a joking way, about another. It doesn’t happen.” Justices on the current Court do not socialize a great deal away from the Court, but they usually have lunch together on days of oral arguments and conferences.

Just as it is difficult to ascertain patterns of influence among the justices from outside the Court, it is also difficult to determine the balance between harmony and conflict in the Court. But one thing seems clear: The current Court is more harmonious than several past Courts, in which some pairs of justices were actually unable to work with each other. Undoubtedly, the absence of such deep conflicts improves the functioning of the Court.

THE COURT’S ENVIRONMENT

When the Supreme Court hears a case on a controversial issue, people who care about the issue often try to influence the Court’s decision. Beyond submitting amicus briefs, interest groups sometimes hold rallies and demonstrations to show support for their positions. Commentators write articles and op-eds to argue for one side or the other. Members of Congress often weigh in on the issue, and sometimes the president does as well.

In the view of Justice Thomas, none of this activity makes any difference. Speaking about the challenges to the Obama health care program that the Court heard in 2012, Thomas likened the efforts to influence the Court’s decision from outside the legal process to basketball fans who try to distract free throw shooters. “Why do you think they’re never distracted? They’re focusing on the rim, right? That’s the same thing here. You stay focused on what you’re supposed to do. All that other stuff is just noise.”

There is considerable basis for Thomas’s conclusion. In comparison with Congress and the president, the Supreme Court is more isolated from the world around it and more insulated from the influence of that world. The isolation is reflected in the relatively limited contact between the justices and other participants in politics, such as members of Congress and representatives of interest groups. The primary source of insulation is the justices’ life terms: No matter whom they displease, they can be removed from office only through the very unlikely prospect of impeachment by the House of Representatives and conviction by the Senate.

But this does not necessarily rule out any influence for the Court’s environment. Certainly justices are aware of events and developments in American society and in the political world. They might take the political world into account for strategic reasons, acting to avoid negative responses to their decisions that would endanger the policies they favor or even damage the Court itself. Strategic considerations aside, justices might simply like to be viewed positively by people outside the Court. For both reasons, the Court’s environment could affect the justices’ choices as decision makers.
Mass Public Opinion

Supreme Court justices would seem to be especially immune to influence from the general public. The public has no direct power over the Court, and the great majority of the Court's decisions are essentially invisible to the public. Yet some observers of the Court have argued that the justices pay attention to public opinion. As these observers see it, the justices listen to the public primarily because public support strengthens the Court's ability to secure acceptance of its decisions from public officials who are responsible for carrying out those decisions and who can limit or overturn them.

It is not clear that justices need to worry about maintaining public support. The Court is viewed more positively by the public than are the other branches of government, and even highly unpopular decisions have little long-term effect on public support for the Court as an institution. Yet justices themselves sometimes refer to the Court's need to act in ways that maintain its legitimacy with the general public, and they may perceive that the Court's public standing is more fragile than it actually is. Those perceptions could be fed by the short-term effects of some highly visible decisions on public attitudes toward the Court.

Further, surveys that show declining public support for the Court in recent years may make the justices nervous, even if that decline reflects a general unhappiness with government more than disapproval of the Court itself. One observer of the Court reported in 2012 that “the current court is almost fanatically worried about its legitimacy and declining public confidence in the institution.” And justices might simply feel more comfortable when the Court's decisions and their own positions in cases garner approval from the general public.

If the justices do take public opinion into account when they decide cases, one effect might be to draw them to support the majority view among the public on issues that many people know and care about. Some observers argue that the justices collectively do fall in step with public opinion on major issues. “Time and time again,” one legal scholar said, the Court's decisions “plainly reflect the tug of public views.” Yet the Court sometimes makes highly unpopular decisions, even when reactions to earlier decisions have made it clear that a decision will arouse strong disapproval. Two examples were its rulings on flag burning in 1990 and on religious observances in public schools over four decades.

Even so, it is possible that public attitudes shape the justices' responses to highly visible issues. The dramatic growth in public support for same-sex marriage did not guarantee that the Court would strike down state prohibitions of such marriages in Obergefell v. Hodges (2015). But the justices probably would have feared a strong negative reaction to such a decision during the long period when there was overwhelming public opposition to same-sex marriage. Of course, during that period such a decision probably would have been unthinkable to the justices themselves: Their attitudes changed just as the attitudes of people outside the Court changed.

Another possible effect of concern with public opinion is more subtle but also more pervasive. It might be that as the general public moves left or right on the
ideological spectrum, the Court moves along with it to avoid straying too far from public opinion in its decisions as a whole. Indeed, studies generally find a tendency for the Court and the public to move in the same ideological direction over time. But even if that tendency exists, it is uncertain whether the justices are being pulled along by the public or whether the justices and the public are responding to the same developments in government and society.

Overall, the impact of the general public on the justices is uncertain. Under most circumstances, the justices seem fairly free to act without taking public opinion into account. Still, consciously or unconsciously, at least some justices might be drawn toward positions that the public supports by their concern for the Court’s standing or their personal interest in public approval. Even so, the justices have much greater independence from the public than do elected officials in the other branches and in state courts.

Elite Opinion: Friends and Acquaintances, the Legal Community, and the News Media

Whether or not justices respond to the general public, they can be influenced by more specific sets of relevant people. One set is the justices’ personal friends and acquaintances. Like other people, justices pay attention to the views of those who are most important to them. If the people who are close to a justice share a strong point of view about certain issues that come before the Court, they may exert a subtle influence on the justice to take positions consistent with that point of view.

The legal community is important as a professional reference group. Justices draw many of their acquaintances from that community. Most justices interact with practicing lawyers, law professors, and lower-court judges, and most of the justices’ public appearances are before legal groups. Lawyers are also the primary source of expert evaluations of the Court, often presented in the law reviews that law schools publish and in legal blogs that have attracted more attention in recent years. The same publications are sources of ideas and arguments about legal issues that the justices address. At least some of the justices pay attention to them. Justice Kagan, for instance, reported that there were three legal blogs that she read every day.

Scrutiny by the legal community helps to make legal considerations important to the justices in reaching decisions. And the arguments of legal scholars on issues may influence the justices’ thinking. Indeed, a good deal of the scholarship that law professors publish is aimed in part at influencing the approaches that the Court takes to legal issues.

The news media may also be important to the justices. The media are the public’s primary source of information about the Court, so they can shape public attitudes toward the justices. And whether or not the news media influence public views of the Court, justices understandably prefer to be depicted positively in news reports. For these reasons, many justices pay attention to coverage of the Court.

Most of the people in the justices’ personal circles, the legal community, and the news media are from elite groups in American society. To the extent that these
elites have a distinctive point of view, they may move justices toward that point of view. For instance, some conservative commentators have argued that several justices who were appointed to the Court by Republican presidents between 1970 and 1990 adopted more liberal positions over time because of their desire to win praise from elite groups that leaned to the left, including legal scholars and reporters who wrote about the Court.\(^\text{129}\)

It is uncertain whether justices actually moved to the left because of this influence. In any event, the elite world has changed. In the past few decades, political polarization has created distinct elite groups on the left and right, including legal scholars and news outlets. Even more than in the past, justices can seek approval from groups that share their point of view. It may be, then, that conservative and liberal justices today respond largely to different subsets of the political and social elites in the United States. Whatever their effects may be, these elites almost surely have greater influence on the justices than does the public as a whole.\(^\text{130}\)

**Litigants and Interest Groups**

Simply by bringing cases to the Supreme Court, litigants, interest groups, and the lawyers who represent them influence the Court’s policies. Once the Court has accepted a case, litigants and interest groups may influence its decision on the merits through advocacy in briefs, including amicus briefs, and oral arguments.

Certainly, justices and their law clerks pay attention to the material presented by the participants in cases. That attention is reflected in the Court’s opinions, which frequently use language in briefs from the parties and from amicus briefs.\(^\text{131}\) When justices question lawyers during oral argument, they are often looking for responses to strong arguments by the other side.

Justices may react to the identities of the litigants in a case, and this possibility is reflected in the efforts by interest groups that sponsor cases to find litigants who might be viewed sympathetically by the justices. The identities of the groups that submit amicus briefs may also influence the justices. The challenge to partisan gerrymandering of legislative districts in *Gill v. Whitford* (2018) generally pitted Democrats against Republicans, because Republican control of most state legislatures and governorships after 2010 had given the party an advantage in drawing district lines. However, the amicus briefs supporting the challengers included one from fourteen prominent Republicans and two from bipartisan coalitions. Undoubtedly, one impetus for those briefs was an effort to convince conservative justices that the challenge was more than a Democratic effort to gain a more favorable electoral position.

The federal government is probably in the best position to benefit from justices’ favorable perceptions. The government’s advantages include the expertise of the advocates in the solicitor general’s office, the justices’ respect for the solicitor general’s professionalism, and their sympathies for the government’s interests. The solicitor general’s participation in cases as a party or amicus has substantial impact on the outcomes of cases, controlling for other factors.\(^\text{132}\) But it is noteworthy that the government’s success rate as a party has declined considerably since the 1980s,
falling to about 50 percent during the Obama administration. This decline does not necessarily mean that the solicitor general’s influence has weakened; other factors may be responsible for the decline. Still, it is a reminder that no litigant has an overwhelming advantage in the Court.

**Congress and the President**

Other government bodies take actions that affect both the Court itself and the impact of its policies. Because of this effect, justices may take those policymakers into account when they reach decisions. The president and Congress are especially important to the Court, so they have the greatest potential influence on the Court’s decisions.

**Congress**

Congressional powers over the Court range from overriding the Court’s interpretations of statutes to deciding on salary increases for the justices. Because of this array of powers, justices have some reason to consider congressional reactions to their decisions. Relations with Congress can affect their prestige and their comfort. And justices who think strategically in a broad sense, who care about the impact of the Court’s policies, want to avoid congressional actions that undercut those policies.

If justices do act strategically toward Congress, one potential form of strategy involves decisions that interpret federal statutes. These decisions are more vulnerable than the Court’s interpretations of the Constitution because Congress and the president can override them simply by enacting a new statute. Indeed, Congress considers such overrides quite frequently, and it enacts them into law fairly often.

For this reason, justices might try to calculate whether their preferred interpretation of a statute would be sufficiently unpopular in Congress to produce an override. If so, justices would modify their interpretation to make it more acceptable to members of Congress and thereby avoid an override. By making this implicit compromise with Congress, the justices could get the best possible result under the circumstances—not the interpretation of a statute that they favor the most but one that is closer to their preferences than the new statute that Congress would enact to override the Court’s decision. It may be, however, that most justices are not bothered much when Congress overrides their decisions. And justices might find it so difficult to predict overrides that little could be gained by trying to make those predictions.

It is not yet clear how often justices pursue this strategic approach. One possibility is that they do so selectively, when they perceive that a decision disfavored by Congress is a very good candidate for an override. If so, to take one example, justices might avoid handing down highly liberal statutory decisions on issues such as civil rights when the president is a Republican and both houses of Congress have solid Republican majorities. By the same token, when party control of Congress and the presidency is divided, as it was between 2011 and 2016, justices might feel great
freedom to interpret statutes as they wish on issues on which the parties disagree with each other.

When Court decisions interpret the Constitution rather than statutes, those decisions are considerably more difficult to overturn directly. But constitutional decisions also have the potential to arouse strong negative reactions from Congress when the Court overrules major government policies. Justices may have reason to avoid arousing such reactions or to reduce conflict with Congress when it arises.

In some historical periods, justices seem to have taken this approach. The first such period was the early nineteenth century, when Chief Justice John Marshall’s Court faced congressional attacks because of its policies. As the Court’s dominant member, Marshall was careful to limit the frequency of decisions that would further anger the Court’s opponents. In the late 1930s, the Court’s shift from opposition to support of New Deal legislation may have reflected an effort by one or two justices to end a serious confrontation with the other branches. In the late 1950s, members of Congress reacted to the Court’s expansions of civil liberties by trying to override some of its policies and limit its jurisdiction. A few justices then shifted their positions on some contentious issues. As a result, the Court reversed some of its collective positions and thereby helped to quiet congressional attacks on the Court.

The period from the 1960s to the present has featured strong criticism of the Court by members of Congress in response to decisions on a variety of civil liberties issues, including school desegregation, legislative districting, abortion, school prayer, and flag burning. On each of these issues, members have introduced bills to overturn the Court’s decisions, to limit its jurisdiction over the issue, or both. There have also been proposals to attack the Court more broadly, such as constitutional amendments that would limit the justices’ tenure to a set number of years.

There have been no clear signs of retreat by the Court in the face of these actions, and the Court has maintained many of the policies that aroused congressional criticism. Yet it may be that threats of negative congressional action and even the ideological composition of Congress have a more subtle effect on the justices’ inclination to strike down statutes.134 Such an effect might help to explain the relatively small numbers of federal statutes that the Court has declared unconstitutional over its history, and justices may be more willing to strike down statutes when Congress becomes less favorable to those statutes over time.135

**The President**

Presidents have multifaceted relationships with the Supreme Court, and these relationships provide several sources of potential influence. As I have discussed, two of those sources are the power to appoint justices and the government’s frequent participation in Supreme Court litigation. The appointment power gives presidents considerable ability to determine the Court’s direction. The president helps to shape the federal government’s litigation policy and thereby influences the Court’s decisions through appointment of the solicitor general and occasional intervention in specific cases.
Justices might be inclined to favor the interests of the president who appointed them in cases that the president cares about, though this inclination probably would not be conscious. A justice who is a close acquaintance of the president might have a stronger inclination to support the president’s position, but such acquaintanceship has become much less common than it once was. Nor is it likely to have a substantial impact on a justice.

Presidents occasionally comment on Supreme Court decisions, and those comments can shape the public’s view of the Court and its decisions.¹³⁶ The president can also influence responses to the Court’s decisions by Congress and the federal bureaucracy. For those reasons, justices may have an incentive to keep the peace with the president. On rare occasions, presidents speak about pending cases in an effort to influence their outcome. President Obama did so as the Court was considering challenges to “Obamacare” in 2012 and 2015.¹³⁷ In this instance and most others, however, it seems clear that any direct presidential influence on the Court is marginal at most.

CONCLUSION

The considerations that shape Supreme Court decisions can vary in their importance from justice to justice. It is possible that some justices give greater weight to legal considerations than do others, and justices certainly differ in their willingness to compromise their positions in order to achieve agreement with their colleagues. It appears that some justices are subject to greater influence from people and institutions outside the Court than others.

The determinants of the Court’s decisions also vary across cases. Some cases are far more visible to the Court’s audiences than others, and justices are more likely to take potential reactions to their decisions into account in the most visible cases. More fundamentally, the weight of legal and policy considerations can be expected to differ across cases. The justices have much stronger views about some policy issues than others, and the application of the law to a particular case varies in how clear or ambiguous it is. The justices’ conceptions of good policy are likely to have greater impact relative to the state of the law when the justices’ policy preferences are strong and the law is quite ambiguous.

This variation requires caution in generalizing about the importance of the various factors that shape Supreme Court decisions, but some generalization is still possible. Of all the considerations that influence the Supreme Court’s decisions, the justices’ policy preferences appear to be the most important. The application of the law to the Court’s cases is usually ambiguous, and constraints from the Court’s environment are generally weak. As a result, justices have considerable freedom to take positions that accord with their own conceptions of good policy. For this reason, the Court’s membership has strong effects on the Court’s direction.

If justices’ preferences explain a great deal, they do not explain everything. The law and the political environment rule out some possible options for the Court, and
they influence the justices’ choices among the options that remain. The group life of the Court affects the choices of individual justices and the Court’s collective decisions. In particular, justices frequently adjust their positions in cases to win support from colleagues and help build majorities. Factors other than policy preferences are reflected in results that might seem surprising—strikingly liberal decisions from conservative Courts and the maintenance of precedents even when most justices no longer favor the policies they embody.

Thus, what the Court does is a product of multiple and intertwined forces. These forces operate together in complicated ways to shape the Court’s decisions. Efforts to understand why the Court does what it does must take into account the complexity of the process by which the justices make their choices.

NOTES


47. Gitlow v. New York (1925); Cantwell v. Connecticut (1940).


49. Hans v. Louisiana (1890).


53. The decisions were *Atkins v. Virginia* (2002); *Roper v. Simmons* (2005); and *Kennedy v. Louisiana* (2008).


56. These decisions were, respectively, *Citizens United v. Federal Election Commission* (2010); *McDonald v. Chicago* (2017); and *Obergefell v. Hodges* (2015).


87. Segal and Spaeth, The Supreme Court and the Attitudinal Model Revisited, 286.


108. Perry v. Merit Systems Protection Board, 16-399, Transcript of oral argument, April 17, 2017, 44.


