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The United States' Supreme Court: Setting the Agenda

Ameriško vrhovno sodišče: ustvarjanje agende

Magistrsko delo

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Ameriško vrhovno sodišče: ustvarjanje agende

Vrhovno sodišče Združenih držav Amerike je najvišje sodišče v državi. Njegove odločitve postanejo enakovredne zakonu. Na vrhovnem sodišču je osem vrhovnih sodnikov (*Associate Justice*) in predsednik vrhovnega sodišča (*Chief Justice*). Nekoč je moralo sodišče preučiti vse zadeve, ki so prispele na Sodišče, vendar pa mu je ob pomoči kongresa uspelo zmanjšati čedalje večji zaostanek. Danes ima vrhovno sodišče diskrecijsko pravico, da izbere, katere zadeve bo preučilo. Ko te pridejo na Sodišče, strokovni sodelavci pripravijo povzetek z osnovnimi podatki o zadevi, da sodnikom ni treba prebrati vseh spisov v celoti. Na temu namenjeni seji (*conference*), na kateri se na kratko dotaknejo primerov, se sodniki odločijo, katere primere bodo vzeli v nadaljnjo razpravo. Vsako leto na vrhovno sodišče prispe približno 8000 zadev, v obravnavo pa jih vzame približno 80. Zelo težko je določiti, katere značilnosti mora imeti primer, da gre uspešno skozi prvo sito, vendar pa obstajajo nekateri dejavniki, kot na primer, kadar nižja sodišča ne soglašajo glede spora, kadar se vključi veliko intervenientov, ki želijo podati svoje mnenje (*amicus brief*), ali kadar so Združene države ena od strank, ki močno povečajo možnosti, da bo zadeva vzeta v obravnavo. Tudi predloge državnega pravobranilca (*Solicitor General*), čigar naloga je Združene države Amerike zastopati v pravnih sporih, Sodišče obravnava zelo resno. Ko je zadeva sprejmeta v obravnavo, morajo stranke vložiti vsebinsko ali meritorno vlogo (*briefs on merit*) in se pripraviti na ustno obravnavo. Na njej zastopniki strank na kratko predstavijo svojo stran spora in odgovarjajo na vprašanja sodnikov. Ti nato na nejavni seji glasujejo o zadevi, predsednik sodišča, sicer pa sodnik z najvišjo senioriteto določi, kdo bo napisal mnenje Sodišča. Obstaja veliko teorij in modelov, kako se vrhovni sodniki odločajo, katere primere bodo vzeli v nadaljnjo obravnavo in kako odločajo v posameznih primerih. Po legalističnem modelu (*legal model*) vrhovne sodnike pri odločanju zavezujejo ameriška ustava, precedensi in zakoni, ne smejo pa zakonov „izumljati“. Zastopniki vrednostnih modelov (*attitudinal model*) zagovarjajo stališče, da sodniki sledijo svojim osebnim prednostnim ciljem in politikam ter se ne ozirajo preveč na institucionalne okvire, saj jim dosmrtni mandat zagotavlja visoko stopnjo avtonomije. Zastopniki strateških modelov (*strategic model*) pa opozarjajo, da sodniki pri svojem odločanju upoštevajo tudi mnenja drugih sodnikov in drugih vej oblasti ter pretehtajo, kaj lahko v danih razmerah dejansko dosežejo v okviru svojih prednostnih ciljev in politik. V nalogi opredeljujemo še četrti model, ki združuje vse tri navedene modele v model, usmerjen v ustvarjanje agende, ki jo razumemo kot opredeljevanje prednostnih vsebin. Izbira zadev (skupaj z vsemi dejavniki, ki vplivajo na proces na tej stopnji) torej sama po sebi ustvarja agendo, obenem pa vseh devet vrhovnih sodnikov s svojim pogledom na pravo prispeva k zmernejši in počasi spreminjajoči se agendi, ki načeloma nikomur ne omogoča prevlade.

Ključne besede: ameriško vrhovno sodišče, agenda, določanje politik, ameriška ustava

The United States' Supreme Court: Setting the Agenda

The United States' Supreme Court is the highest court in the country. What it decides becomes the national law. There are eight Associate Justices and one Chief Justice. In the past, the Court had to review all the cases that came to it, which caused a steadily growing backlog. With the help of Congress, however, it managed to address this backlog. Today it has the discretionary right to choose which petitions for a writ of certiorari it will grant. When petitions come to the Court, law clerks prepare cert. memos with basic information of the case, so that justices do not have to read all the briefs themselves. At a conference, where they briefly address the cases, justices decide which cases they will grant review. Every year the Court receives approximately 8,000 petitions, but hears only approximately 80 cases. It is very difficult to determine what characteristics a case should have to be granted review, but if, for example, there is a conflict between lower courts, if there are a lot of amicus briefs, or if one of the parties in the dispute is the United States, a case will likely be granted review. Recommendations from the Solicitor General, who represents the U.S. before the Court, are also taken very seriously. Once a case is granted, the parties have to file briefs on merit and prepare for the oral argument. During the oral argument, the lawyers for the parties briefly present their cases and answer justices' questions. Justices then have a vote at a private conference, and the Chief Justice or Senior Justice who is in the majority decides who will write opinion of the Court. There are many theories and models how justices decide which cases they will grant review and how they decide cases. According to the legal model, justices are restrained by the Constitution, legal precedents and statutes, and should not make new laws. Proponents of attitudinal models propose that because justices are secured by their lifetime tenure, they can pursue their personal policy preferences without too much concern for the institutional constraints. Advocates of strategic models point to the fact that when deciding, justices take into consideration other justices and other government branches, and consider what they can achieve realistically in relation to their preferred policy outcome. I propose a fourth model that combines all the three models into an agenda-based model. The case selection (with all the factors that influence the Court members during this stage) creates an agenda in its own right, but the fact that nine individuals each contribute in their own way ensures that, generally, no individual legal philosophy prevails and that the Court's agenda changes incrementally.

Key words: U.S. Supreme Court, agenda, policy outcome, U.S. Constitution

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1 INTRODUCTION

May we live in interesting times! No proverb is more appropriate than this one in the midst of the 2016 American presidential campaign. The tycoon turned reality TV star Donald Trump is leading the national polls on the Republican side, while the Republican establishment is in panic. On the Democrat side, a self-proclaimed socialist Bernie Sanders is doing well alongside the establishment candidate – Hillary Rodham Clinton. In what has already been a vitriolic campaign, on February 13, 2016 breaking news emerged – Supreme Court Justice Antonin Scalia was found dead after passing in his sleep at age 79. Not a couple hours had passed since his death, and fiercely-dividing and partisan messages on the Republican and Democrat sides have replaced the early words of condolences and praise for this colorful and intellectual giant that had so marked the Supreme Court since he was appointed Supreme Court Justice in 1986. Justice Scalia was considered the linchpin of the Conservatives on the Court. This leaves the current Court equally divided – four mostly conservative justices, with Justice Anthony Kennedy being the swing vote especially in cases for gay rights, and four mostly liberal justices. Of course, justices are supposed to rule in an objective and unbiased way, but seeing the fierce fight over who should nominate the next Justice – President Barack Obama, who is leaving the office on January 20, 2017, or the succeeding president – one can sense what is at stake. It is no secret that Justice Scalia was a staunch opponent of issues such as affirmative action and the right to abortion, on the one hand, and believed individuals have a constitutional right to bear arms for personal protection, on the other. The person who will replace him will wield immense power as the Court stands locked at 4-4. This is also a great opportunity for President Obama to nominate his third Justice[1] to the Court and leave an imprint on the future, as his candidate will likely have to decide *inter alia* about the policies and programs that Obama started during his presidency, such as the plan to reduce carbon dioxide emissions and his immigration reform, with which he seeks to liberalize immigration policies. Without a doubt, approval will be difficult to achieve since the majority in the U.S. Senate, who approves or rejects the presidential nominees, belongs to the Republicans. The Republican majority leader, Senator Mitch McConnell said, "The American people should have a voice in the selection of their next Supreme Court justice. Therefore, this vacancy should not be filled until we have a new president" (quoted in *Battle Begins Over Naming Next Justice*). Republican presidential candidates also stood united in the view that it must be the next president who will nominate a replacement for Justice Scalia.

[1] The first two being Justice Sonia Sotomayor and Justice Elena Kagan.

The position of Supreme Court Justice is by no means purely political, but the partisan divide between the players that decide who will become the next member of the Court has widened so deeply that non-partisan decisions are becoming ever more difficult to achieve.

1.1 Introducing the subject

The United States' Supreme Court is the highest court in the United States. It is also a constitutional court and has with decisions such as *Marbury v. Madison* (1803) fought and won the right to be the highest arbiter in the country on issues regarding the American Constitution. Article III, Section I of the Constitution establishes the highest federal court, i.e. the U.S. Supreme Court. The judicial branch on the federal level consists of 94 district courts, 13 courts of appeals and the Supreme Court (Kaplan 80). The Supreme Court consists of nine Justices, even though the exact number is not formally prescribed in the Constitution; for example, in the past the Court consisted of six justices and President Franklin D. Roosevelt contemplated raising this number to 15 to be able to exert influence on the Court. There are eight Associate Justices and one Chief Justice that presides over the Court. According to the name of the current Chief Justice, we can refer to today's Court as the Roberts Court after the Chief Justice John Roberts. Chief Justice Roberts succeeded the previous Chief Justice William Rehnquist, who headed the Court for 19 years – from 1986 to 2005. Supreme Court Justices are appointed by the U.S. President, and after a hearing in the Senate, the candidates are approved or rejected by the Senate majority. Justices are appointed for life, which insulates them from external pressures and allows them to exercise independent judicial review. A party who wants their case to be heard in the highest court files **a writ of certiorari** or **cert. petition**. The Court receives more than 8000 cert. petitions every year, but only grants review to approximately 80 cases. The Justices have a discretionary right to choose which cases they will grant a more detailed review. In this way they have an enormous responsibility and power to decide which issues and policies they will give more attention to, and ultimately, what will become national law. Over the years, the caseload has increased dramatically and the Court has been trying out different techniques for how to cope with this gargantuan demand. For instance, each justice has several **clerks**, young graduates from prestigious law schools who, generally, have clerked for judges in lower courts before clerking at the Supreme Court. Law clerks participate in the so-called cert. pool where each clerk is randomly assigned a certain number of petitions and makes short summaries – memorandums – for all the justices. Justices then meet at conferences where they discuss the prepared memorandums and vote on whether they will grant or deny a review. Normally, the Rule of

Four applies, whereby four justices (a minority of a nine-member court) can vote to give a petition a chance for review. Justices first decide whether they have jurisdiction over a case and then also take into consideration other factors; for instance, they can deny review if other venues for appeal have not been tried yet, if parties look only for advisory opinions, or if a case involves a political question that they deem should be deferred to the executive or legislative branch. On the other hand, justices will often grant review when lower courts disagree over the interpretation of law.

However, justices are also people with ideological and political beliefs, and some claim that those beliefs govern the way they decide whether they will grant a petition, and ultimately, how they will decide the case in the end. There are various approaches to how justices are governed in these situations. According to *legal approaches*, justices are restrained by law and legal precedents or **stare decisis**, and no matter what their political preferences, they will decide only within this legal frame. *Attitudinal approaches* focus on the political and ideological beliefs of the Court's members. Proponents of these approaches believe that justices pursue policies that are ideologically close to them. According to these, the President carefully chooses the candidates that could advocate his (or her) ideological preferences for a long time, even after he (or she) is out of office. As the members of the Court are protected by life-tenure, they can practice their agenda-setting without much external influence. That being said, s*trategic approaches* contend that even though justices are driven by their policy preferences, they adapt to the realities of internal and external influences. For example, a justice may vote to reject a petition because the circumstances at the Court are more favorable to reversing a lower-court decision – a decision that is more detrimental than the status quo. Naturally, all approaches draw criticism from various sides due to simplifying or not considering all the facts. There are other factors that can have an impact in the selection of cases. Some say (cf. Lazarus for more) that clerks, who are an important part of the cert. pool, have a weighty responsibility when they prepare memos for justices and that they can also overlook some important cases, especially at the beginning of their clerkships, which generally coincides with judicial holidays when, normally, justices are away. In addition, Lazarus (1999) claims that clerks can engage in agenda-setting of their own. Some justices (for example, Justice Samuel Alito in this Court, or previously also Justice John Paul Stevens, who is now retired) opt out of cert. pool and go through the petitions in their own respective chambers. Another important player at this stage is **the Solicitor General**. The Office of the Solicitor General, which consists of the Solicitor General and their assistants, represents the

federal government of the United States before the Supreme Court. It is sometimes referred to as the "tenth Justice" because it is the most frequent advocate before the Court and has a vast knowledge of the litigation of the Court. The Solicitor General can recommend that the Court deny or grant review at this agenda-setting stage, and justices often follow these recommendations (Black and Owens). This makes the Solicitor General an influential actor in deciding on what to decide on.

In this thesis, I explore the agenda-setting of the Supreme Court, that is, what motivates the Justices in deciding which policies they will give more attention to and ultimately how they will decide the cases. I am interested in the ideological and political preferences of the Supreme Court Justices and in their influence on the process of deciding the cases. I question if decision-making is done strategically and if the purpose is always an ideological one. I also explore how decisions affect policy outcomes and look for evidence of it in practice.

In this thesis, I will closely examine the case of *Citizens United v. Federal Election Committee* (2010), which dealt with the issue of campaign finance. Initially, the case only focused on a documentary film about the presidential candidate Hillary Clinton, but during the oral argument the Justices raised some questions and expanded litigation to deal with the issue of freedom of speech. The case was transferred to the next term when much more was at stake than what the parties had set out to do originally.

1.2 Relevance of the subject

In every country, the judicial branch has the important role of ensuring justice to everyone and in this way helping to maintain the democratic processes. Different societies through history have called on various groups of, generally, (wise) men who have discussed what is acceptable and what is not acceptable for their society, thereby creating different sets of rules for the members of those communities. If those rules were arbitrary and unfair, the members of such societies would be confused as to how to obey, or would even be unwilling to play by these rules. Generally speaking, in democracies with long traditions the judicial branch has played the arbiter in explaining the rules of the state and in intervening in various disputes. Justice personified is often portrayed as a blindfolded lady, who holds scales in one hand and a sword in the other. The blindfold ensures that justice does not differentiate and is equal for everyone. The sword represents the punishment if it turns out that the law was not respected.

The United States Supreme Court Justices are entrusted with a tremendous responsibility – the decisions that they make become the national law. They are guidelines for showing lower courts how to decide, and guidelines for people to know what behavior and acts are tolerated in the society and what is considered off-limits. It is important for citizens and researchers to get to know the processes that guide the governing of their country. The Constitution is the text that sets the basic standards, and the members of the Supreme Court take care that these rules are respected. This is by no means an easy task. Chief Justice Charles Evans Hughes once said: "We live under a Constitution, but the Constitution is what judges say it is" (quoted in Pacelle 2011, 2). The members of the Supreme Court, who are not elected by the people but are nominated by the President and approved by the Senate, have complete discretion over which cases they will hear. In this way, they have an opportunity to set their own political agenda, putting certain issues into the national political agenda.

Pacelle et al. (2011) describe three models that seek to explain what influences justices to choose cases and how they decide those cases. One intriguing and disconcerting model relies on justices' ideological leaning. Some researchers (e.g. Segal and Spaeth) believe that justices are more policy-oriented than guided by legal principles. It is probably too simplistic to fully explain the reasons for justices' decisions only through their ideological or attitudinal beliefs (Pacelle et al.), which is why one must examine other models that contribute to the explanation of decision-making. An institution that oversees that the Constitution is followed by the other two governmental branches, naturally, first looks through the legal prism. Legal models illustrate the importance of stare decisis or legal precedent. Some justices, like Justices Sandra Day O'Connor and David Souter in *Planned Parenthood v. Casey* (1992), believe that precedents provide consistency and legitimacy to the Court[2], and give a signal to the world outside the Court that the reading of the Constitution does not change every time the composition of the Court changes. Strategic models take into consideration other factors. The Supreme Court is part of the judicial branch which in turn is part of the three governmental branches that check and balance each other. Because it is a part of a larger system, it cannot in practice completely disregard the opinions of the other two branches, also because it relies heavily on them, for instance, to implement its decisions. Even though it is possible for Congress to overturn the decisions of the Court, this is a long and difficult process that requires a lot of will and motivation to unify a large number of members of the

[2] Some justices, on the other hand, are not too respectful of precedent. Justice Antonin Scalia once remarked of Justice Clarence Thomas: "He does not believe in stare decisis, period" (Liptak, *Thomas Is Getting a New Chance to Break Precedent (if Not Silence)*).

House of Representatives and the Senate. But Congress has the ability to reduce or water down the scope of the Court's decisions and in this way to undermine its authority (O'Brien). For example, after *Roe v. Wade* (1973), when the Court decided that women had the right to have an abortion, Congress passed some laws to limit the scope of this decision (e.g. by cutting funds for abortions in prisons). The U.S. President has the most direct influence on the Supreme Court composition by nominating the candidates. In practice, justices are generally ideologically close to the president who nominated them, but there are many exceptions. President Eisenhower, who nominated Chief Justice Earl Warren, later remarked that this appointment was "the biggest damn-fooled mistake" that he had ever made (in O'Brien 2014, 68). Unhappy with the policy of abortion, President Ronald Reagan promised to appoint only judges who opposed abortion (ibid.). Indeed, he managed to appoint more than half of all the lower-court judges in the U.S.[3], in the hope of preparing grounds and encouraging litigation to eventually overturn *Roe v. Wade*.

Pacelle et al. (2011) claim that the post-Brown[4] Supreme Court has become more open to issues of civil rights and individual liberties, for example, by granting more indigents' petitions, but according to Chemerinsky (2010), since 1968, the conservatives on and off the bench have been practicing judicial activism in favor of corporations rather than individuals.

This study will be an endeavor in researching the many different aspects that Supreme Court justices take into account when they decide which cases they will accept. By having the discretionary power to choose cases and not having to explain their choices, they set their own political agenda and have the ability to draw attention to certain policies and in this way create a need for a broader discussion. Other political players are thus led in the direction that was set by the Court's agenda; civil initiatives get organized, constituents turn to their representatives for more information, the President is asked to comment or has to react to the decisions. This agenda-setting can have a substantial effect on policy outcomes and affects the daily lives of the American people. Do justices behave strategically during the process and are they influenced by internal and/or external actors? Is decision-making driven by justices' ideologies and, indirectly, by the President that nominated them? Theoretically, the Court members should be objective and insulated from external influences, but they are also humans with their own set of beliefs.

[3] President Ronald Reagan appointed 376 judges (including 3 Supreme Court Justices). President Bill Clinton was not too far behind – he appointed 373 judges (including 2 Supreme Court Justices) (Wikipedia).
[4] *Brown v. Board of Education of Topeka* (1954) dealt with segregation in schools.

The case *Citizens United v. Federal Election Committee* (2010), which I will examine more closely, addressed the issue of political speech and directly affected political campaign financing. Effectively, the case enabled corporations to spend as much as they want to support the candidate of their choice and in this way bring large amounts of money into the world of politics. Some justices made this a case of free speech even for corporations, but I am interested in whether the decision was made according to the partisan divide and how the case was handled from the beginning until the final decision. I am also curious about how the decision affected the policies related to political campaign financing.

1.3 Research questions

In this thesis, I will examine the deciding process of the Supreme Court. The assumption is that although the Supreme Court justices are legal experts, chosen to solve a variety of legal problems impartially and objectively, they also have their own political preferences. Theoretically, those preferences should not impair their ability to decide neutrally and according to the U.S. Constitution and legal traditions of the U.S. Supreme Court. In the case *Texas v. Johnson* (1989), a man who was charged with violating the law of Texas for burning an American flag and put into prison, appealed all the way to the Supreme Court. Justice Antonin Scalia famously commented the case: "If it were up to me, I would put in jail every sandal-wearing, scruffy-bearded weirdo who burns the American flag. But I'm not the king." Even though this act was morally against Justice Scalia's principles, he believed the First Amendment to the Constitution gives people the right to express their views. Justice Clarence Thomas, after he had passed by the narrowest of margins the hearing at the Senate (52-48) and was finally appointed Supreme Court Justice, appeared on the cover of a popular American magazine alongside his wife and a Bible in clear view. On the bench, his decision-making is strongly influenced by his ideological beliefs.

Reading the Constitution is not an easy endeavor. Some justices and scholars believe that the reading of the text should focus on what the Framers intended when they were writing it. Justice Scalia, who was an originalist, believed that the Supreme Court should give the Constitution the meaning it had when it was framed. One should not succumb to temptations and 'find' all sorts of new values in the text as one goes along. On the other hand, some justices are more in favor of pragmatic approach when reading the Constitution. Justice Stephen Breyer, for example, believes in a Living Constitution and in the fact that the

Supreme Court decisions have consequences in the real world, which should be taken into account when deciding.

I am interested in how different legal approaches and values impact justices' reasoning. Individuals' ideologies and values are often connected to certain policy outcomes. For example, some believe the government should not interfere in issues related to the welfare state, issues related to consumers' and employees' rights, and environmental issues, for example, but should regulate issues connected to morality and restrict or abolish the right to have an abortion or the right of homosexuals to get married and have children. They also advocate for more government spending on police and military. Others, on the other hand, believe in more government regulation in issues related to social equality and environment, but oppose its interference in moral issues, such as the right to have an abortion. Conservatives generally belong to the first group, while liberals tend to adhere to the second ideology. An individual's ideology often has an influence on their political beliefs and preferred policy outcomes. A conservative will more likely approve of the capital punishment and oppose affirmative action, while a liberal will generally approve of affirmative action, but oppose the capital punishment.

I am curious to see how personal preferences of the Court members affect the policies that have a direct influence on the daily life of American citizens and on other government branches. My research questions are guided by three different theoretical approaches, namely legal, attitudinal, and strategic approaches.

Are justices driven by legal considerations when deciding cases?

Is the purpose of their decision-making always ideological and therefore focused on a preferred policy outcome?

Are they strategic actors who take into consideration not only preferences and constraints of other political actors, but also preferences of their fellow justices?

Finally, do they attempt to alter outcomes by acting as strategic agenda-setters?

I assume that justices act strategically when they determine how they will decide the cases since they have the opportunity to choose which cases they will grant a writ of certiorari.

I expect that personal political and ideological preferences play an important role in decision-making on the Supreme Court since in recent years the confirmation hearings of the

candidates selected by the President have generally been very partisan. Justices probably share the same ideology with the president who nominated them, so they will more likely decide in accordance with the party lines of that president.

On the other hand, justices are legal experts and try not to be affected either by their own moral values or by the values of the president who selected them.

The hypothesis is that the decision-making on the Court creates an agenda that is influenced by the legal considerations, preferred policy outcomes that reflect justices' ideological attitudes, and their conscious decisions to assess whether their preferred policy outcomes have a realistic chance of prevailing at the merits stage, which points to strategic behavior.

It is important to examine the principles of decision-making within the highest court in the country because its decisions have an important impact on U.S. society. What it decides becomes the national law; whether that be the right to have an abortion, the right to bear arms, or whether the capital punishment represents a cruel and unusual punishment (and is therefore unconstitutional according to the Eighth Amendment), etc. By learning more about the driving force and modus operandi of the justices, one can determine if the institution provides stability on neutral principles or if the process is tainted by capriciousness of the nine non-elected individuals. The judiciary needs to be independent so that it can serve the people and the greater good.

This is an especially exciting time in the wake of the 2016 Presidential elections as the new President will likely have a chance to nominate the next Justice (or more) and thus leave a personal stamp on the new composition of the Supreme Court and possibly change the reading of the U.S. Constitution.

I chose to examine *Citizens United* because it is a well-known case that deals with very important issues that affect the American people and the other government branches. It deals with the issues of money in politics and freedom of speech. In my case study I will test whether these issues have an ideological value and if justices decided according to their ideological and political preferences or according to the legal frameworks of the Constitution and stare decisis. I will also look for strategic behavior on the bench and analyze whether the purpose of such behavior, if it exists, served to achieve a certain policy outcome preferential

to any ideology. In brief, with this case study I will analyze the validity of legal, attitudinal, and strategic models of the decision-making process.

1.4 Methodology

In this thesis, I will use several methods and approaches to try and describe the deciding process on the Supreme Court from a variety of angles. First, I will look into the process of how cases are selected to be heard by the Court. I will analyze the relevant primary and secondary sources. The Court members are very discreet in revealing the reasons, for example, why they decide to grant or deny review in certain cases, but those who research this topic can turn to a few sources to find out more. After they retire, justices can choose to give their personal papers (Justice Harry Blackmun's papers are a common and plentiful source, for instance) to various institutions and give insight into this more personal and less visible process. Quite revealing and unprecedented was the book *Closed Chambers* by Edward Lazarus, a former clerk for the late Justice Blackmun.

The U.S. Constitution, the Court's decision in *Citizens United v. Federal Election Commission*, oral argument in the case, and interviews with different justices will be used as the primary source. Especially informative was the book *Deciding to Decide* by H. W. Perry, Jr. (1991), a study for which he conducted (anonymized) interviews with five Justices of the Supreme Court, many former clerks, judges from the D.C. Circuit Court of Appeals, and members of the Office of the Solicitor General. Examples of secondary sources include books on the Supreme Court, articles from political science journals and articles from magazines for broader audiences (The New Yorker, for instance). In helping to better understand the legal terminology, I will make use of a tertiary source, namely Black's Law Dictionary. Transcriptions of oral arguments and commentaries from scholars on the blog of the Supreme Court – the SCOTUSblog – are a very useful and bountiful resource to anyone who researches the issues of the highest court in the U.S. Another indispensable resource is the website supported by the Chicago-Kent College of Law (Illinois Institute of Technology), which provides abundance of information on the Supreme Court and makes it accessible to everyone. For a comprehensive overview of the federal judicial system, one should make use of the Federal Judicial Center's website.

To present the issues, verify my hypothesis, and answer all my research questions, I will use theoretical and empirical approaches. With the former I will describe the decision-making process on the Supreme Court and different approaches to explaining how justices decide

their cases. In the empirical part, I will use a case study to see in a specific case how the decision was made. Even though, obviously, one case is insufficient to make generalizations, it provides a practical implication of theoretical background and enables an in-depth insight into the process of decision-making on the Supreme Court. I will examine the decision in *Citizens United v. Federal Election Commission* (2010) and describe its effects on the U.S. politics. It is a very relevant decision as the issue of large sums of money in politics takes center stage as we follow the debates and discussions of the 2016 Presidential elections in the U.S.

The hypothesis and research questions will be verified mainly with the use of qualitative methods. With the help of the descriptive method I will first shed light on the facts and processes at the Court, and then I will analyze and synthesize the information in a case study to see if my hypothesis that the Supreme Court Justices are political actors with their own agendas is true or false.

1.5 Brief introduction on structure

Chapter 2 provides a brief overview of the United States government structure and outlines the characteristics of the American dual judicial system with its state and federal judicial systems. In Chapter 3 the institution of the Supreme Court is described. The chapter denotes characteristics of justices on the Court, explains how they are chosen for the position, and how the judicial branch interacts with the legislative and executive branches. In that chapter we also take a look at how the Court deals with the growing caseload and manages to stay abreast. Chapter 4 analyzes the deciding process; from the point when a case comes to the Court, to the process of deciding which cases will be granted review, to the merits stage, oral argument, opinion-writing, and, ultimately, to the final decision of the Court. In Chapter 5, we look closely at the case *Citizens United v. Federal Election Commission* (2010) and describe how the justices came to their decision, which addressed the issues of free speech and campaign finances. Chapter 6 offers a discussion of the process of decision-making and how justices shape national policies that affect everybody in the United States.

2 THE UNITED STATES' LEGAL SYSTEM

The United States of America (hereinafter United States or U.S.) is a democratic federal constitutional republic. It is composed of fifty states, a federal capital district (Washington D.C.), and some territories (for example, Puerto Rico, Guam, Northern Mariana Islands, the U.S. Virgin Islands, American Samoa). This capital district falls under the exclusive jurisdiction of the Congress and is therefore not a part of any U.S. state (Walters and Travis 2010).

The United States was founded in the year 1776, when the (then) thirteen colonies near the Atlantic coast signed the United States Declaration of Independence. In that document, they formally and unilaterally announced that they had become free of British rule and became independent and sovereign states (McFerran 2005). Since 1776, the United States have grown from a country with under three million inhabitants to a country of 50 states and more than three hundred million citizens, "spreading from ocean to ocean and beyond" (Farnsworth 2010, 4). Along with territorial and demographic expansion came steady growth in the country's global influence. Politically, economically, and culturally the United States became a role model, a trendsetter, and an example. The global power and influence of the U.S. culminated in the twentieth century (sometimes nicknamed "the century of the U.S."), especially after its victory in the Second World War and the economic growth that ensued. The U.S. became a permanent member of the United Nations Security Council and took responsibility for the political management of the world, thereby definitively giving up its politics of "splendid isolation" (Valladao 1998, 32).

2.1 Form of state and political system of the United States

As already mentioned above, the United States is a federal constitutional republic. We will briefly highlight some elements that characterize the U.S. political system in order to better understand the role of the various governmental branches and how they interact with each other.

2.1.1 Federal state

A federal state or federation is a political entity in which power is "shared between a national government and its constituent states" (Elliot and Ali 2007, 27). In most federations, the status of the constituent states is laid down in a constitutional text and cannot be changed unilaterally by states or federal political bodies (Kaczorowska 2012).

A distinction can be made between different types of federalism and federations. A first major distinction is simply related to the number of federated authorities in a given federal state. If there are just two of them, we call it "bipolar federalism" (for example, Belgium). If there are more than two, we speak of "multipolar federalism" (for example, the United States, Germany, Switzerland, Canada, Mexico, etc.) (Blanke et al. 2015). Secondly, we can make distinctions according to the way the federal state was created. Some federal states started out as unitary states, but gradually more and more competences or powers were attributed to the states or regions. This process is often called "federalization by disassociation" or "federalization by disaggregation", a phenomenon we see, for example, in Belgium (Brans et al. 2013). On the other hand, there are cases in which pre-existing independent states or entities come together to form a new federation. This "federalization by association" or "federalization by aggregation" is what happened in the United States (Brans et al. 2013). A third distinction relates to the degree of involvement and cooperation between the federal and the federated entities. The United States has long known a system of so-called "dual federalism", in which "the states and the national government exercised authority over distinct and mutually exclusive realms" (Gardner and Rossi 2011, 106). The states have authority over certain policies, while the federal government over others. The Supreme Court decides which one is superior to the other (Gardner and Rossi 2011). In the twentieth century, however, after the two World Wars and the Great Depression, U.S. federalism changed. The nation-state became stronger and the federal government expanded its authority over certain issues with programs, such as the New Deal by President Roosevelt. An "enlarged view of federal powers" and a so-called "cooperative federalism" came to rise. The states and the federal level started working together to solve problems and their respective authorities "no longer corresponded strictly to particular areas of regulatory activity" (Gardner & Rossi 2011, 106). Lastly, it is worth noting that in the 1970s a counter-movement against this latter form of federalism started in the U.S., sometimes called "new federalism". According to critics, the powers of the federal government had increased too much. Under President Ronald Reagan the deference of authority from the federal government to states continued.

2.1.2 Separation of powers

The United States' political system is characterized by a separation of powers. This means that authority exercised by both federal and state governments is divided among three coequal branches – the legislative, executive, and judicial branches. At the federal level, an article or section of the U.S. Constitution describes each of the three branches. In this thesis, I will

focus on the judicial branch, and in particular on one component of the federal judicial branch, namely the U.S. Supreme Court. As it is impossible to discuss the judiciary branch, without referring to the other branches of government, it is useful to make an overview of all three branches of government and the "links" that exist between them.

a) The legislative branch

Legislative power is held by various state legislatures (at the state level) and the U.S. Congress (at the federal level). In the simplest terms, the function of the legislative branch consists of making law. In practice, however, its functions are more diverse. At the federal level, for example, the functions of the U.S. Congress are listed in Article I, Section 8 of the Constitution and include the power to levy and collect taxes, to coin money, and to declare war.

b) The executive branch

Executive power is vested in the President for the national government (according to Article II of the federal Constitution), and in the governors of states. The executive branch basically executes and enforces laws made by the legislative branch (Mays 2012).

c) The judicial branch

The judicial branch consists of the various courts, both at the federal and the state levels. Its function consists of interpreting laws, applying them, and deciding if they are constitutional. In Federalist No. 78, Alexander Hamilton described the judicial branch of government as the "least dangerous" because the courts lack the sword (they cannot enforce the laws) and the purse (they cannot appropriate funding). However, since the Supreme Court asserted its power of judicial review in the case *Marbury v. Madison*, described later in the paper, it has been able to determine the constitutionality of the actions of the other government branches and state courts (Mays 2012).

2.1.3 Checks and balances

Thus, the three (coequal) branches of government each exercise their own unique powers, but they do not act in isolation. Indeed, the separation of powers does not entail the creation of a barrier, which would block any contact or interaction between the branches (Barak 2009). On the contrary, the three branches must cooperate in order to achieve their goals. The authors of the U.S. Constitution saw the separation of powers, combined with a system of checks and

balances, as crucial to securing liberty and avoiding the abuse of power. Thus, the different powers are interdependent, rather than independent (Mays 2012).

We will briefly mention two examples of checks and balances that touch upon the judicial branch.

The first example is the U.S. President's power to nominate and appoint federal judges (pursuant to Article II, Section 2, Clause 2 of the United States Constitution, known as the Appointments Clause). This is a way in which the executive branch can influence the judicial branch. Technically, the chief executive nominates all judicial candidates (and appoints them with the advice and consent of the U.S. Senate), but in practice the president influences the judicial direction more by appointing justices to the Supreme Court than judges to the lower courts. There are two reasons for this, namely, the Supreme Court appointments are generally regarded as more politically significant than appointments on the lower courts, and the president's capacity to appoint district judges is limited by the practice of senatorial courtesy, whereby "senators of the president's political party who object to a candidate whom the president wishes to appoint to a district judgeship in their home state, have a virtual veto over the nomination" (Carp et al. 2014, 132).

The second example is the power of judicial review, i.e. the power of the Court to decide on the constitutionality of laws passed in Congress. This constitutes a way for the judiciary to check the actions of the legislative branch. In the landmark case of *Marbury v. Madison*, the Court asserted its constitutional authority to declare congressional acts unconstitutional, thereby establishing "that federal legislation was subject to judicial review in the federal courts" (Farnsworth 2010, 8). A few years later, it also affirmed its right of judicial review with regard to the actions of state legislatures (ibid.). Lower federal and state courts, too, can exercise the power to review the constitutionality of legislation (Carp et al. 2014).

2.1.4 Presidential system

The United States has a president that functions as head of state and head of the federal government. According to Article II of the U.S. Constitution, the executive power is vested in this position. That same article also describes the President's office, qualifications, and duties.

In a presidential system, like the one in the U.S., the executive and legislative branches are elected individually. Neither "selects the other, is directly accountable to the other or controls the other's agenda. [...] This means that neither branch can force the other to resign and face

new elections" (Kesselman et al. 2013, 112). It is, however, to be noted that many republics, like the U.S., have a procedure of impeachment, whereby the president can be forced by the legislature to resign for misconduct.

The situation is different in a parliamentary system, where the executive and legislative branches are dependent. They are "fused", meaning that the government is accountable to the parliament and must resign if it does not survive a parliamentary vote of confidence, but also that "the government has substantial control over the parliamentary agenda" (Kesselman et al. 2013, 112) and that it can dissolve parliament, thereby triggering new elections.

Finally, there are also presidential systems that differ from both presidential and parliamentary systems. A good example of this category is France (the fifth republic), that has a so-called semi-presidential system. It is a dual system, meaning that executive power is shared between an elected president and a prime minister who can (at least in theory) be voted out of office by the legislature. As a consequence, semi-presidential systems have – in the same manner as "pure" presidential systems and unlike parliamentary systems, "the potential for divided government" (Harvey 2008). But unlike those truly presidential systems, they also have a potential for an ideological split *within* the (dual) executive. Such cohabitation happens when one part of the executive (the president) is from a different political party than the parliamentary majority, hence the government (ibid.).

2.2 United States' legal system

The United States' legal system consists of federal and state judicial systems. Together they enforce the law in the U.S.

2.2.1 Common-law system

The United States' law is often labeled as *common law*. As this term can have different meanings, it is important to first explain its different possible uses. The first use refers to law that comes from the judicial branch and not the legislative branch (Farnsworth 2010). In this sense it largely corresponds to the notion *case law*, but is still broader. It is a "compilation of traditions, principles and legal practices that have been handed down from one generation of lawyers and judges to the next" (Carp et al. 2014, 8). It is not systematically codified, is sometimes unwritten, and is rather flexible, i.e. it can evolve in the event of changing needs and values (ibid.). In this meaning, *common law* is to be contrasted with *statutory law*, being the enactments of legislatures. Those enactments are in written form and serve the broader

society. The second use of the notion common law refers to "the body of rules applied by the common-law courts as distinguished from the special courts of equity or of admiralty" (Farnsworth 2010, xx). The third use refers to the United States "as a 'common-law' country, whose law is based on English law, as opposed to a 'civil-law' country, whose law is derived from the Roman law tradition" (ibid.). Globally, the predominant type of legal system is the civil-law type. It is interesting to note that also the U.S. State of Louisiana uses the civil law or Napoleonic Code legal system (Mays 2012). There are a lot of differences *between* the two types of systems, but also *among* the countries that belong to the same type. A few basic differences between common-law systems and civil-law systems are that common law attributes a much bigger role to precedents and operate in an adversarial mode, whereas civil-law systems normally operate in an "inquisitorial mode". Common-law systems focus more on the rights of the accused, whereas civil-law systems focus on the "rights of the victimized community" (Mays 2012, 35).

2.2.2 Sources of U.S. law

As in most developed legal systems, there is also a wide variety of sources of law in the United States. Some of them are binding (the so-called primary sources; see subsections a) to e) below) and some only offer a commentary or analysis and are, at most, persuasive (the so-called secondary sources; see subsection f) below). There is a hierarchy to the various sources, which entails that a certain source or enactment can be declared invalid if it conflicts with a higher one.

a) Constitutions

In the U.S., the federal Constitution is the primary source of law, to which all other legislative sources are subject (Farnsworth 2010). Article VI, Clause 2, of the federal Constitution formulates this concept of supremacy in the following terms: *"This Constitution [...] shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding."*

Each of the 50 states, however, also has its own constitution. The law of a given state has to be "consistent with the state constitution *and* the [federal] Constitution of the United States" (Mays 2012, 43).

b) Statutes

These are the acts of legislative bodies at federal and state level. Although (unwritten) case law has traditionally been the core of a common-law system, the importance and quantity of written legislation (statutes, but also administrative rules, regulations, etc.) have increased dramatically in the last hundred years (Farnsworth 2010). Statutes passed by Congress are subject only to the Constitution. Treaties made by the United States have the same authority as federal statutes and are also subject only to the Constitution (ibid.).

c) Orders and rulings of political executives

Essentially, legislatures make the law and executives enforce and apply it (Carp et al. 2014). However, the executive can also engage in lawmaking, namely when presidents, governors, mayors or others "fill in the details of legislation by legislative bodies, and sometimes when they promulgate orders purely in their executive capacity" (Carp et al. 2014, 6).

d) Decisions of quasi-legislative and quasi-judicial bodies

Under some circumstances boards, agencies, commissions, departments, etc. can also make rules or to deliver decisions that are semi-legislative or semi-judicial in character (Carp et al. 2014). Such rules can be a source of law in the United States, because they impose a certain way of behavior and can impose penalties for noncompliance of these rules (ibid.).

e) Judicial decisions

Unlike in continental Europe, the judge is not just the "bouche de la loi" (the mouth of the law), as Montesquieu phrased it, but also a lawmaker. A judicial decision establishes a precedent and creates rules of law, so that similar cases can be decided in a similar way, establishing a doctrine often called *stare decisis*. Four common justifications for this doctrine are equality (similar cases are treated in the same way), predictability (one knows what to expect in a future dispute), economy (using precedents saves energy and time of judges and justices), and respect (adhering to precedents shows respect to the institution of the Court (Farnsworth 2010).

Although an important factor, the doctrine of precedent has never enjoyed the same absolute authority in the U.S. as in England, *inter alia* because of the great volume of decisions and the rapidity of change (Farnsworth 2010).

f) Secondary authorities

Lastly, also secondary authorities like treatises, law reviews and legal encyclopedias can be mentioned as a source of law. Although they can have influence and be persuasive, they do not have the binding authority of the abovementioned primary sources of law (Farnsworth 2010).

2.2.3 Judicial system

The United States has a dual court system, meaning that there are not only federal courts, but also state courts, albeit unique structures different in each state (and courts for Washington D.C.) (Mays 2012) Some legal issues can be resolved in the state courts and some in the federal courts, while some issues can be handled by both systems.

Furthermore, a distinction can be made as to the subject-matter of the dispute. Some of the courts handle a broad range of cases and issues, while others are specialized (ibid.).

In the framework of this introduction, we will merely outline the main features of the U.S. judicial system, without going into detail.

2.2.3.1 State courts

The majority of litigation in the United States comes before state courts (Farnsworth 2010). Each state has its own judicial structure and there is a lot of variety between those different structures, to the extent that no two states are exactly the same when it comes to the organization. In some states the three-tier system resembles the federal court system and in some states they have completely different systems. Some states have a more simplified court system (e.g. California), whereas others have a very complex system with overlapping jurisdiction (e.g. New York) (Carp et al. 2014).

In general, all the state court-systems are hierarchically arranged with lower-level **trial courts** (one or two levels) and higher-level **appellate courts** (one or two levels). The levels or categories of courts we normally encounter are: trial courts of limited jurisdiction, trial courts of general jurisdiction, intermediate appellate courts, and courts of last resort.

a) Trial courts of limited jurisdiction

These courts can have different names – justice of the peace courts, magistrate courts, municipal courts, city courts, county courts, etc. Their jurisdiction is limited to petty matters.

Often they can only handle certain kinds of cases (e.g. traffic violations) and in civil cases they are normally limited to disputes under a certain amount (Carp et al. 2014).

b) Trial courts of general jurisdiction

These courts also go by different names, such as superior courts, circuit courts, district courts, and courts of common pleas (in the state of New York, the trial courts of general jurisdiction have the confusing name – supreme courts). They are generally divided into judicial districts or circuits (Carp et al. 2014). Trial courts of general jurisdiction are, like their name suggests, usually "competent to hear all cases (civil and criminal) that are not restricted to special courts of divisions" (Farnsworth 2010, 44). In most states they also have an appellate function.

c) Intermediate appellate courts

These courts, mostly called courts of appeals, were founded to ease the workload of the state's highest court. They hear appeals and are often the last resort for litigants in the state court system; most of the cases that are appealed from trial courts do not make it past the intermediate appellate courts. In most states, there is one single court of appeals with state-wide jurisdiction. Some states have more courts of appeals, that are each responsible for a certain geographical area or a specific subject matter (Carp et al. 2014).

d) Courts of last resort

All states have one court of last resort, and the states of Oklahoma and Texas have two such courts (one for civil cases and one for criminal cases). The titles of those courts vary, but mostly they are called supreme court or a variation of that title (Carp et al. 2014). These courts are different in size of the bench, ranging from five to nine judges. To make things a bit more complex, judges from these courts are sometimes called justices, as in the U.S. Supreme Court. They have jurisdiction in matters regarding state law and are the final arbiters in those matters. In states with intermediate appellate courts, most cases that come to courts of last resort come from those intermediate courts. These highest courts have, like the U.S. Supreme Court, discretion in case selection. In states where there are no intermediate appellate courts, cases generally come on a mandatory review basis (ibid.).

2.2.3.2 Federal courts

The authors of the U.S. Constitution required the establishment of a Supreme Court and allowed the establishment of lower federal courts.

Article III, Section 1 of the U.S. Constitution states that "[t]he judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

In accordance with this rule, a federal court system with three principal tiers was created, namely, the district courts, the courts of appeal and the Supreme Court. Apart from those courts, there are still some special courts of limited jurisdiction (like the U.S. Court of Federal Claims, and the U.S. Tax Court) (Farnsworth 2010).

a) District courts

The U.S. district courts are the federal trial courts of general jurisdiction for civil and criminal matters. Many of the federal cases never pass beyond this stage (Mays 2012). The district courts are the (only) federal courts in which the factual record is established. Appeal cases focus on correcting errors, but will not reconstruct the facts (Carp et al. 2014).

In total, there are 94 federal district courts, spread over 50 states, Washington D.C., and some territories. Some states, such as Utah or Nebraska, contain just one judicial district, while others, such as Texas or California, contain up to four (Farnsworth 2010).

b) Courts of appeals

The U.S. Courts of Appeals handle the majority of the cases that are appealed in the federal system. These can be cases originally coming from state courts but appealed to the federal district courts, or cases that originated in lower federal courts – the federal district courts (Mays 2012). The courts of appeal are often called circuit courts, a name derived from the practice of circuit riding – when district court judges and justices of the Supreme Court used to serve on the benches of the courts of appeal (ibid.). The practice stopped due to the growing caseload and to spare justices such time- and energy-consuming duties.

The courts of appeal each have jurisdiction over one federal judicial circuit. There are thirteen Courts of Appeals circuits – twelve that geographically cover the whole country; the District of Columbia is covered by the D.C. Circuit, and Guam, for instance, is in the Ninth Circuit. The Thirteenth Circuit is the Federal Circuit that reviews cases from specialized federal courts (for more see Farnsworth 2010, and Kaplan 2015). Most of the cases that are brought before the U.S. Courts of appeal never reach the highest court in the country.

c) Supreme Court

The U.S. Supreme Court forms the top of the pyramidal federal court system. As this thesis revolves around the U.S. Supreme Court, its working processes and agenda setting are further examined in the following chapters.

2.2.4 Selection of judges

In the United States, unlike in many other countries, there is no career judiciary and no formal route for young law graduates who want to become judges – there is no apprenticeship or service that must be entered (Farnsworth 2010). The American legal profession believes that a career judiciary has some advantages, but the experience and independence that lawyers or other practitioners bring to the bench are often very much appreciated. While the inexistence of career judiciary as such is not subject to much criticism, there is criticism about the ways in which judges are selected (ibid.). We will briefly outline the three main ways in which U.S. judges are selected.

a) Election

Election is a very common selection method at the state level (Carp et al. 2014). Traditionally, judicial elections were rather uncompetitive and involved only modest spending. But in recent years, the amount of money spent on those elections has risen considerably. Also the source of these campaign funds has changed. The data indicate that the "majority of monies raised and spent at the state supreme courts level [...] come from political interests and not the candidates themselves", which raises concerns about those judges' independence (Carp et al. 2014, 107).

Generally speaking, there are two types of elections – partisan elections and non-partisan elections. The method of partisan elections entails that candidates run for election or re-election "on a ballot where their political party identification is clearly indicated" (Mays 2012, 91). In those elections, political organizations and other entities have a strong influence on selection of the candidates. The (noble) aim of these elections is that voters can choose who will serve them as a judge and can vote underperforming judges out of office in a next election. In practice, however, most voters are badly informed about the candidates, so they tend to choose according to political party lines. They are influenced by factors such as the name of the candidate, or they do not go to vote at all (Mays 2012). In non-partisan elections, candidates run in popular elections, but without clear political party endorsement. This

method was created "to take some of the raw partisanship out of judicial elections" and let candidates "run on their ideas and qualifications" (Carp et al. 2014, 108). In practice, however, it seems that candidates in non-partisan elections also consider political parties and other entities (e.g. political action committees – PACs, and independent-expenditure only committees – super PACs) as important sources of campaign funds.

b) Appointment

In general, three types of appointment can be distinguished.

Firstly, the states' executive branch usually has some competence to appoint judges, usually on an interim basis. As with the organizations of the court system, there is a lot of variety in this respect from state to state. In some states the governor makes full-term appointments together with the state legislature, while in other states the governor does this "together with a judicial nominating commission" (Mays 2012). Furthermore, almost in all states the state governor fills vacant offices when judges die, resign, or retire (ibid.). Interim appointments are a way for governors to appoint political friends and political allies, thus packing the bench with politically useful candidates.

Secondly, all of the Article III federal judges (federal district court judges, judges in the courts of appeals, and the Supreme Court justices) are chosen for office by executive appointment, more specifically by the president (Carp et al. 2014). In practice, the President often relies on the closest members of the administration, members of Congress, and governors (particularly from his own party) to suggest names of suitable candidates (Mays 2012). Once the nominees are chosen, their files are forwarded to the U.S. Senate, where hearings are held to consider the nominations (in fulfillment of Article II, Section 2, of the U.S. Constitution, where it is stated that the president appoints judges "with the advice and consent of the Senate"). Federal judges serve life terms "during good Behaviour" (U.S. Constitution, Article III, Section 1).

Thirdly, there are two states, Virginia and South Carolina, with a system of legislative appointment, meaning that their legislators have the power to appoint judges (Carp et al. 2014).

c) Merit selection

In order to take politics out of the selection process, reformers invented the so-called system of merit selection (also called the Missouri Plan, after the first state to adopt this method). This system is a combination of elections and appointments (Carp et al. 2014). When a

vacancy occurs, a nominating commission, usually composed of judges, attorneys and citizens, is convened (Mays 2012). This commission drafts a list of suitable candidates and then sends it to the governor. If the governor appoints a candidate (they can also reject the list completely), this person serves in office until the next election, where they run against any other candidates for the position (ibid.). Sometimes judicial decisions (for instance, deciding that same-sex marriages are not unconstitutional, or being pro-choice or pro-life) can make a judge lose the retention vote – this clearly demonstrates that even the merit selection procedure is not free of political and partisan interference.

3 THE UNITED STATES' SUPREME COURT – AN OVERVIEW

"The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish" (The U.S. Constitution, Article III, Section 1).

Even though the U.S. Supreme Court was established by the U.S. Constitution as the highest court in the country, the beginnings of the Court were humble. Alexander Hamilton described the judicial branch as the least dangerous of the branches. In the beginning, he was correct. When the Court met for the first time on 1 February 1790 in New York City, not all the members arrived. The members of the Court lived in their circuits and had to go on long and uncomfortable journeys to attend the Court's sessions. The Court had the first session in New York City and later in 1790, when the U.S. capital moved to Philadelphia, the Court's sessions also moved there. It was in 1800 that the capital moved once again, this time to Washington D.C., and the Court also settled there. In the beginning, the Court held sessions twice a year, in February and August, and sessions lasted between two and three weeks. In those days, the Court did not have its own building, instead justices met in the basement of the Capitol. After the British burned down the Capitol, the Court rented the Bell Tavern and held its sessions there between 1814 and 1816. In 1860, the Court moved to a room previously occupied by the Senate.

This dependency and being forced to move back and forth marked the attitude of elected branches towards the judicial branch in that time. The personnel changed frequently as even the justices felt more responsible towards their own circuits, where they resided most of the year, than to the federal court. The growth of the population and territorial expansion contributed to the steadily growing workload and the Court's sessions moved back earlier and earlier, until in 1917, the beginning of the Court's term settled on the first Monday in October, which has remained until today. The term runs all through the month of June and after that justices retire for the summer holiday. An individual term is called an October Term, for example, this term, which ends at the end of June 2016, is called October Term 2015.

The Court struggled for recognition of the judiciary as a co-equal government branch and in the beginning of the 19th century found an opportunity to establish its institutional authority: the case was *Marbury v. Madison* (1803).

Establishment of judicial review – Marbury v. Madison (1803)

The Anti-Federalists, led by the new President Thomas Jefferson, won the 1800 elections. The Federalists, who favored strong federal government and strong federal courts, were afraid that the other faction, who was suspicious of a national government and was in favor of strong states and state courts, would undermine the position of the country on the federal level. In order to retain some Federalist control, outgoing President John Adams, on his very last day in office, appointed several judges and government officials, but due to time restraints some commissions were left undelivered. John Marshall, who was just appointed Chief Justice and used to work as Secretary of State, did not manage to deliver all the commissions and left them to his successor as Secretary of State James Madison. The new President Jefferson naturally opposed to this late court packing and ordered Madison not to deliver those commissions. One of those whose commission was not delivered was William Marbury, who decided to contest this decision and asked the Court to file a writ of mandamus[5], an order that the government recognize his appointment. The Court realized that there was a lot at stake with this decision. If the Marshall Court (named after the Chief Justice John Marshall) had ordered the appointment of Marbury, President Jefferson would have most likely ignored the decision and thus undermined the Court's authority. On the other hand, if the Court had refused to issue the writ of mandamus, it would have appeared weak and confirmed Jefferson's view of the judicial branch as inferior to the elected branches. John Marshall's reasoning took everyone by surprise. The opinion commenced by claiming that the appointment was valid as soon as it was signed by the president as, according to the Constitution, the appointment is "the sole act of the president". It then proceeded that the Court could not protect Marbury from this violation because it did not have original jurisdiction over his case. The Judiciary Act of 1789 authorized the Supreme Court to issue a writ of mandamus in cases of government officials. But according to the Constitution, stated the opinion, Congress did not have the right to authorize the Court to issue writs of mandamus. Furthermore, any law that was at odds with the Constitution should have been declared void. The opinion stated: "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict each other, the courts must decide on the operation of each." (*Marbury v. Madison*, in O'Brien, 54) Also, "[t]he judicial

[5] A writ of mandamus is an order from a court to an inferior government official ordering the government official to properly fulfill their official duties or correct an abuse of discretion (definition from Legal Information Institute, Cornell University Law School).

power of the United States is extended to all cases arising under the constitution." (ibid.) By asserting its constitutional authority, the Marshall Court managed to entrench the power of the judicial branch to have the authority of judicial review, that is to have the power to check whether the actions by legislative and executive branches are in line with the Constitution. With this self-imposed authority the Court managed to break away with the notion of being part of the weakest branch, but established itself as co-equal with the other two government branches.

3.1 Organization of the Supreme Court

In the 19th century the justices stayed in boarding houses while they were in session. Chief Justice Marshall was a big advocate for collegiality and justices on his court would often dine together and discuss the cases on the docket. The Supreme Court had only one clerk, who organized accommodation for the justices and was in charge of administrative matters (collecting fees, managing the docket, answering correspondence, etc.). There was also a reporter of decisions, who published final decisions of the Court at his own expense or profit (O'Brien 2014).

With the increase of workload and longer terms, justices moved from their circuits to live in Washington D.C. and worked most of the time from home, as they had no offices at the Court. Until the early twentieth century, the Court did not have its own building, but Chief Justice William Howard Taft lobbied in Congress to finally find some financial means to construct an independent building for the Supreme Court. He believed the Court had to physically distance itself from Congress and symbolically show that the judiciary is an independent branch of the government. Unfortunately for Taft, he did not live to see the new Supreme Court building. The building was completed in 1935 in Corinthian style with large pillars and materials mostly from the United States. It has a large and opulent library that is closed to the general public, but the public can visit parts of the Court and listen to the oral arguments. Above the library, there is also a basketball court, jokingly referred to as the highest court of the land (O'Brien 2014). Some justices disapproved of such opulence and preferred working from home. It was only during the Vinson Court (1946–53) that all justices regularly worked in the building (ibid.). Today the Court employs a large staff, which is in stark contrast to the early days, when the Court employed only one clerk, who was responsible for all the justices and administrative work.

Staff at the Supreme Court

In 1975, the Court responded to the growing caseload by establishing the Legal Office. Staff counsel advises the justices and other officers at the Court on the procedures and jurisdiction. The Office handles the cases that come to the Court on original jurisdiction, often complex cases that can take several years to be resolved. They also advise justices on personal matters related to taxes and ethics.

The Court has a large administrative staff, but only four statutory officers (O'Brien 2014, 147–153):

a) Clerk of the Court: The Clerk of the Court is responsible for maintaining the docket and records of the Court. The Clerk's Office collects the filing and admission fees, maintains the Court's argument calendar, is responsible for the correspondence and provides assistance to attorneys and litigants through written communications. The Office posts useful information on the Court's website and prepares a list of cases granted or denied review and formal arguments. The office has a staff of approximately 30 people. The salary and duties of the Clerk of the Court are prescribed by the justices.

b) Reporter of Decisions: The Reporter of Decisions is responsible for editing and publishing the Court's opinions. The Office of the Reporter of the Decisions also writes headnotes and makes editorial suggestions. It has a staff of ten employees.

c) The Marshal: In the 19th century, the Marshal of the Court was responsible mainly for maintaining order in the courtroom. With the approval of the Chief Justice, the Marshal also sets regulation of the dress code in the courtroom; for example, women are allowed to wear hats in the courtroom, whereas men are not. The Marshal is also responsible for more than 400 employees of the Court (a nurse, a hairdresser, a barber, carpenters, police, cafeteria workers, etc.)

d) The Librarian: The Court's library is not open for public, but is reserved for the use of justices, law clerks, Congress, and members of the Supreme Court bar. It has approximately 25 employees, who are responsible, among other things, for answering questions related to library resources and circulating the books.

Various Chief Justices have approached the administrative demands on the Court differently. For example, Chief Justice Fred M. Vinson (1946–53) increased the number of his law clerks and appointed some other Court officers to deal with administrative matters. Chief Justice

Warren E. Burger (1969–86) brought photocopying machines and computers to the Court, even though to this day some justices still prefer writing by hand. Burger also changed the sitting arrangement of justices – instead of sitting in one straight line, since 1972, the justices sit in a half-hexagonal bench to see and hear each other and the attorneys better. With Chief Justice Roberts (2005–) the Court started publishing transcripts on its website on the same day as oral arguments. Over the course of time, life on the Court has become increasingly more bureaucratic due to the increasing number of petitions that come to the Court every year. Long gone are the days when justices sat together to dine and discuss cases after hearing oral arguments. Today justices oftentimes do not even see each other except on conference days. They contend that this also has to do with the character of individual justices, but indeed the heavy workload does not allow too much interaction on a daily basis.

What kind of matters does the Supreme Court decide? The Court members have often reiterated that the Court is not a tribunal for correcting the mistakes of the lower courts. They are interested in cases that are relevant to broader audiences and that shape public policies through interpreting the Constitution and various statutes.

O'Brien (2014, 168) lists three major sources of the Court's jurisdiction:

1. Article III of the Constitution
2. Congressional legislation, providing appellate jurisdiction
3. The Court's own interpretation of the two previously mentioned sources

It also deals with cases that involve ambassadors, public ministers, and consuls, cases that involve disputes where the United States is a party, disputes between two or more states, between a state and a citizen of another state, and between a state or its citizen(s) and foreign countries (The Constitution, Article III, Section 2).

When deciding to grant review of a case, the Court examines if it has jurisdiction over a case, but also considers the following criteria (O'Brien, 172–187):

a) If a case **lacks adverseness**, that is to say if the parties involved do not have opposite interests, the Court will probably deny review. The Court does not give advisory opinions.
b) **Standing to sue**: The individual has to "show injury to a legally protected interest or right and demonstrate that other opportunities for defending that claim before an administrative tribunal or a lower court have been exhausted" (ibid., 174).

c) **Ripeness or mootness**: Sometimes justices can reject a case if it has not percolated enough in the lower courts, or if the injury has not yet occurred. On the other hand, the issue can become moot if real adverseness or controversy no longer exists.

d) **Political questions**: The Court generally defers a case that raises political questions to the elected branches.

e) **Stare decisis**: Stare decisis means to uphold precedents. It enables the continuity and stability of the law. Stare decisis will be described in more detail later in this thesis, but it is noteworthy that justices approach overruling precedents in very different ways. For some, precedents represent the stability and continuity of the system, which ensures that system is not completely unpredictable and the subject of the justices' whims. Some justices also say that overruling too many precedents could undermine the image of the Supreme Court, giving the public the message that the reading of the Constitution changes every time the composition on the bench changes. If this were true, the Supreme Court could be seen as a purely political institution, which unashamedly pursues its own interests without any reference to legal boundaries. If stare decisis is overturned, however, this is a signal to litigants to bring more cases related to overturned issues and to try to build a doctrine in a new direction (Pacelle, 120).

3.2 Supreme Court Justices

There are nine Supreme Court Justices: eight Associate Justices and one Chief Justice. What characteristics should candidates who apply for the position of Supreme Court justice have? If the Court wants to be perceived as an independent institution whose legitimacy relies on unbiased decision-making that stems from the legal traditions, the candidates should have an appropriate legal background, extensive professional knowledge, and personal integrity that reaches beyond the partisan divide. Henry Adams, a legal scholar, points to the following criteria that relate to judicial merit: justices should "[demonstrate] judicial temperament; [have] professional expertise and competence; absolute personal and professional integrity; an able, agile, lucid mind; appropriate professional background or training; and the ability to communicate clearly, both orally and in writing" (in O'Brien 2014, 33). Reality and experience show that the nomination and appointment of the justices should also be viewed in a political context.

3.2.1 Nomination process

Members of the Supreme Court are not elected democratically by the people and receive a life-long tenure. Pursuant to the Constitution, the president and generally his team of White House advisors nominate a candidate, who is then approved or rejected at a Senate hearing. To be appointed the candidate must receive more than 50 of the 90 votes. Once appointed, justices serve for life, but in cases of inappropriate behavior, they can also be impeached by Congress. So far the only justice that was impeached was Samuel Chase (1796–1811); however, he was not forced to step down. Under the threat of impeachment, Justice Abe Fortas resigned in 1969, when it came out that he was given $20,000 for advising a foundation. Appointing justices is one of the more important legacies a U.S. president has, as justices have a great influence on public policies long after the president who nominated them is out of office. Naturally, the president and justices do not know what issues will reach the Court during their tenure, but there is a tendency that more liberal presidents select more liberal justices, and more conservative presidents select more conservative justices.

When looking for candidates, most presidents seek advice from their attorneys general and White House advisors, but they also get recommendations from members of Congress, bar associations, and interest groups. The president often seeks approval also from the American Bar Association (ABA), which then sends its evaluation reports to the Senate Judiciary Committee. President George H. W. Bush stopped with this practice, but President Barack Obama returned to it (O'Brien). Upon receiving the name of the nominee from the president, the Senate sends it to the senators of the candidate's state, and if they approve of the candidate, a hearing before a subcommittee of the Judiciary Committee can begin. Finally, the Senate votes to approve or reject the nominee. Presidents employ various strategies in nominating candidates. In the past, geographical representation played an important part. For example, the third seat on the bench was reserved for New Englanders and the sixth seat for Southerners. Nowadays geographical representation is not such an important factor anymore, but the bench still reflects the socio-economic changes the American society has gone through in the last decades. President Lyndon Johnson in 1976 symbolically nominated the first African American on the bench – Thurgood Marshall. Marshall had also been the first African American to become U.S. Solicitor General, but was even more known as the lawyer in *Brown v. Board of Education* (1954), a case where the Supreme Court decided that segregation in public schools was unconstitutional. When Justice Marshall retired in 1991, President George H. W. Bush replaced him with another African American – Clarence

Thomas. Ideologically, the two Justices could not be more different. Justice Marshall was a very liberal justice, who wanted to help minorities better integrate into American society and was a strong opponent of capital punishment. Justice Thomas, on the other hand, is one of the most conservative justices on the bench, who abhors any form of affirmative action and is against government involvement in the welfare state.

a) Gender

Different presidents, such as Truman, Johnson, and Nixon, for example, thought of nominating a woman, but it was only President Ronald Reagan, who already in his presidential campaign promised to appoint a woman, in 1981 nominated Sandra Day O'Connor, a judge on the Arizona Supreme Court of Appeals, to replace Justice Potter Stewart. Today there are three women on the Court – Justice Ruth Bader Ginsburg (nominated by President Bill Clinton in 1993), Justice Sonia Sotomayor (nominated by President Barack Obama in 2009), and Justice Elena Kagan (nominated by President Obama in 2010). All in all, these four women are the only female justices to have ever served on the bench.

b) Ideology

When presidents nominate their candidates, they also have to act strategically, especially when the majority in the Senate is of a different party than the president. Sometimes presidents underestimate the power of opposition and interest groups. Probably the most famous example of this is President's Reagan appointment of Appeals Court Judge Robert Bork to replace retired Justice Lewis F. Powell. The opposition found Bork ideologically too extreme and managed to mobilize different interest groups that executed a concerted effort to prevent his nomination. As the result of a fierce campaign, Bork publicly denounced his previous rather controversial writings and views as acts of thought experiment during the Senate hearing. He gave direct answers and views on specific cases, which is in stark contrast to the candidates who came before and especially after him, who try to avoid revealing any specific view on the law or judicial philosophy. At the final vote, his nomination was rejected by 58 to 42 votes. President Reagan still pushed for a more ideological candidate and next chose a protégé of Bork's, Judge Douglas Ginsburg. After it became known that Ginsburg had smoked marijuana as a student and assistant professor at Harvard, his nomination was withdrawn. The president's third nominee, a moderate conservative judge from the Ninth Circuit (Anthony Kennedy), was confirmed unanimously in 1988. Altogether 30 candidates

were rejected, postponed, or withdrawn from the process due to the opposition in the Senate (cf. O'Brien 2014, 41).

Hearings at the Senate have increasingly become an exercise in avoiding answering directly to Senators' questions. But this is a two-way process – many say that the question of abortion has become a litmus test for many Republican Senators. President Reagan promised to appoint only judges who oppose abortion and abstain from judicial activism. Judicial activism is, obviously, in the eye of the beholder, as such strong opposition to abortion could also be viewed as activist. On the other hand, Justice Sotomayor and Justice Kagan both avoided answering directly when faced with the question of abortion in their confirmation hearings, while Clarence Thomas claimed that he did not remember engaging in any discussions on *Roe v. Wade* (Toobin, *The Burden of Clarence Thomas*). On the bench, Justice Thomas is a staunch anti-abortionist, while Justices Sotomayor and Kagan are more liberal on the issue.

c) Religion

When it comes to religion, 92 out of 112 justices were of Protestant faiths (Episcopalian, Congregationalist, Quakers, Baptists), 12 were Catholic, and eight Jewish. On today's Court three Justices are Jewish (Ginsburg, Kagan, and Stephen Breyer) and five Catholic (Sotomayor, Samuel Alito, Thomas, Kennedy, and John Roberts). The late Justice Scalia was also Catholic. Naturally, religion should not have any influence on how justices decide, but experience shows that conservative justices more often let their religious beliefs influence their decision-making; they are more often pro-life and less strict on separation of religion from state than liberal justices. Former Justice Blackmun's law clerk Edward Lazarus describes in his book *Closed Chambers* how during Christmas the Court traditionally decorated a Christmas tree in the Great Hall and organized a party for the staff, where they sang Christmas carols. Justice Thurgood Marshall "made it a practice to absent himself from the party and annually RSVPed with a sarcastic note that he 'still believe[d] in the separation of church and state'" (1999, 332). Justice Thomas, after being confirmed in the Senate, appeared in a popular American magazine and was photographed for the cover of that magazine with his wife and with the Bible in clear view.

d) Education and experience

Justices have different backgrounds, even though in recent decades there has been a tendency that candidates come from lower state courts. In total, 85 out of 112 justices had fewer than ten years of experience in lower federal or state courts, some not even that, for example, Chief

Justices John Marshall and Earl Warren, and Justices Louis Brandeis, Charles Evans Hughes, and Felix Frankfurter (O'Brien 2014, 34).

3.2.2 How presidents choose candidates

To summarize, when looking to appoint Supreme Court justices, presidents take into consideration candidates' professional expertise and some factors that symbolically represent different groups of the American society, such as gender, race, geography, and religion. They can also use the nomination to reward individuals for being faithful to their party or ideology, and as a personal favor. This kind of behavior is, of course, limited by the Senate, but presidents differ in how they approach this task.

O'Brien (2014, 54–55) summarizes three ways in which presidents operate when nominating candidates:

a) "Classic Democratic Model", whereby presidents reward their friends and are somehow less concerned with the candidates' legal expertise. Presidents Roosevelt, Truman, Kennedy, and Johnson were less concerned with pursuing their agenda through influencing who sits on the bench.
b) "Bipartisan Approach" was used by presidents Eisenhower, Ford, Clinton, and Obama. Their main concern was the candidate's professional expertise. This, however, should be put in the context of their presidencies. Namely, when a president faces a Senate with a majority of the opposite party, a more ideologically extreme candidate would not survive the checks and balance from the legislative branch, which happened to Reagan's candidate Robert Bork.
c) "Republican Ideological Judicial Selection", whereby putting candidates on the bench would translate into forwarding the president's political agenda on the Court. Presidents Nixon, Reagan, George H. W. Bush, and George W. Bush operated in this way. It was already mentioned that President Reagan vowed to appoint only anti-abortionists in the hope of overruling *Roe v. Wade*. Bush Jr. nominated candidates who were in favor of deferring more authority to the executive branch and expanding presidential powers.

3.2.3 Packing the Court

With the exception of the first American President George Washington, President Franklin Delano Roosevelt had the chance to nominate the most justices – during his presidency, he

nominated eight. When he started his presidency, Roosevelt faced staunch opposition from the bench for his New Deal economic programs. Frustrated, he was seriously considering enlarging the bench and "packing the Court" with candidates that would support his policies. The number of SC Justices is not prescribed in the Constitution and had varied in the past from five to ten (for more see section Important legislation connected to the jurisdiction of the Supreme Court below). The Court was often locked 5-4 against the New Deal policies, but it was Justice Robert H. Jackson who switched his vote in the late 1936. Even though Justice Jackson supposedly had changed his mind before Roosevelt proposed his reorganization of the bench, the move became famous as "the switch in time that saved nine", meaning that if the President had not received the approval of the majority, he would have likely attempted to enlarge the bench with candidates who would have supported his policies. In his last six years, President Roosevelt had an opportunity to fill eight positions and in this way remodel the composition to his own liking and to pack the Court anyway.

In 2016, President Obama faces a different challenge. The late Justice Scalia, who died on February 13, 2016, was the pillar of the conservative faction on the Court that is often divided on 5-4 votes in constitutional matters. If he succeeds in nominating a more liberal justice, this would shift the balance to the liberal side after decades of conservative Court. As stakes are high, the Senate entrenched its position that a lame-duck president with just under a year in office should not nominate a candidate. The Republicans are engaging in the political gamble, in the hope that they will win the 2016 presidential election and be able to secure an ideological kin to promote their policies and political agenda.

3.3 Dealing with increasing caseload

Since the first session of the Supreme Court on February 1, 1790, the docket has increased dramatically. The main contributing factors were the growth of the population, territorial expansion and systemic changes of federal regulation. Civil War, Reconstruction period, World Wars I and II, Vietnam War, etc. were sources of conflict that resulted in increased caseload. Furthermore, the industrialization and business boom that ensued brought about various issues to be resolved on a national level. In addition, the decision from the 1960s to give indigents access to the Court had a dramatic effect on the docket as jailhouse lawyers flooded the Court with their petitions. The docket in fact has reflected the socio-economic and political changes that the U.S. society has been going through since the founding of the country.

O'Brien (2014) lists three ways that were used to cope with the growing docket:

a) Bureaucratic response:

The Court answered with different managerial and technological measures to improve the quality and speed of their decision-making. In the beginning, justices only met twice per year. Gradually, the sessions grew longer and longer, until they fixed the term that begins in the beginning of October and runs through the following June. The time for oral arguments, on the other hand, shortened, so that today each side has 30 minutes to outlay the points and answer justices' questions. In some cases, justices make an exception and allow litigants more time. The Court also started using modern means of technology (photocopying machines, computers, etc.) and hired more professional staff. Some measures, such as hiring more law clerks, do not necessarily translate into more decisions and less work for the justices because they also need to organize their chambers and supervise the work of the clerks.

b) Internal procedures and processes:

The Court through time has changed some requirements for accepting cases and raised administrative fees. They also introduced penalties for filing frivolous cases, cases that deal with petty or even absurd claims and waste the Court's time.

c) Jurisdictional response:

Congress has also stepped in at the request of the judiciary and enacted some laws that enlarged the Court's discretionary review. They also responded by creating an independent tier of lower appellate courts. The Court now essentially decides cases that bear national importance and those that come under its original jurisdiction, described in the Article III of the Constitution.

3.3.1 Important legislation connected to the judiciary

Geographic expansion and the fast-growing backlog of cases prompted Congress to enact some legislation to cope with the changes. What follows is a short list (compiled from a very comprehensive list of the Federal Judicial Center[6]) of the most important legislation that was passed to help the judicial branch and the Supreme Court better manage the various changes.

[6] The Federal Judicial Center is a very comprehensive source for the federal judiciary and landmark judicial legislation.

1. Judiciary Act of 1789

With this act Congress established federal judicial courts in the U.S. and provided some basic guidelines for the federal judiciary. The proponents of a strong federal government and federal courts had different views than the proponents of strong states and state courts, and this conflict of views infused the debates on how much authority each should have and to some extent is still dividing political factions to this day. The Constitution provided only the most basic outlines for the judicial branch and Congress sought to define judicial boundaries in more detail. With this act, the judiciary was divided into three parts: a) the Supreme Court, which was comprised of one Chief Justice and five Associate Justices, b) U.S. circuit courts (the middle tier of federal judiciary), which served as main trial courts and exercised limited appellate jurisdiction, and c) district courts in each state, Kentucky and Maine (which were not separate states at the time), which were responsible for minor civil and criminal cases, and had a federal judge, who presided over it (Federal Judicial Center, The Judiciary Act of 1789: *"An Act to establish the Judicial Courts of the United States."*). Two Supreme Court justices and a local district judge presided over those circuit courts, which meant that justices had to ride circuits, which was a very time-consuming and undoubtedly uncomfortable practice, considering the infrastructure of the day.

2. Judicial Act of 1801

This act expanded federal jurisdiction and reduced the number of justices from six to five. It also reduced justices' duties in the circuit courts, as these duties posed a considerable burden with regard to time and caseload.

3. Seventh Circuit Act 1807

Due to geographical expansion, Congress established the Seventh Circuit, which included Kentucky, Tennessee, and Ohio, and increased the number of justices to seven. The seventh justice also presided over that circuit.

4. Eighth and Ninth Circuits Act 1837

This act established two new circuits and added two new justices to the bench, that now consisted of nine justices. The Seventh Circuit was reorganized and included Illinois, Indiana, Michigan and Ohio. The Eighth Circuit included Kentucky, Tennessee, and Missouri. The Ninth Circuit included Alabama, Arkansas, Louisiana and Mississippi.

5. California Circuit Act 1855 and Tenth Circuit Act 1863

With the joining of California to the United States, a separate circuit was established, but at first without a Supreme Court justice to preside in the circuit courts due to the long distances that justices would have to travel. Eventually, in 1863, the Tenth Circuit was established, which included the states of California and Oregon. The tenth justice was added to the Court.

6. Judicial Circuits Act 1866

With this act, a period of constant change with regards to circuits ended by Congress revising the boundaries of circuits that are in broad terms in place even today. The number of circuits was set to nine and the number of justices decreased from ten to seven.

7. Circuit Judges Act 1869

For the first time the judges were entitled to receive a pension when they retired if they were at least 70 years old and had served at least ten years. This act set the number of justices to nine, which has not changed until this day. Due to the increasing workload, Congress established circuit judges, and Supreme Court justices were required to attend the hearings at their circuit courts only once every two years.

8. Jurisdiction and Removal Act 1875

Circuit courts were granted the right to hear all cases arising under the U.S. Constitution or laws of the U.S. provided that the dispute was worth more than $500. The debate on the need and benefits of a joint judicial system in interstate commerce was growing.

9. Evarts Act 1891

Due to the burdens of an ever-growing caseload, a separate tier of appeals courts was established. In addition, Congress authorized the Supreme Court some limited authority to determine which cases it would hear. Suggestions on how to deal with the growing docket came from the House of Representatives, the Senate, and justices themselves. These included, for example, enlarging the bench and shifting of cases to state courts. In the end, a combination of suggestions from the House of Representatives and Senator William M. Evarts came down to the following: a) circuit courts were left to work as trial courts along with district courts, b) in each of the nine circuits, courts of appeal were established, c)

justices were no longer obliged to perform any circuit duties, and d) justices could grant a writ of certiorari to hear certain cases.

10. Judicial Code of 1911

U.S. circuit courts were abolished and their jurisdiction was deferred to district courts.

11. Conference of Senior Circuit Judges 1922

An annual conference consisting of the Chief Justice and senior circuit judges was established to give advice on administrative matters of federal courts.

12. Judges' Bill 1925

The Senate Judiciary Committee formally asked justices to help draft legislation that would ease the increasing backlog of the Court. Much of mandatory jurisdiction of the Court was eliminated, the right of appeal was diminished considerably, and a large portion of the appeals were to be handled through petitions of certiorari.

13. Tenth Circuit Act 1929

The Eighth circuit was reorganized to establish the Tenth Circuit, which would better handle the caseload. Wyoming, Colorado, Utah, New Mexico, Kansas, and Oklahoma became part of the Tenth circuit, while Minnesota, Iowa, North Dakota, South Dakota, Nebraska, Missouri, and Arkansas stayed in the Eighth circuit.

14. Administrative Office Act 1939

An independent agency was established to manage budgetary and personnel issues of the federal judiciary. Prior to the establishment of this office, these issues were handled by the executive branch, so this represented a symbolic act to underscore the independency of the judiciary.

15. Federal Judicial Center Act 1967

Federal Judicial Center, an agency that conducts research and educational programs for federal courts, was established.

16. Eleventh Circuit Act 1980

There was a reorganization of the Fifth circuit due to the growing caseload, especially on the issues concerning civil rights. To ease the burden of the busiest federal court that consisted of Texas, Louisiana, Mississippi, Alabama, Georgia and Florida, the Fifth circuit was split. As a result, the Fifth circuit is now composed of Texas, Louisiana, and Mississippi, and the Eleventh circuit is composed of Alabama, Georgia, and Florida.

17. Federal Circuit Act 1982

Another circuit (the Federal circuit) was established, which was not defined in geographical terms, but by its special jurisdiction. The U.S. Court of Appeals for the Federal Circuit was created by joining the U.S. Court of Customs and Patent Appeals with the U.S. Court of Claims.

18. Act to Improve the Administration of Justice 1988

The Supreme Court justices thought that they had spent too much time on mandatory jurisdiction, so Congress replied with an act that eliminated most of the Court's mandatory jurisdiction. Appeals from federal district courts were permitted in some cases, but were repealed from state court decisions. Litigants seeking a review of lower court decisions could send a petition for certiorari, but the Supreme Court members used their discretion to decide whether they would hear the case or not.

3.4 Important actors in the decision-making process on the Supreme Court

3.4.1 Solicitor General

Let us now consider an important player in the Supreme Court decision-making. The Solicitor General (hereafter SG) in short represents the United States before the Supreme Court. The Office of the Solicitor General (hereafter OSG) has a very high success rate getting their cases at least to the conference level and when appearing before the Court, in fact, it is the most successful of the litigants that present their cases before the Court. Some say that the SG has a considerable influence on justices, but can we truly make a direct correlation between the high success rate and an outright influence on the justices' decision-making? Let us first explain who the SG is and what the factors are that contribute to the office's efficient representation.

With the Judiciary Act of 1789 Congress created the Office of the Attorney General, whose functions were to represent the U.S. when it appeared as a party before the Court and give legal advice to the executive branch. But with the docket steadily growing, the Office could not cope with the workload and had to hire external lawyers to help them provide the duties of the Office. Because this proved to be quite expensive and because the staff was overwhelmed, Congress decided to respond with the Federal Judiciary Act of 1870. They created the Department of Justice and the Office of the Solicitor General. With this reorganization they attempted to coordinate the legal strategy and decrease the cost of the external help.

The U.S. President appoints the Solicitor General and the OSG is part of the executive branch. Black and Owens (2012) indicate the following reasons why researchers of the Supreme Court should also consider the role of the SG and their influence. Firstly, the decision about which issues the SG will act on has an effect on the outcome of a range of national policies. Secondly, the president communicates with the Court through the OSG as the president cannot influence justices while they are on the bench. If the influence of the SG is unconditional, then presidents could achieve policy outcomes of their choice by bypassing Congress whenever they failed to reach an agreement with them. Finally, officials who work for the OSG are very skillful professionals – some may have already clerked for the justices and some go on to become justices themselves. Justice Elena Kagan was the first woman to hold the position of Solicitor General (between 2009 and 2010), and Chief Justice Roberts and Justice Samuel Alito both worked for the OSG.

The main responsibilities of the OSG are coordinating the U.S. appellate strategy and legal representation of the U.S. before the Court (Black and Owens 2012). If the government loses in lower courts, the SG must give permission for the case to be brought to the Supreme Court. The SG decides which cases will go to appeal, so if, for instance, a federal agency loses a case in lower courts, the SG decides if the policy is worth appealing or not. Furthermore, if two federal agencies are in conflict, the SG determines whose interests will prevail. To summarize, it has control over which cases and policies will reach the Supreme Court. The SG can also file an amicus curiae brief, which is a brief filed by individuals or groups who are not direct parties in a case, but have an interest in the outcome of the case. The SG sometimes files such briefs voluntarily or the Supreme Court invites him to file such briefs, i.e. it calls for the views of the Solicitor General (CVSG). In their research, Black and Owens found that in the period 1984–1993, 19 cases were filed voluntarily by the SG, whereas 174 were filed by CVSG. Why does the Court invite the SG to file an amicus brief? The OSG consists of

top-notch lawyers, who come from the best schools, have often clerked at the Court, and often have political experience, such as working for the president's administration. But they also have access to all three government branches and resources of different federal agencies. They have experience in litigation before the Court and, generally, write coherent and clear briefs. In the process of selecting which cases to pursue, the Office already internally screens different cases. Perry (1991), who conducted anonymized interviews with several law clerks and justices, the majority of whom served during the 1976–1980 October terms, gives numerous examples of clerks and justices giving credit to the OSG. One of Justice John Paul Stevens' clerks stated that if the SG was petitioning, they always wrote a memo. Justices also praised the SG by saying "We assume that he screens out a lot of junk cases," "There is also a tradition of very fine work. He knows what the business of the Supreme Court should be," and "They are very careful in their screening and they exercise veto over what can be brought to the board" (all Perry 1999, 132).

Because of the first-hand knowledge of many officials in the OSG and their vast experience in litigation before the Court, they have an advantage over other litigants. Black and Owens cite that during the Rehnquist Court, the SG won in 62% of cases where the U.S. was a party in the dispute, and 66% where the U.S. filed an amicus brief.

Many scholars (Black and Owens, Pacelle, Caldeira and Wright, Epstein, Segal, Spaeth, etc.) have attempted to explain why the SG, sometimes also called the "Tenth Justice", is so successful and how this office influences the decision-making of the justices. Black and Owens in their research of the influence of the SG on decision-making at the stage of setting the agenda briefly list some theories that could explain the phenomenon of the SG.

They believe that justices use the agenda-setting stage in order to advance their policy goals. They found that "justices are more likely to vote to hear cases when the policy they expect the Court to make is better than the status quo" (Black and Owens 2009, 6). There are some scholars (most notably Segal and Spaeth) who believe that justices decide in a way to advance policies based on their ideological preferences. This will be examined in more detail later in the paper.

The SG plays an important part in this stage, so it is vital to try and understand the circumstances in which the office works and, potentially, its influence on the members of the Court.

According to one theory, this success is attributed to the separation of powers (Black and Owens 2009). The Court relies on the executive and legislative branches to help implement its decisions in practice. If the other two branches decide not to cooperate and even defy the Court, the decisions can be watered down or even ignored, which is why some believe that the Court sometimes acts strategically (strategic models of decision-making). If the president communicates through the SG, the Court can pick up signals with regards which policies are preferential to the executive. A theory close to this one assumes that for some policies the Court defers decision-making to democratically-elected branches. Another theory focuses on the experience that the OSG attorneys have on the Court's legal practices. They know how to communicate their cases and even know which words and phrases to use in their briefs to achieve the desired effect, i.e. that their case be heard before the Court. Yet another theory focuses on the strategic behavior of the OSG and claims that the SG deliberately chooses the cases that he is more likely to win. Black and Owens (2012) contend that all those theories help in understanding the role of the SG, but they do not prove directly that the justices are persuaded to take a different position only because of the SG advocacy. Instead, Black and Owens explore the interplay of policy and legal considerations in this relationship. For their research they examined three different scenarios to analyze the SG's influence on justices with regard to their agreement on policy and legal considerations.

a) Legal support but policy disagreement: they observed that justices, no matter how ideologically close or far to the SG, are less likely to follow the office's recommendation if there is a disagreement on the policy outcome. This suggests that justices do not attribute much consideration to who suggests a certain measure, but to what they suggest itself.
b) Policy agreement but no legal support: no matter how close or far ideologically, if the SG's recommendation is not supported by legal considerations, justices are more likely to ignore the advice of the SG.
c) No legal support and no policy agreement: in this scenario, justices are the least likely to follow the SG's recommendation, but the research found that even in this setting, they still frequently follow the SG's recommendation. Not only justices who are ideologically close to the SG, but also justices on the other side of the ideological spectrum and who disagree with the recommendation still follow the SG's recommendation in a substantial number of cases.

When a lower court strikes down a law or if lower courts disagree on how to interpret the Constitution, it is the Supreme Court's duty to clear uncertainty and give directions to the lower courts on how to decide certain issues. In such cases the Court often invites the OSG to write a brief that helps clarify the decision. Indeed, due to the experience and expertise of the lawyers in the OSG, their briefs are generally well-crafted and readable, and often (but not always) contain a clear view, i.e. whether the Court should grant or deny review, and how the case should be decided and why such a decision should be made.

Justices are aware of the balancing role of the SG and the possibility of misusing the function. Wohlfarths (in Black and Owens 2012) discovered that the more ideological the SG is, the less the justices follow the SG's recommendations. Black and Owens further discovered (2012, 128) that the SG is most influential when the Court invites it to file an amicus brief. It has less influence when the SG files the brief voluntarily, and even less when the SG participates in a case as a direct party. In addition, an attorney who works for the OSG has more influence on justices than the same attorney who does not work for the OSG anymore. Such is the trust of the Court members in the institution of the OSG that this player deserves the full attention of all scholars researching the Supreme Court of the United States.

3.4.2 Law clerks

Law clerks, sometimes also called "junior justices", have become indispensable for the work of the Supreme Court. Their role has changed a lot since the early day of the Supreme Court when they also served cocktails at the parties at the Court. In 1919, Congress decided that justices could each have one law clerk, and by 1941 the number increased to two clerks per justice (O'Brien 2014). The third law clerk emerged in the October Term 1970 – Justice Brennan recounted (in Hentoff 1990) that Justice Harlan's sight was getting worse, so his colleagues urged him to take on one more clerk. He eventually conceded on the condition that the others would also get the third clerk. After Justice William Douglas suffered a stroke at the beginning of 1975, the other justices decided to take on his clerks, so that those three clerks could continue with their clerkships. The justices then decided that they should all have four clerks. Today, Associate Justices have four clerks, while the Chief Justice has five.

Typically, law clerks are in their mid-twenties and have mostly graduated from the best law schools (for example, Harvard, Yale, Columbia). Prior to clerking at the Court, they have clerked for lower courts. Some justices have a preference for taking their clerks from certain circuit judges, some ask law professors to suggest good candidates, and some rely on former

clerks' suggestions. Frequently, the clerks are white males; O'Brien documents some telling statistical data – in the last couple of decades "fewer than 5 percent were Asian Americans, fewer than 2 percent African Americans, and only 1 percent Hispanic" (2014, 135). In his research of the Supreme Court law clerks from 1998, Mauro (2014) found out that female clerks represented only one fourth of all clerks, while by 2014 this proportion had increased only slightly – to one third.

When employing law clerks, justices also take into account personalities – one of Perry's informants said that one justice liked to employ good guys, "I don't think Justice E's clerks were chosen on ideology so much but on a certain personality. They were generally people who were nice guys … They were low key, kind of clean cut nice guys – kind of like the justice" (in Perry 1991, 72). Ideological preferences and legal philosophies are normally not crucial when selecting the clerks, but some justices employ more partisan clerks than others, perhaps not intentionally, but because they are more compatible in terms of personality. Justice Scalia, a conservative justice, was known to have employed a liberal clerk each term in order to engage in constructive arguments that would clarify issues from different angles.

The public sometimes speculates about the influence of law clerks on justices' decisions. Even though justices often downplay clerks' influence on their decision-making, they do contend that they are indispensable for the Court's operation. It has already been mentioned that new clerks generally come to Court at the beginning of the summer, when justices are mostly already away on holiday. They only receive a couple of days' training from the clerks who are leaving, and literally at the end of their first week they are left alone to make some sense of the piles of petitions for writ of certiorari.

The staff in the library is of course a good source of help as is the book *Supreme Court Practice*, written by former law clerks R. Stern, E. Gressman and S. Shapiro. Lazarus (1999) wrote that clerks could also make use of internal tips and pointers from former clerks, who would sometimes compile a document for internal use. In Justice Blackmun's chambers, where Lazarus clerked, they received a memorandum *"Helpful Hints for Blackmun Clerks"*.

Clerks' roles on the Court's agenda are especially worth examining in the cert. stage, when clerks make recommendations about whether to deny or grant review to cases, because clerks also have their own legal philosophies and preferences for policy outcomes. Lazarus writes that some strategic behavior can be witnessed when clerks downplay certworthiness of certain

types of cases; during his clerkship, when the Court was conservative, liberal clerks tried to "trivialize capital cert. petitions" (1999, 267).

When clerks come to the Court, they often have preconceptions about which issues their justices (and others) are interested in, and put in extra effort when they come across those issues. After having clerked for a while, clerks also learn if their (mis)conceptions were right or wrong. Also, clerks who are part of the cert. pool not only write for their justices, who might not be interested in the questions raised in the petition, but also for other justices who might feel more enthusiastic about those issues. In addition, justices are unpredictable – even if a case looks certworthy at the first glance, justices might for different reasons decide not to take the case. This could be part of some strategic calculation or due to other subjective reasons. Even though the possibility that clerks would engage in strategic behavior exists and must be taken into account, one must realize that clerks also operate within the legal framework of decision-making. When they first arrive at the Court, even though they have little knowledge or experience in how the Court decides what to decide, they want to show their legal excellence and justify that they deserve the opportunity to clerk for the highest court. One of the few predictable facts they can rely on is the fact that the Court only grants review to about 1% of all the petitions that come to it. It requires a great deal of justification as to why a certain case should be granted review as opposed to being denied. In the beginning, they are much more hesitant to recommend review (cf. Blake for more). Also, through experience they learn how to sift through piles of petitions and write more efficient memos. Clerks say that at the beginning, they can examine five petitions per day, while at the end of their year at the Court this number goes up to 30 per day (Perry). Clerks who are not part of the cert. pool can of course try to "bury" or downplay a case, but if an issue is important and has been percolating in lower courts for a while, it will either sooner or later reappear in other petitions or get on the discuss list from the other chambers, in which case they could lose credibility and trust from justices. Also, if they suggest granting a lot of certs, their legal judgment can be questioned and they could also become less trustworthy.

Justices are aware of all that; due to their experience and knowledge of the Court's decision-making process, they can sometimes decide on certworthiness only by reading the questions raised in the petition. Also, they know each other very well and know which issues are important to other justices, so even if a clerk suggests denying review, they would still read the memo to be prepared if another justice puts the petition on the discuss list.

Clerks are not only important in preparing the cert. memos; they also prepare mark ups for their justices on memos from other clerks. To prepare justices for an oral argument or to help them in the opinion-writing stage, clerks also prepare bench memos. Naturally, they often write or help to write the first draft opinion. One of the few justices in recent years to have generally written the first draft himself was Justice Stevens. Others generally trusted the clerks with this task with the exception of some important cases. Justice Scalia would write a first draft himself in cases that he found important and especially compelling.

Clerks and justices view their role in the deciding process very differently. Some believe they should frame their arguments to suit their justice's standing on the case, and some believe their role is to point out the weaknesses and strengths of the justice's opinion, and make arguments for the opposite view. In his research, Perry (1991) inquired about clerks' role in the process as "surrogates" or "devil's advocates", and he found out that clerks' and justices' views varied immensely. When Chief Justice Rehnquist was a clerk for Justice Robert Jackson and the Court heard *Brown*, he tried to persuade him not to strike down the precedent *Plessy v. Ferguson* (1896), according to which the "separate but equal" doctrine should have remained constitutional, which would have continued segregation in U.S. schools. Clerk Rehnquist was not successful, but this came back to haunt him during his confirmation hearings before the Senate. When asked about it, Justice (and later Chief Justice) Rehnquist defended himself by saying that it was in fact Justice Jackson who wanted him to play the devil's advocate and examine the case from different perspectives. Justice Jackson's papers indicate, however, the opposite. The view that clerk Rehnquist presented was supposed to be purely his own.

Even though clerks do exert some influence on justices, either through their ideological leaning or legal philosophies, justices determine how they will eventually decide. Justice Jackson was supposedly not convinced in *Brown*. Lazarus (1999) writes about another famous case *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), with which the Court upheld the standing of *Roe v. Wade* that women have a constitutional right to abortion. Justice Kennedy's clerk Michael Dorf and Justice Souter's clerk Peter Rubin supposedly had a significant influence on the final opinion (Lazarus 1999, 472). All in all, no matter what the intentions of the clerks are, it is their justices who eventually decide whether they will follow the clerks' suggestions or not.

4 DECIDING WHAT TO DECIDE

Let us now describe how a case generally gets to the Supreme Court. Up until the Act of 1925, 80% of the cases came on appeal and only 20% on writs of certiorari. After the Act, however, a whopping 99% of cases come to the Court on certiorari (O'Brien 2014). It is obvious that such discretionary authority to choose the cases they will review allows the justices to set an agenda of their own. Certs of certiorari are also a means by which the Court keeps up with the enormous caseload. Annually, the Court receives approximately 8000 petitions of certiorari, but it grants review to approximately 80 of them. The chances that the case will be heard before the Court are very slim.

Everything begins when an individual or a group (plaintiff) decides to sue another individual or a group (defendant) over a dispute. The plaintiff's first step is to file a lawsuit before a federal district court that functions as a federal trial court. If the federal district court decides in favor of the defendant, the second step for the plaintiff is to appeal to the U.S. Court of Appeals. There are 13 federal Courts of Appeals, each of which is responsible for its own circuit. A three-judge court reviews the case and, for example, affirms the ruling of the federal district court. In such a case, the plaintiff can either file a petition to the Supreme Court or asks for a rehearing *en banc*, which means that a full court rehears the case instead of the usual three-judge panel. If the Court of Appeals denies the request, the plaintiff has 90 days to file a PETITION FOR A WRIT OF CERTIORARI. This is a brief in which the parties describe the facts and background of the case and explain why the Court should grant them a review. These briefs are very important as they set the tone of the case by pointing to the relevant facts. Some attorneys have more experience in writing such briefs – there are even some law firms that specialize in litigation before the Supreme Court – and write clear and coherent briefs with a clear presentation of the issues. Attorneys also know that the Court tends to grant review to cases in which they have to resolve ambiguity or disagreement among lower courts. After the cert. petition is filed, the defendant can acquiesce (agree) with the plaintiff, waive the right to respond to the petition (renounce), or file a brief in opposition (for an excellent and comprehensive description of the process see Supreme Court Procedure on SCOTUSblog). All the briefs are sent to the Clerk's Office, where they are verified if they comply with the administrative requirements.

Already at this stage an individual, a group or entity that has an interest in the outcome of the case can file an AMICUS BRIEF. A "friend of the Court" (Latin: *amicus curiae*) can file a

brief in support of the plaintiff or defendant, adding some additional information that could shed light on the case and explain why it is important the case be heard. There are many studies on how an amicus brief affects whether a petition will be granted or denied further review. Caldeira and Wright (1988), for example, conducted studies to explore the influence of amicus briefs on getting a case heard before the Court. Those briefs may be filed by individuals or groups or entities and they have varying levels of influence on the Court. Organized groups, for example, have a long tradition of trying to influence legislation and pressure the government to enact a certain policy outcome that they would benefit from. The fact that there is an amicus brief implies that the issues raised in the petition are probably significant for the broader public and not only for the petitioner in question. This generally raises the possibility that a case be granted further review. Caldeira and Wright believe that the Supreme Court "is quite responsive to the demands and preferences of organized interests when choosing its plenary docket. In this regard, the Supreme Court is very much a representative institution" (1988, 1122).

After the Clerk's Office verifies administrative requirements, the briefs are sent to the chambers.

4.1 Writ. of certiorari and cert. pool

A cert. pool is a mechanism that was implemented in 1972. It is not entirely clear who came up with the idea, but the process was established to help the Court address its caseload more efficiently and to save the justices precious time. The justices' law clerks who participate in the cert. pool are randomly given briefs to prepare a memorandum for all the justices. Today only Justice Alito is not a member of the cert. pool; instead his clerks go through all briefs and make recommendations or report directly to him. Justices Marshall, Stewart, Brennan, and Justice Stevens, who retired in 2010, for example, opted to be out of the pool.

What is the main function of the cert. pool? With the establishment of cert. pool, one clerk became responsible for writing a memo for all nine justices instead of each chamber going through all petitions on its own, which could mean that the same briefs would be checked nine times. When a petition for certiorari comes to the Court, the Clerk of the Court randomly assigns it to chambers and in each chamber it is randomly assigned to one of the law clerks to write a CERT. POOL MEMO. The clerk will then record some facts about the case – from which court it came, which judge wrote the decision of the lower court, which judges dissented or concurred. The memo also contains the summary of the issues, facts, opinion of

the lower court and a short analysis. In the past, law clerks did not write a recommendation about whether to grant or deny review, but now the memo also contains the clerk's recommendation. In the memo, there is also information on authorship, i.e. which law clerk wrote it. It is the Chief Justice who oversees the process of cert. pool. O'Brien (2014) writes that Chief Justices Rehnquist and Roberts had to rebuke the clerks when they learnt they had interchanged briefs. The random assignment of those briefs is meant to ensure the neutrality of the person who writes the memo, and if the author of the memo is personally biased to the issues of the petition, neutrality is difficult to achieve.

After the memo is written, the Chief Justice's chambers sends it to the other chambers where clerks 'mark it up' for their justices (Perry). This means that they note if they agree or disagree with the memo, or add some of their comments. For example, in Perry's study, one clerk observed, "We were nonstrategic in the pool memo, but in talking to Justice ____ or in the markup we would say things like 'you can't get a fifth vote'" (ibid., 56). It has been said that the clerks who write a cert. pool memo for all the justices write in a more formal manner. In addition, experienced clerks sometimes already know that their justice is not interested in the issues or would not grant review, but as they are writing for everyone, they nonetheless have to spend more time and effort in writing the memo. Some clerks have commented that after they had gained more experience they could more quickly see if a case was, for example, frivolous, in which case the Court would not grant review.

One clerk commented "If one were just working for one justice, you could probably say, 'look, this is ridiculous, there's no reason to take this case.' But when you're writing a memo for all the justices, you have to lay it all out" (in Perry 1991, 52). On the other hand, many clerks did attest to one important advantage of the cert. pool. Due to a vast number of petitions, the Court could quickly discard many of them without properly looking into them. By having to write a memo, the Court ensures that at least somebody reads the petition carefully.

As we can see, this stage of screening thousands of petitions and picking out the most relevant according to the Court members is a stage where issues rearrange in order of importance and is a stage to set an agenda. Law clerks are an essential part of it. Even though law clerks generally come from the best law schools and have clerked for judges in lower courts, when they arrive at the Court, they are inexperienced in the Supreme Court's mode of decision-making. In addition, they have their own ideological views and some justices prefer having

clerks that have similar ideological views. On the other hand, Justice Scalia was famous for hiring one liberal clerk every term and engaged in extensive legal discussions about issues with this clerk. Sometimes ideological views transpired also through the cert. pool memos. In Perry's research of the Supreme Court, he interviewed many former law clerks and justices that served mostly during the 1976–1980 October terms, and even though clerks' memos did not generally reflect the opinion of the justice of their respective chambers, many noted that memos from one justice's chambers were noticeable. For example:

> "Frequently, I would have to supplant Justice A memos; they were so truncated. They would say something to the effect that here is another one of those silly petitioners wanting such and such (C32)" (Perry 1991, 57).

> "Effectively when someone from Justice A's chambers would write one [memo], we would go back and check everything. (C43)" And also from the same clerk: "Well, sometimes they would leave out, oh, critical facts, or they would really have a misstatement of the force of precedent, or sometimes they were even monkeying around a little with the record as far as we were concerned" (ibid., 57).

It is not always the ideological component of the law clerks that sets the tone of the memo. Blake et al. (2015) also point to some specific characteristics of the cert. pool process. Namely, new clerks arrive in July when justices are normally away for the summer. They receive only a couple of days' training from the clerks who are leaving the Court some days later the same week. They can also turn to *Rules of the Supreme Court of the United States*, but of course they have to apply them to the realities of the petitions. Part III of the Rules gives more detail on the Jurisdiction on Writ of Certiorari and Rule 10, specifically, talks about Considerations Governing Review on Writ of Certiorari. It starts with "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons" (*Rule 10. Considerations Governing Review on Writ of Certiorari*). Blake et al. (2015) note that new law clerks are very cautious and "grant averse". Supposedly, they are inclined to deny rather than grant the cert., as they do not want to overly expose themselves and potentially lose some credibility in the long run. If they recommend a grant for cases that justices do not find relevant or certworthy, their recommendations could lose credibility.

So at this influential agenda-setting stage, we could say that law clerks behave strategically, albeit not for ideological reasons, but simply because of practical reasons. Over time, when

they gain more experience regarding the decision-making process, they also become more confident as to what justices might be interested in and, in general, which cues they can look for when recommending certs. On the other hand, law clerks come from lower courts where they actually had to look into cases and determine whether errors were committed in the process. This new operation mode, some say (Cordray and Cordray, quoted in Blake et al. 2015), could actually lead to clerks recommending more grants than later in their clerkship.

Justices are most likely to take these factors into account when they meet for their first conference in late September. When they come back from their summer recess, they have a so-called *long conference* because they have to go through the approximately 2000 petitions that have accumulated during summer. Taking into account these conflicting factors, Blake et al. (2015) examine the idea that petitions for certiorari have a lower chance of getting their cases granted if they are filed in summer, when the justices are away and new and inexperienced law clerks go through piles of petitions. They indeed found that petitions have a considerably lower chance of getting through in a long conference than in any other conference during the term. In addition, they found considerable influence of the new law clerks on this occurrence. Some experienced and knowledgeable attorneys strategically try to postpone filing their certs or ask for a rehearing *en banc* to ensure that their petitions avoid the long conference, even though this is not always possible as they cannot influence when the lower court will decide their case. Blake et al. argue that this could be remedied by training new law clerks better and supervising them in this early stage of their clerkship.

Law clerks undoubtedly have some influence on the Supreme Court's agenda and decision-making, but some scholars (Spaeth, Segal, Caldeira, Wright, etc.) attribute justices' policy preferences as the most influential in this process. They believe that whether justices will grant or deny review depends primarily on their policy preferences and calculation if they could get enough votes for the desired outcome in the merits stage. This will be examined in more detail later in the section on models of decision-making.

Each chamber has its own way of addressing cert. petitions, but interesting is the case of late Justice William Brennan. During the summer holiday, when he was away, his law clerks would write pool memos like the other clerks from the pool chambers. But when the Justice came back, he took over the process of going through petitions. He thought it was important for the clerks to get a taste of the issues coming to the Court, but he nevertheless did the review himself not only because he was fast at it, but also because he enjoyed it. His clerks

said that he could eliminate 90% of certs just by reading the presented questions (Perry). He had his own vision of the direction the Court should be taking and he followed it in the cert. process.

After law clerks write their respective memos and send them for review to the other chambers, the Chief Justice is responsible for drawing up a discuss list.

4.2 Discuss list

The process of choosing which cases and issues will be granted review continues with the creation of the discuss list. Until 1935, the justices gave every case a chance to be considered, but with the increase of cases coming to the Court, especially the so-called frivolous (i.e. absurd and without merit) cases, something had to be altered. Chief Justice Charles Evans Hughes started creating a list that was eventually called "the dead list" (Black and Boyd 2012). Even though at the time the Court gave all petitions a chance to be discussed, the dead list contained mostly cases they regarded as frivolous. Gradually, by 1950, the Court came up with another list, the so-called discuss list. This was a list with the cases that justices thought were worth discussing. The Chief Justice is responsible for making the list with all the petitions that he found certworthy from the cert. memos. Then the Chief Justice sends the list to all the chambers, where each justice can add petitions but is not allowed to take away any of the petitions from the other justices. All the petitions that do not end up on the discuss list are denied review and put on the dead list without even a vote from the justices. Those petitions that were denied review at this stage were generally only examined by law clerks when they were preparing the memos for the justices. On the other hand, if only one justice believes that a petition is worth reviewing, they can put it on the discuss list for at least a brief review by the whole Court at a conference.

How do justices decide which petitions out of thousands involve issues that are of national importance and could influence national policies? This is unquestionably a daunting quest, but Black and Boyd (2012) suggest that justices look for some shortcuts or so-called "informational cues" to help them find the needle in the haystack, i.e. find issues that they regard important from a legal point of view, but also issues that could further their policy outcomes. Equipped with the memos from law clerks and with no time to spare, they have to find some modus operandi of coping with the caseload.

Cues that help determine certworthiness

Black and Boyd believe that justices "rely upon cues that are relatively inexpensive in terms of time required to identify their presence" (2012, 1127). They speculate that in the first stages some easy to spot information play a more important role, while further in the agenda-setting process, more time and effort are spent on more informative cues. The most basic cues that do not require a lot of time are:

a) **A conflict in the lower court ("horizontal" disagreement)**: A judge filed a dissenting opinion, disagreeing with the majority on the bench. It is naturally more time-consuming to determine what exactly led to the disagreement, but due to the relative rarity of dissents in the federal circuit court, this could be a sign that the petition needs a closer examination.
b) **A conflict between lower courts ("vertical" disagreement)**: A conflict at two levels of the judiciary system could signal some confusion or disagreement over interpreting the law, and the Court could be the arbiter of the conflict.
c) **Absence of legal conflict**: The petition of certiorari does not provide grounds that a legal conflict actually exists. Sometimes attorneys try to form petitions, but there is in fact no actual conflict.
d) **Unpublished lower court opinion**: Sometimes the lower court does not publish its decision because it does not involve an important legal question. This could be a clue for justices that such a petition is not worthy of their review.

Black and Boyd also speak of cues that are still easy to spot, but have a higher information value:

e) When **the U.S. Solicitor General** files an amicus brief: Justices value the recommendation of the Solicitor General's Office as they have a tradition of good litigation before the Court. Their Office employs very good lawyers with good resources and access to various federal agencies. They screen which petitions are worthy of follow-up, and justices generally rely on their judgment. This information cue is not only important at this stage, but also later at the agenda-setting stage, when justices vote to grant a review in the case where SG participates as an amicus curiae.

Caldeira and Wright (1990) also state the following important factor:

f) **Amicus briefs**: Briefs filed by interest groups or other entities can add information and signal that the petition has a broader impact than only on the direct parties. Caldeira and Wright found out that the amicus briefs increase the likelihood of a granted petition. Sometimes attorneys organize a vast number of amicus briefs and structure litigation in a more coherent manner. Lazarus (1999) writes, for example, that attorney Kathryn Kolbert in the case *Planned Parenthood v. Casey* (1992), which directly challenged the milestone case on abortion *Roe v. Wade* (1973), coordinated the filing of amicus briefs, so that on the pro-choice side there were eleven amicus briefs (instead of many more), while the pro-life side submitted twenty-three briefs.

And, naturally:

g) **United States as a petitioner**: When the United States is a direct party in the dispute, the petition will almost always be granted review.

Black and Boyd also considered cues that have high cost and high values, which means that justices and their legal clerks have to invest more time and effort to see whether the issues raised in the petition truly deserve a closer examination from the Court. This is the reason such cues are more likely to be considered later in the agenda-setting conference.

4.3 Conference

Justices meet for conference on Fridays. This is an opportunity for all justices to get together and briefly discuss petitions for certiorari that were put on the discuss list, and vote if they will grant or deny review. In the beginning, in the Marshall Court, justices voted in order of juniority, from the newest justice to the senior justice, because they did not want the junior justices to be influenced by the senior ones. For a long time, the public believed that this was still done today, but at least with Perry's research, this idea was exposed and clarified by justices, who told him they vote by seniority. None of his informants seemed to find this order troubling.

The Chief Justice, who is responsible for making the first draft of the discuss list and who later sends it to other chambers for their suggestions, has a significant influence on the leadership of the conference. Some even say that to some degree the Chief Justice could try to make their own agenda at this stage, but normally, justices and clerks in Perry's research

claimed that this does not happen because other justices can later add their own suggestions. Some justices also wait for others to put the cases on the list, as they do not want to be the only ones who proposed a certain case. During the conference, Chief Justices have different styles of leadership (for more see O'Brien 2014). Chief Justice Stone, for instance, preferred lengthy discussions and an exchange of views, but with the growing caseload this became increasingly burdensome. Chief Justices Hughes and Rehnquist, on the other hand, discouraged long discussions and tried to limit everyone's contribution to the basic facts. Chief Justice Rehnquist established a rule that "nobody speaks twice until everyone has spoken once" (Justice Breyer in O'Brien 2014, 208).

The level of preparedness also seemed to vary hugely – Chief Justices Burger, for example, seemed to have been less prepared and more interested in the administrative aspect of his role, whereas Chief Justice Roberts is supposedly always very well-prepared and a good leader. The discussion, however, is often a "misnomer" (Justice Scalia in O'Brien 2014, 208), as justices sometimes do not even give any opinion, but quickly state their views, or even only cast their votes.

After one justice has the possibility to put a petition for certiorari on the discuss list, it takes four justices to grant a review. This is called THE RULE OF FOUR. Only in this case does a minority prevail over a majority, with the rationale behind this being to avoid the monopoly of the majority in this agenda-setting stage. Sometimes a justice also says that they will vote for a petition if three other justices vote to grant review – this is the so-called JOIN THREE VOTE. A justice can have mixed feelings about a petition, but would only vote for it if there are three justices who feel strongly about the issues raised in the petition. It can also happen that three or more justices say that they would "join three", which means that they would join if three justices voted to grant a petition, but in such case the petition is denied because there are no clear votes.

It is also possible that a petition is relisted to the next conference, which can happen if justices want to research the petition in more detail, if somebody is preparing a dissent from denial of certiorari, but also if only four justices vote to grant review. In such cases the Chief Justice might ask if there is an option that one of them needed more time to research the issues and possibly deny review. This option came out due to the increasing volume of work on the Court. It is much less time-consuming to relist a petition and later deny review than to actually grant a review to the petition. Lazarus (1999) writes about some attempts of the Chief

Justice trying to manipulate the relisting of the case. Namely, the attorneys in the case *Planned Parenthood v. Casey* (1992) speculated and filed the petition in time, so that the Court would reach its decision before the presidential elections. The issue of the right to abortion has in previous decades always been one of the top issues in any electoral campaign. There were many speculations that the Chief Justice by relisting the case wanted to postpone the case until after the election. After some pressure from the associate justices, he finally gave in and at the next conference, the justices voted to grant review.

At the conference justices could also decide not to hear the oral argument and DISPOSE OF A CASE SUMMARILY. That means that they effectively decide the case, but without the attorneys having the chance to come and make an oral argument. There is an informal rule that at least six justices have to agree to dispose of the case summarily. Some say that the reason justices treat some petitions summarily is to gain time, but not all justices agree with this procedure. Indeed, Perry contemplates: "the justices are forever chiding the bar for writing cert. petitions that argue the merits rather than concentrate on why the Court should take the case. Given the increase in summary dispositions, however, one wonders if perhaps it is not dangerous for counsel not to include a healthy discussion on the merits" (1991, 101).

Dissents from denial of certiorari

When justices deny review to a petition, some justices can protest because they feel strongly about the issues. They can protest by writing a dissent from denial of certiorari. They can either note a dissent which later appears next to the decision that the Court denied the petition for a writ of certiorari. But the justice can also write a dissent or only announce that he or she is considering writing it. Justices Brennan and Marshall used to make it a habit to write a short dissent from denial for all the cases involving capital punishment. They believed that capital punishment represented cruel and unusual punishment, as noted in the Eighth Amendment of the Constitution, and was therefore unconstitutional. This is why they always wrote the same statement when the Court voted to deny petitions for certiorari when it involved the death penalty. Justices and clerks say (for more see Perry) that dissents from denial could be written or only announced to be written to persuade other justices. But some say that the purpose of dissent from denial is to further justices' personal strategic policy preferences. By publishing such dissents, they involve the lay audience and in such a confrontational manner point out certain issues, make a statement, or even signal to the potential litigants that they should file more petitions in that domain. Certain justices, on the

other hand, are more cautious about publishing dissents from denial; Justice Stevens believed that such practices are counterproductive for the authority of the Court as the public only receives fragmented information, which can be misleading.

Members of the Court are thought of sometimes as acting strategically. Some believe that the undemocratically-elected justices, who are rarely held accountable for their decisions, are driven by ideological preferences, while others try to explain their decisions within various legal frameworks. Due to the increasing workload, since 1925 justices have been able to set their own agenda by having discretionary power to choose which cases they will hear. In addition, they are not required to motivate why they granted or denied petitions for certiorari, which makes the decision-making process even more intriguing. Many claim that justices act strategically in the agenda-setting stage by, for example, not voting to grant review to a given petition because they know it will not get the required five votes at the end. In such circumstances, they prefer having the status quo, even if it is not optimal in their view, than risk having it overturned by the majority on the bench.

The public generally only gets a glimpse of the goings-on in the highest Court in the U.S. This happens when retired justices hand their papers to different institutions that can decide if they will make them public or not. These papers shed light on a part of the whole story, but it makes understanding of the Court's modus operandi easier. Scholars and researchers are left with some theories about what makes a petition for certiorari certworthy. As will be more discussed later, justices and scholars are divided over reading and interpreting the Constitution, and depending on the composition of the bench some issues will receive more attention than others. That is not to say that justices' decision-making is based on their ideological preferences – but it does depend on justices' legal philosophies how they will approach the Eighth Amendment, for example, or how they feel about overruling the precedent.

After the justices have voted to grant review to certain cases, an ORDERS LIST is made and released the following Monday after their conference (for more on the procedure see SCOTUSblog – Supreme Court procedure). The parties then have to file BRIEFS ON THE MERITS in which they explain why the Court should rule in their favor. They generally have forty-five days to file the brief, which is limited to fifteen thousand words. At this stage individuals, groups, or entities can file an amicus brief and urge justices to rule in favor of one party or the other. Generally, to file an amicus brief one needs permission of both parties, but

the Court regularly allows it even if one side opposes it. The U.S. Solicitor General and states do not need a permission to file an amicus brief. The Solicitor General can also file a motion for divided argument, in which the Court is asked for permission to speak during the oral argument. Depending on which party the Solicitor General is supporting, the allotted time will be divided between the party the SG agrees with and the SG.

4.4 Certworthiness and the question of whether to grant or not

Much research has been conducted to determine what makes a petition certworthy. In researching the topic, Perry (1991) discovered the following type of behavior.

1. Justices are well aware that other justices on the bench might be hostile to their preferable outcome on the merits, so they rather vote against granting a cert. and leaving the situation, even if they do not entirely agree with, as it is, rather than risk reaching a worse outcome that would have precedential value and set the law for the whole country. This behavior is called DEFENSIVE DENIAL. Undeniably, this is strategic behavior, but even though clerks and justices admitted using defensive denials, such practices are more of an exception. Experienced clerks often know which issues their justices are interested in, and they sometimes suggest a strategy in voting. For example:

   > "We were nonstrategic in the pool memo, but in talking with Justice _____ or in the markup we would say things like 'you can't get a fifth vote'" (in Perry 1991, 56)

The Court does not have to explain why it denied review to cases due to the additional burden this would impose, but this feature allows for some strategic behavior.

2. On the other hand, justices do look for the so-called good vehicles, cases that involve issues that would further their legal doctrine or that they find interesting and worthy of a clearer explanation of the rules. Perry calls this behavior of intentionally looking for cases AGGRESSIVE GRANTS. Even though this does occur from time to time, this is not practiced too often because the system does not favor such behavior, but also because it is much easier to deny a case than it is to grant it. The cert. stage is much more prone to denying certs due to the enormous amount of petitions that come to the Court, therefore granted cases receive a lot of scrutiny from the members of the bench, lower courts, media, and ultimately the public.

There are justices who try to advance issues on the Court's agenda, but many justices believe that the Court should rather be a reactive institution than a proactive one, or simply put, that the issues should come to the Court from the people and democratically elected branches. Justice Ruth Bader Ginsburg, for instance, believes that the change should come from the people and Congress, and not from the Supreme Court. Interestingly, even though she is an active supporter of women's rights and the right of women to have an abortion, she was not entirely satisfied with how the Court decided *Roe v. Wade* (Toobin 2013). According to her view, the change should have been made incrementally and in dialogue with Congress. External circumstances should have allowed for political and societal changes, and the Court should have waited for the cases to come to it. On the other hand, some advocate for a more focused Court with a vision of what role the judiciary should have in the country. The Warren Court, for example, was at the forefront of the Civil Rights movement in the 1960s – it gave more rights to minorities and opened the Court to indigents, deciding cases such as *Gideon v. Wainwright* (1963) (with which the Court decided that the free counsel should be available to indigents in all cases). Even though many have accused his court of judicial activism, there are legal scholars (e.g. Chemerinsky) who believe that U.S. society was ready for changes, especially in the realm of civil rights, and that the Court was merely reacting to the changes outside the courtroom.

To grant or not to grant

Justices are said to be sending signals to litigants about which issues the Court would like to hear more about or on which grounds. Some say that dissents from denial contain hints to the litigants how they could change their litigation for the Court to grant the review. Nevertheless, there are no clear and bullet-proof characteristics that would result in a case being granted review. The Court is not too worried if they miss an important case by denying the cert.; if an issue is important enough, it will come back to the Court. It is also true that importance is in the eye of the beholder – it is subjective, prone to change, and sometimes difficult to pinpoint. There are, however, some particularities that ease justices' dilemmas – either to grant or deny a case.

1. If a case is FRIVOLOUS, it will probably be denied. This means that a case perhaps deals with an absurd situation or involves specific facts, for example, if a party appeals to the Supreme Court because they allegedly ran a red light and had to pay a fine for that. Such cases normally only deal with a very particular situation that is not of

general importance, but relates to the petitioner only. Such cases may annoy justices and are generally considered a waste of time and resources.

2. Justices prefer a case that has already PERCOLATED in the lower courts before it comes to the Court. The Court can benefit from judges' and scholars' opinions and views, which can help clarify the issues. If a Court takes up an issue too quickly, they can set a precedent that was not well thought through or that did not anticipate certain problems, which is why it is normally good for an issue to percolate for a while. It is of course difficult to determine exactly how long an issue should be left in the lower courts and justices sometimes decide that it is better to take the case and clarify it than to let the cacophony of views and ideas add to the confusion and chaos in the lower courts' decisions.

3. If a case has BAD FACTS, it means that the issues in the petition are not presented in a clear and coherent way. One clerk that was interviewed by Perry summed it up in the following way: "When the facts are complicated, then their decision is less legal and more factual. They want a case… where they can establish a principle of law pretty clearly. The more the facts complicate the case, it's less legal and more factual" (Perry 1991, 235).

4. Sometimes a case is denied because there is a better case is in the PIPELINE. There are many petitions that raise similar issues and some are better, so-called, vehicles for the issues – such cases are clearer, ask better questions, and can be applied more broadly. Justices and clerks do not know, of course, about all the cases that are coming to the Court, but certain cases incite legal debates among scholars before reaching the Supreme Court, or law clerks hear form their former colleagues from the lower courts that there are some interesting cases that might come up.

5. It is surprising to learn that justices sometimes deny review to a case when they are unsure what to do with them. Or they think they cannot in any way add value to the existing case. They find them INTRACTABLE. On the other hand, it also occurs that the Court grants a case even when they know there is actually no solution for it (Perry 1991).

All the mentioned examples only have a cursory value and they are more an exception than the rule. The Court takes such a small fraction of cases each term that it is difficult to make

generalizations. For all examples mentioned above there are cases that are granted contrary to what has been stated. Internal and external circumstances can lead a justice or the Court to change its general practice or behavior.

"It only takes one thing to make a case uncertworthy. It takes a combination of things to make a case certworthy" (Perry 1991, 245). There are certain factors that raise probability that a case moves to the merits stage.

1. An important, but by no means decisive factor is CIRCUIT CONFLICT. When two or more circuits disagree about federal law, the Court can decide to step in and give a definite decision. But as it was mentioned earlier, oftentimes it is seen beneficial if an issue percolates for a while, becomes clearer, and dispels some irrelevant facts on its way.

2. A case can become so IMPORTANT that the Court takes it even if there is no conflict. Naturally, some justices believe that every capital punishment case is important and should be given the Court's full attention (e.g. Justices Brennan and Marshall), while others would rather not deal with them at all. Importance is a subjective factor, but in a case such as *United States v. Nixon* (1974)[7] the Court disregarded some of their usual benchmarks for certworthiness and took the case because it was important for the U.S. politics and public. "Importance is often determined by the breadth of effect rather than the depth" (Perry, 254). *Brown v. Board of Education of Topeka* (1954) is an example that was important for American society. Because it was such an important case and one of the landmark cases of the Supreme Court, there are many theories about the decision. Some say that the Court acted proactively and against the will of the public and the President, but the other side believes that the country was ready for a change. The rise of various civil rights movements paved the way for *Brown*. *Bush v. Gore* (2010) is a curious case, as justices and scholars disagreed (and still do) as to whether it was so important to take it urgently or if it would have been better to leave the decision to the state court – the Florida Supreme Court. It also involved a political question which the Court normally shuns and defers to the democratically-elected institutions.

[7] *United States v. Nixon* (1974) dealt with the question of whether executive privilege makes the President immune from judicial review.

3. Justices also have issues or AREAS that they find more important. Some justices are interested in one area and completely uninterested in another, depending on personal and professional experience. Even though generally they do not allow personal preferences to override legal consideration, there are many justices who become closely connected to certain areas. Being the justice who wrote the opinion in *Roe v. Wade,* Justice Blackmun became closely connected to abortion issues. Justice Brennan and Justice Marshall were known abolitionists. The latter was also an attorney in *Brown,* which makes his connection to civil rights issues even more evident.

4. In exceptional cases justices are moved by EGREGIOUSNESS. Even though they generally refuse to hear cases to correct errors from lower cases, sometimes the injustice wrought by the lower court decision is so serious that they make an exception and grant to hear the case.

4.5 Oral argument

Oral arguments are usually scheduled between October and April, and last for two weeks in a row. The Court hears one to three cases per day on Monday, Tuesday, and Wednesday. Generally, each side has 30 minutes to speak, but this can be shared among an attorney who represents the party and a lawyer who acts as an amicus on the side of one party. The Solicitor General gets a chance to speak directly to the Court often, while lawyers representing other amici curiae get this chance less often. In the past, oral arguments were much longer – in 1848 it took eight hours for a case, but from 1970 this time decreased to one hour per case. Every now and then the Court makes an exception to this rule – in *Brown,* the Court allowed approximately 13 hours and a half of oral argument (O'Brien 2014).

After a case is granted review, lawyers have approximately four months to prepare for the argument. The courtroom can seat 300 people and arguments are generally open to the public. This is the first time the parties' attorneys can communicate directly to the Court members. There are many strategies how to use the time allotted to them. In order to help the lawyers prepare and present an oral argument, the Court published a brochure *Guide for Counsel in Cases to be Argued before the Supreme Court of the United States*. The lawyer should be prepared for many questions from the bench; the justices can interrupt them at will, even mid-sentence. The lawyers, on the other hand, are not allowed to interrupt the justices. Therefore, preparation for this stage is crucial and lawyers should strive for brevity and adaptability as they can be sure that they will be constantly challenged by the justices. Today many justices

ask a lot of questions; Justice Scalia was famous for his outspokenness and provocation; some regarded it even inconsiderate to other justices. Some justices are known for asking a lot of hypothetical questions (e.g. Breyer and Kagan) that are not necessarily directly connected to the case. With such questions justices want to explore the issues in a larger context or clarify the issues. Justice Thomas, on the other hand, is the only justice that rarely asks a question during an oral argument. In fact, on February 29, 2016 Justice Thomas broke his ten-year-old silence and finally asked a question from the bench. There were many theories for this behavior; Thomas himself offered that he is rather shy and does not want to interrupt the lawyers, and also that the briefs contain all the information that he needs. Legal journalist Toobin from The New Yorker, on the other hand, is very vocal in his view that this silence is a disgrace and shows disrespect and disregard for the institution of the Court and the parties that come before the Supreme Court.

Much research has been conducted to study justices' behavior during oral arguments, and many say that the more questions an attorney is asked, the more likely it is that her side will eventually lose. Also, justices are only human and also resort to more emphatic and emotional language. The stronger the use of such language by a justice, the more likely it is that he or she will vote against that side (Black et al. 2011). The way a question is formed and how loaded it is with emotions can reveal a lot about the attitude of the one who poses the question.

Scholars of the Supreme Court have been trying to study the function and influence of oral arguments. Justices differ in their levels of preparation for this stage. Today, law clerks normally prepare a bench memo for their justices, in which they include the facts of the case, issues that are raised in it, and possible questions for the parties.

Justice William Douglas believed that a case can be won or lost during an oral argument, Chief Justice Warren, conversely, did not think they were significant. Justice Sotomayor believes the oral argument serves two purposes. Firstly, attorneys get an opportunity to clarify any misunderstandings, and, secondly, it serves as an opportunity for justices to see what the other justices think about the case, and which parts they find weaker. Justice Stevens thought of it as a dialogue between justices through attorneys.

Some believe that during an oral argument justices build coalitions and hear where they agree or disagree. In the past there were fewer questions from the bench than today.

Attorneys for the parties have to balance between answering justices' questions and communicating the main points of their argument. The Chief Justice, who is supposed to lead an argument, can give attorneys more than 30 minutes, or only allow them to finish the sentence, if the sentence is not too long. It has happened that attorneys did not finish their argument in the 30 minutes allocated and kept on speaking, so some justices stood up and left the courtroom.

4.6 Opinion writing

Justices hold private conferences to discuss merits of cases on Wednesday afternoons to discuss cases they heard the previous Monday, and on Fridays to discuss cases they heard the previous Tuesday and Wednesday. The discussions that go on during these conferences are secret. Some justices tell their clerks what goes on, but not always and not all of them. The public and scholars get a glimpse of what goes on there if a retired justice decides to give their private papers to a library or some other institution. Even then one only sees the conference from the perspective of that one justice. In the past, justices had more time to deliberate and discuss cases. It is known that the Marshall Court would dine together to discuss the cases and achieve a greater unity of the Court. Due to the increasing workload and development of differing judicial philosophies, this is no longer the case. Justices only briefly discuss the cases and vote. The vote at this stage is only tentative and is done to determine who will write an opinion for the case. The votes stay tentative until the final opinion is reached. Chief Justice is responsible for leading the conference and it largely depends on his interpersonal and managerial skills on how he will approach it. Some approach it in a rather more bureaucratic manner and strive for efficiency and equal distribution of opinions, some are more interested in the interpersonal relations on the Court, and some take into account both.

After they take a vote, the practice is that if the Chief Justice is in the majority, he assigns who will write the opinion for the Court. If he is not in the majority, it is the senior Associate Justice of the majority, who assigns the opinion-writing task. Chief Justices differ in how they handle the assignment task – some keep important cases to themselves and some distribute them more equally. It is said, generally, that Chief Justice Rehnquist and Chief Justice Roberts both strive(d) for equal distribution. This can of course be difficult – not all cases were created equal – some are more difficult, salient, or involve issues that justices find more important. Sometimes Chief Justice also thinks about the different areas of expertise of justices and assigns the opinions accordingly. For example, Justice Harry Blackmun used to

be counselor at the Mayo Clinic and was the one to write the Court's opinion in *Roe v. Wade*, so he was always associated with abortion cases. Lazarus (1999), a former Blackmun clerk, writes how the justice would read extensively about medical facts and testimonies whenever he had to research cases that dealt with abortion. Chief Justice Warren, on the other hand, was against specialization because it "discouraged collective decision making and might make a 'specialist' defensive when challenged" (in O'Brien 2014, 276). Sometimes, but not always, new justices are given to writing opinions on which the Court is unanimous because those opinions are generally considered to be easier to write. Opinion writing can also be assigned according to the "voting paradox", i.e. assigning "the case to the justice whose views are closest to the dissenters on the ground that his opinion would take a middle approach upon which both majority and minority could agree" (Danelski in O'Brien 2014, 274). Chief Justices do engage in strategic behavior when assigning opinions, but this is not necessarily motivated by ideological views of the policy outcomes, but by their judicial philosophy and vision of the role of the Court. Chief Justice Marshall thought it important that the Court acted unified and reached a collective decision in order to strengthen the image of the Court in the eyes of the public and elected branches. Others believe that diversity on the bench reflects the diversity of society; unanimity is therefore not to be artificially forced upon the members. Chief Justice Roberts tries more than his predecessor to reach a consensus and often assigns opinions to moderate and centrist justices, who normally do not write extreme opinions and command a majority with less difficulty.

4.6.1 Writing and circulating opinion

After a justice is assigned with writing an opinion, the most difficult and time-consuming task can begin. Justices differ in how they approach writing the first draft, but mostly this task is delegated to law clerks. Before a draft is circulated to other chambers, a justice reads it and makes some editorial or more substantive changes. Lazarus writes about the potentially enormous influence of some clerks. Draft opinions are written by inexperienced clerks, who have little insight into the bigger picture and the vision of the role of the Court, and who try to impress their justices; or worse, by ideologically-driven clerks who try to "lace[d] their opinion drafts with extreme theories in the hope that some would survive the editing process" (1999, 274). If we look at the whole process of writing and circulating opinion, however, extreme ideas probably do not fare well in the long run. It should be noted that not all justices delegate writing of the first draft to clerks. Famously, Justice Stevens normally wrote these

himself, and Justice Scalia engaged in this practice for cases that he found especially interesting.

On average, it takes approximately three weeks of work before a draft is circulated to other chambers. O'Brien (2014) lists the following factors to consider and that can potentially lengthen or shorten this time frame. Namely, it depends on whether a case is **important** and how **divisive** it is – not only on the Court, but also among a broader public. The **size of majority** at the conference contributes to the difficulty or easiness of the task. If the members vote **unanimously** at the conference, the author generally has an easier task, but if they are split 5-4, the author will probably try to accommodate the opinion to suit the most indecisive or centrist justices. Next, if the Court's decision **reverses the decision** of the lower court, the opinion should be even better-argued than if the final decision **affirms the lower court's decision**. Also, during this stage one of the justices can decide to **switch votes** and this can also lengthen the writing time as somebody else could take over the role of authoring the opinion if the switching vote contributes to a new majority. For several reasons a case can be **carried over to the next term**, which obviously prolongs the standard three-week time frame.

Circulating drafts only became a standard practice in the beginning of the twentieth century; the practice provides for deliberation, opportunities to build coalitions and enlarge majority, on the one hand, but also provides opportunities for shifting votes and fragmentation of the opinion. Justices sometimes use clerks for lobbying or inquiring about other justices' opinions. They can also threaten to write a separate opinion. This is why authors can decide to accommodate their opinion or tone down the language. Justices also inform authors that they would join the opinion if they add or omit parts of the draft. They can suggest minor or major changes that can drastically change the reasoning. The author then has to balance between engaging some additional justices and losing others due to changes; also, they must decide how much substance they are willing to change for a broader or different majority. The final decision can be a combination of compromises and different views, which can eventually lead to an opinion that is difficult to follow by the lower courts. Lazarus (1999) writes that in some cases it can lead to creating confusion instead of "delineating rights" (436).

It has to be noted though that switching votes and reassigning opinions do not occur too often, but it does happen that a dissenting opinion becomes a majority opinion. One of the most famous examples was opinion-writing in *Planned Parenthood of Southeastern Pennsylvania*

v. Casey (1992). What started as majority opinion, written by Chief Justice Rehnquist, which would have most probably overturned *Roe v. Wade* and made a path towards abolition of abortion, turned into a decision made together by the three centrist justices – O'Connor, Souter, and Kennedy.

4.6.2 Separate opinions

When it comes to writing separate opinions, the attitude of the Supreme Court members has changed dramatically since the Marshall Court. The difference between the beginnings when the members discussed cases at length to reach a collective decision and today's nine individual "law firms", justices' chambers, who normally only see each other at conferences and oral arguments, is tremendous. Until the beginning of the twentieth century, separate opinions were rare. O'Brien (2014) gives an explanation as to why this practice changed in the 1930s and 1940s. Namely, with the development of certain judicial philosophies, the New Deal justices started to gather around two major groups – those who advocated judicial self-restraint (for example, Frankfurter, Reed, Jackson) on the one hand, and the ones who advocated for more progressive judicial activism (for example, Black, Douglas, Murphy) on the other. Justices became increasingly more articulate in expressing their own views on judicial philosophy and the role of the Supreme Court in U.S. society. In addition, some say that Chief Justice Stone was perhaps less of a strong leader and could not (or perhaps did not want) stop the process of transforming "the Court's norm of consensus into one of the individual expression" (O'Brien 2014, 295).

The two types of separate opinions are:

a) DISSENTING OPINION is an opinion written by a justice who strongly disagrees with the majority opinion. When justices are especially dissatisfied with the Court's opinion, they will read their dissent, or parts of it, from the bench, and thus make a statement that the Court is not united in its decision; and a
b) CONCURRING OPINION is an opinion written by a justice who agrees with the Court's final decision, but believes that the Court should reach that decision on different grounds. So different that it should be noted by a separate opinion.

In those opinions justices do not have to make any compromises or accommodate them in any way to suit the majority opinion. It is said that through these opinions, the Court gives signals to lower courts and litigators about the direction their potential petitions should take. The rise

of individual opinions also points to fragmentation of the Court, which could be discomforting for the general public, who no longer sees the highest court of the country as a stable and predictable institution, but an institution prone to changes every time the composition on the bench changes. "[P]roliferation of individual opinions comes at the cost of consensus on the Court's policy making and the certainty and stability in the law" (O'Brien 2014, 297). By writing decisions that are difficult to implement in real situations, they also send signals to lower courts that they are not unified in their decision-making. But many justices defend the right to have a different opinion because this improves majority opinions by encouraging the author of the opinion to better argument their reasoning.

Justice Ginsburg claimed that "nothing is better than an impressive dissent to improve the opinion for the Court. A well-reasoned dissent will lead the author of the majority opinion to refine and clarify her initial circulation" (in O'Brien 2014, 304).

Justice Scalia added, "By enabling, indeed compelling, the Justices of our Court, through their personally signed majority, dissenting and concurring opinions, to set forth clear and consistent positions on both sides of the major legal issues of the day, it has kept the Court in the forefront of the intellectual development of the law….The Court itself is not just the central organ of legal *judgment*; it is central stage for significant legal *debate*" (in O'Brien 2014, 305–6).

4.7 U.S. Constitution and its interpretation

"Every generation gets the Constitution it deserves" (Feldman 2008). The U.S. Constitution is one of the most fundamental texts of the U.S. and its citizens. It structures the federal government into three branches; Article I established the legislative branch, Article II the executive branch, and Article III the judicial branch.

In 1787, delegates from 12 out of 13 states met in Philadelphia to discuss the future of the union and its organization. Rhode Island did not send its delegates to Philadelphia because they were against centralized government (Kaplan 2015). George Washington was elected to be the president of the Constitutional Convention. Delegates discussed the issues related to sovereign states that would together constitute one nation. Even though they agreed with the general idea, they differed greatly in how to achieve it. The distribution of power and the role of the federal and state governments were central issues that divided and still divide the U.S. to this day. Naturally, also the members of the Supreme Court, that reflect the views of

Americans, differ in how much some decision-making should be deferred to states instead of the federal government. Chief Justice Rehnquist and Justice O'Connor, for instance, were advocates for strong states. The Constitutional Convention was thus marked by compromises. For example, the issue of representation of smaller and larger states resulted in a Congress that was divided into the Senate, where each state, no matter the size of it, has two representatives, and the House of Representatives, where the number of representatives is attributed according to the state's population. It was also decided that in cases of conflict between federal and state law, federal law would prevail over state law. After the Convention, states had to deliberate and eventually ratify the Constitution. As the result of various disagreements and apprehension among states, ten amendments were added to the Constitution, called the Bill of Rights, which served to protect the civil rights of the people and control the power of the government. The federal government had to protect these rights. The powers that were not given to the federal government were left to the people and the states. The amendments are also known under more popular names, such as freedom of speech or the right to bear arms. Later, more amendments were added and today there are 27 amendments. The U.S. Constitution was ratified in 1788.

This seminal text was constructed with joint effort and was a result of compromise between the various actors that actively participated in its making. More than two hundred years after ratification, the Constitution has withstood the test of time, but judges and justices do not completely agree about its reading and interpretation. For example, **strict constructionists** believe in the literal reading of the text. Two main and opposing groups that disagree about reading the Constitution are **originalists** and **living constitutionalists**.

a) ORIGINALISM

Originalists believe that one should look for the original intent of the Framers and that one is ill-advised to "discover" new rights, as the late Justice Scalia would say. Such "new" rights, according to him, included the right of abortion and rights of homosexuals, for example. Justice Scalia was one of the most fervent advocates of such reading and believed that the Constitution served to "rigidify things" (Talbot 2015, 19). According to this view, originalism offers stability and keeps at bay reckless behavior that depends on the whim of individual justices and that could possibly change law according to their idiosyncratic ideas of fairness. This view also requires knowledge of history at the time of the founding of the nation and does not take into account accumulated wisdom or experience.

This view has been criticized, for instance, that even the Framers did not agree and had to make compromises during the writing process. The language of the Constitution is vague, which can lead to differing interpretations; even legal scholars and judges from lower courts sometimes disagree and ask the Supreme Court for clarification. If the wording were clear, the reading would be an easier task, and deciding very straight-forward.

b) LIVING CONSTITUTIONALISM

The underlying values make the Constitution still very much a relevant and authoritative text, and some believe that this vagueness is in fact an advantage and shows the genius of the Founding Fathers, as the text can, with some changes, still be applied more than two hundred years later. Justice Breyer, a famous advocate for LIVING CONSTITUTIONALISM, stated that if one is to seek the original meaning in the text, this could probably be done better by nine historians and not nine justices (Breyer 2010). The pragmatic view sees many gaps in the Constitution, which must be interpreted by the judiciary. For example, the emergence of many new issues, such as internet crime, internet surveillance, etc. cannot be dealt sufficiently by only having in mind the original intent of the Framers from the end of the 18th century. Critics of living constitutionalism point out that this interpretation is vulnerable to personal interpretation and frequent alterations because it is subjective.

On the other hand, critics of originalism warn of its rigidity. The society faces technological, social and political changes, and the Court should try and keep up the pace. If the original intent of the Framers is to be followed along with the traditions of the late 18th century, flogging would still be acceptable as a punishing measure, and schools would still be segregated (Chemerinsky (2010) claims that they are increasingly becoming segregated again). The justices should be pragmatic, according to living constitutionalism, and follow the development of American society, but also think about the consequences that could arise due to their decisions.

Justices and legal scholars are also divided when it comes to relating to judicial practices outside the U.S. For example, should international law be respected in the U.S. and should non-citizens have the same rights in the U.S. as its citizens. Feldman (2008) describes two opposing views on the matter.

One group, especially prominent during the George W. Bush presidency, is inward-oriented. They did not believe that non-citizens should have the same rights as U.S. citizens. However,

they themselves were not too sure how this would be seen by the U.S. public, so they opened a prisoner camp in Guantánamo Bay in Cuba and locked up people they thought were dangerous and complicit in terrorist crimes. The Bush administration did not want to afford those people the same rights as they would if they were locked up in the U.S. prisons, which are regulated by states, and thought they had found a legal loophole by locating them here. This careful consideration shows that the administration was aware of the legal constraints, but was consciously looking for ways to avoid them because of the view that, at home, U.S. law is above international law.

The opposing view is more outwardly directed. When the U.S. signs an international agreement, it should respect it the same way as if it originated from within the country. This view is more associated with liberals and underlies the idea that countries all over the world are connected globally. It also stems from the ideas behind the Geneva Conventions, for example, that countries should provide some minimal standards to foreign prisoners because they want their citizens to have the same rights in foreign countries. This view also holds that the underlying values of the U.S. Constitution are universal and should extend internationally, for the greater good. "What is most important about our Constitution, liberals stress, is not that it provides rights for us but that its vision of freedom ought to apply universally" (Feldman 2008).

Justices on the Supreme Court also generally favor one of the two views. When the Court decided in *Boumediene v. Bush* (2008) that prisoners locked in Guantánamo had the right to be protected by due process of law and the Geneva Conventions, Justice Scalia resolutely opposed, saying that the Court's decision "will almost certainly cause more Americans to be killed" (in Feldman 2008). The Court's majority in the case, on the other hand, wanted to prevent the executive and legislative branches from creating a situation where judicial review would not be possible.

It is difficult or even impossible to determine whose reading of the Constitution is the right one; this is probably a reminder that the Constitution, written more than two hundred years ago, could not foresee all the changes that the U.S. and the world would undergo, and therefore serves as a cursory instruction together with the Declaration of Independence and the Bill of Rights and should be adapted to the realities of modern times, while at the same time relying on the basic values of these seminal texts, namely, that society and its people

should strive for "Life, Liberty, and [the] Pursuit of Happiness" (in Kaplan 2015, 3) and that the government should protect and not destroy those rights.

Chief Justice Charles Evans Hughes famously said once "We live under a Constitution, but the Constitution is what the judges say it is." There is a fine line between interpreting the Constitution and making public policy. One justice might see his decision-making as only following the words of the Constitution and might call another justice's decision-making judicial activism. The public, on the other hand, could see the same behavior as the justice's pursuit of their own ideological policy preferences. There is no doubt that the Supreme Court is an important policy-maker, deciding which cases to hear and how to decide them. It is easier to get five votes (majority) out of nine on the Court than to get a majority in Congress, so different issues and policies are brought to the national agenda via the judiciary. Certainly, they have to pass through a minute sieve of cert. and merits stages, and after the Court brings a decision, it relies heavily on the executive and legislative branches to be implemented or altered, but the Court does have a considerable opportunity to pave the way for certain policy outcomes. In recent decades, the mantra "to change constitutional interpretation one must change the composition on the bench" is to an extent true – we have witnessed opposition from Congress whenever an opportunity opens up for a president to fill a place on the bench; especially if the two branches are from opposing parties, and if the balance between liberals and conservatives on the bench can change. A president can also try and appoint candidates who would promote the president's policies and change the direction of the current legal doctrine. Since the hearings of Bush's candidate, circuit judge Robert Bork, candidates for justices have shown considerable skills to avoid answering directly politically sensitive and divisive questions, or to answer them in a way that is difficult to predict how they will behave once they are appointed.

4.8 Models of decision-making

On the bench, justices' decision-making is a combination of their personal attitudes, legal views and constraints, persuasiveness of litigants, etc. Pacelle et al. (2011) describe three existing models of decision-making on the Supreme Court; namely, legal, attitudinal, and strategic models.

4.8.1 Legal models

According to the legal model, justices should decide cases within the norms of the Constitution and legal traditions, and should avoid making new laws. The rather insufficient view presupposes that for every legal question one should find law from existing legislation and not make it. The choice should not be guided by justices' moral preferences, but by "neutral principles" that advance the democratic values and moral principles of the Constitution. When decisions are not influenced by justices' ideological preferences, they are seen as more objective and more broadly applicable. Originalists stress the importance of the original intent of the Founding Fathers, so that new justices would not wield too much power and dramatically change the existing judicial philosophy. This view is not without problems. First of all, the Framers did not agree on many issues and the result was a compromise led by the unifying idea of people having the right to live in liberty and pursue a life of happiness. The language of the Constitution is oftentimes vague and leaves a lot of space for personal interpretation. When originalists want to avoid some of the new justices exerting too much influence on the Court, this poses a very subjective value decision. Is it to say that only the Framers from the end of the 18th century had the capacity to decide objectively and in the name of the greater good? In addition, were those, without a doubt fine, statesmen better equipped to deal with modern issues, such as how much personal privacy we are to hand to the government for greater security in the face of threats posed by global crime groups?

Legal realists are aware of the limitations of that view and contend that decision-making is a combination of legal frames (or constraints) and personal preferences. Many legal scholars agree that most justices normally pay attention to legal norms, and one of the most important is **stare decisis**.

Stare decisis

When deliberating about cases, the Court is restrained mostly by the Constitution, statutes, and precedents. Lower courts look to precedents when deciding cases and the Supreme Court does the same. Precedents have even more weight if there are more cases with the same or very similar issues that come to the same conclusion. Sometimes justices are said to choose cases whose reasoning could strengthen a certain precedent and "weave" it into the law so that it establishes a certain doctrine that is difficult to overturn. The doctrine of precedents also enables more stability and gives the Court more authority. Many judges and justices pay attention to precedents, but sometimes they do not agree with them. It is said that it takes

special attention if a precedent is to be overruled. The famous case *Casey* was based on the precedent *Roe v. Wade*, which gave women the right to choose to have an abortion or not. The more conservative justices, who have been more or less vocal in their opposition and preparedness to strike down that precedent, finally found a good case with which they could severely undermine *Roe*. However, the then three centrist Justices O'Connor, Kennedy, and Souter wrote a separate opinion, which would later become the Court's opinion, and upheld the precedent. Justice Souter wrote "[T]o overrule, under fire, in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy" (in Talbot 2015). The three centrist justices relied heavily on the Harlanesque approach to stare decisis. Namely, Justice Harlan was an advocate of incrementalism, so in order to overrule a precedent the Court needed especially persuasive reasons to do that, unless there was a truly fundamental error in the reasoning or some new facts emerged in the meantime. For a more detailed description on what went on during the opinion-writing, see Lazarus (1999). Perry (1991) in his research also showed that justices often pay more attention if they are to overrule precedents. On the other hand, if the law never changed and remained a medley of decisions from the beginning of the 19th century, segregation, for example, would still be constitutional.

4.8.2 Attitudinal model

Some scholars (most notably Segal and Spaeth) have promoted the view that since justices have reached their career pinnacle and are insulated from taking responsibility by their life-long tenure, they are able to pursue their policies based on ideological preferences. Legal constraint only serves as a pretext for their decisions that are actually fueled by their personal values and attitudes.

Even though this model sounds tempting, especially in lieu of the bitter campaign led by Congress against President Obama's nominee for the Supreme Court vacancy[8], some say (Pacelle et al.) that this model is better in predicting than it is in describing the motivation for justices' behavior.

The most obvious critique, of course, points out that justices are legal scholars, limited by various factors in their decision-making. They have respect for judicial legitimacy and the

[8] At the moment of writing, we are witness to a furious Republican campaign not to even offer Merrick Garland, President Obama's candidate to replace the late Justice Antonin Scalia, a chance of a hearing in the Senate. Some Republican senators who believe the candidate has the right to have a hearing supposedly face threats from the GOP leadership that they will not be given support in the next elections.

legal frameworks in which they operate. They also depend on other government branches; if the Court decided to act in a certain way and the executive and legislative branches chose not to implement the Court's decision, the authority of the Court would become meaningless, as it wields neither the power of the sword nor the purse. Justices also change their attitudes – during the span of their justiceships and also within the span of one case. Justice Blackmun, for instance, incrementally changed his attitude towards the capital punishment during his tenure on the bench due to the experience and witnessing various cases and circumstances of the death penalty. In 1994, he finally declared that he would no longer "tinker with the machinery of death" (in Lazarus 1999, 509) and converted to abolitionism. Justice Kennedy, after his supposed initial purpose of striking down *Roe* in *Casey*, was persuaded by the legal reasoning of Justices O'Connor and Souter. Well-developed oral arguments or amicus briefs also have the potential of changing justices' minds no matter what their attitudes are.

It is very difficult to measure the extend of influence of personal values and attitudes on justices' behavior on the Court, and even though upbringing and individual value system do have an impact on judges and justices, the attitudinal model is too simplistic to self-handedly explain the decision-making. One proof could be the relatively high occurrence of unanimous decisions – if justices were interested only in promoting their preferential policy outcomes, they would probably reach fewer unanimous decisions. It is, however, to be noted that unanimous decisions are more frequent with statutory cases and less so with constitutional cases, which tend to be more divisive (Pacelle et al. 2011).

4.8.3 Strategic models

The third model focuses on the strategic behavior of justices. Even though they have their preferences, they do understand that they are a part of a larger system – firstly, they are part of a nine-member court and, secondly, they are also part of the checks and balances system. According to these models, strategic behavior can be practiced throughout the decision-making process. In the beginning, at the cert. stage, justices can decide not to grant review to a petition because they know (or think) they cannot get the needed majority at the merits stage. They prefer to have the status quo of the current situation than to risk and make a situation worse. Chief Justice can act strategically in assigning opinion-writing to people with more moderate views, who can gather more votes. During opinion-writing, justices can have an influence on the final opinion by (subtly) hinting that they would join the opinion if the author added or omitted something from the opinion. They could also threaten to write a

dissenting opinion, so that author changes their, for example, initially more sweeping or extreme opinion.

It is interesting at this point to mention the profound influence of the so-called **swing justices**. These are justices who are generally more centrist and are on some issues more unpredictable than their more conservative or liberal colleagues. Justice O'Connor used to have such influence, and today Justice Kennedy has taken over the role. In fact, some scholars and journalists (for example, Toobin) write that this court is in fact the Kennedy Court as it is often split 4-4 and Kennedy often casts the crucial fifth vote to shift the balance on one side or the other. Even though Justice Kennedy is more conservative, he generally votes with the liberal justices in cases that deal with the rights of homosexuals. There have been speculations that the litigants and justices give more attention to suit the judicial philosophies of those justices when the Court is closely split.

Strategic models also consider strategic behavior in relation to the other government branches, which can undermine the Court's authority. The President can refuse to help implement the Court's decision and Congress can pass such laws to effectively undermine the impact of the Court.

It is, of course, very difficult to predict not only the fellow justices' reactions, but also the reactions of the other government branches, which is one of the main critiques of this model. Amicus briefs can, for instance, reveal the intention or views of the important actors, but the justices still operate within a legal frame, which gives the decision-making more authority and respect.

As we have seen, all the three models have some compelling reasoning in explaining justices' behavior when deciding what and how to decide, but neither is self-sufficient. I believe that only the interplay of factors at the micro-level (individual and attitudinal factors) and the macro-level (legal and institutional) can lead to a more comprehensive explanation. Justices are people with their own moral beliefs, but are also influenced by their legal background and are aware that they are a part of an institution. If they want to preserve the integrity of the institution of which they are also a part, they must behave in a certain way and respect the legal framework (or constraints – depending on the interpretation) to achieve decisions that will be respected by the other branches and the public. Justices are also aware that they are a part of checks and balances system, so they cannot completely disregard and disrespect the other branches by entirely selfish and self-serving decision-making.

This is why I propose a fourth model that combines all three models and is concerned with creating an agenda. On the one hand, agenda creates itself through the Court's various decisions. On the other hand, justices, by acknowledging different factors at play, try to form a legal doctrine or philosophy according to their views. The fact that there are nine different views ensures that the legal philosophy, with the exception of some policies, changes incrementally and is a result of compromises.

5 CASE STUDY: CITIZENS UNITED V. FEDERAL ELECTION COMMISSION

The case *Citizens United v. Federal Election Commission* (2010) came to the Court in 2009 because a non-profit organization called Citizens United contested the decision of the Federal Election Commission (hereafter F.E.C.) and the decision of the federal district court in Washington, both stating that they were not allowed to broadcast a documentary film as video-on-demand on cable TV. The documentary was "Hillary: The Movie" and it portrayed Hillary Clinton, who was at that time a presidential candidate, as an ambition-driven, deceitful, and corrupt politician. With the documentary, Citizens United wanted to discredit the candidate before the coming presidential elections in 2008. The F.E.C., however, banned it because they viewed it as "electioneering communication". According to the Bipartisan Campaign Reform Act (hereafter BCRA), it was prohibited to broadcast such communication in a specific timeframe before the elections.

In 2002, Congress passed the BCRA, with which they wanted to control corporations' and unions' influence in the democratic process of elections by limiting their financial expenditures and contributions. The Act prohibited corporations' and unions' financing of advertisement that advocated for or against a candidate 30 days prior to a primary or a caucus, and 60 days prior to general elections.

5.1 Previous efforts to regulate campaign finance

The common sense and experience of the people to mistrust corporations and their influence in democratic processes was also reflected in Congressional efforts to draw the line between people having the right to express their views and to be heard, on the one hand, and corporations and interest groups expressing their views, on the other. In 1907, Congress passed the Tillman Act, which prohibited corporations from giving direct contributions to political campaigns. The legislature saw the detrimental effect of money in politics, and, especially after Watergate, they tried to put this practice under control. In 1971, they passed the Federal Election Campaign Act (F.E.C.A.) to increase the transparency of contributions to federal campaigns. The Act was amended several times; it added limits on campaign contributions, and in general imposed more requirements for individuals running for posts at the federal level, political parties, and political action committees (PACs). Still, political parties could spend unlimited amounts of soft money for so-called party-building activities,

such as candidate-related issue advertisements, whose supposed function is to educate voters. Those advertisements could target candidates and could attribute to them behavior or views that are misleading as long as they do not clearly advocate or oppose them. Mayer (2011) writes that often those advertisements do not have any informative value, but serve to smear them and compromise their chances of (re)election.

The Supreme Court responded and in *Buckley v. Valeo* (1976) decided that limiting individual contributions in federal elections was not unconstitutional because it prevented corruption or appearance of corruption, but that limiting independent expenditures violated the First Amendment and freedom of speech.

In 1990, in *Austin v. Michigan Chamber of Commerce*, the Court upheld the limitations for corporate spending and using treasury money to support or oppose candidates in federal elections. Corporations, on the other hand, could set up independent funds, which could be used for political purposes.

Congress again reacted by passing the BCRA, also known as McCain-Feingold Act after the main authors Senators John McCain and Russell Feingold, with which it amended the F.E.C.A. and *inter alia* set limits on interest groups' and political parties' contributions and prohibited issue advocacy advertisements that promoted or opposed a candidate at the federal level 30 days prior to a primary or a caucus, or 60 days prior to general elections.

Issues related to campaign financing kept coming to the Court and formed blocks mainly around two predominant ideas – one side saw this regulation as governmental overreach into the basic right of the people and corporations to have freedom of speech, while the other side warned against the dangers of intrusion of money, especially large amounts of money from corporations, into politics. With the decision *McConnell v. Federal Election Commission* (2003), the Court upheld the part of the McCain-Feingold Act that limited campaign expenditures by corporations and trade unions in order to prevent corruption or appearance of corruption. The Congressional effort to control corporations' and trade unions' political engagement was incrementally modified by the judiciary until *Citizens United* dramatically swayed the balance of campaign finance to one side.

5.2 First argument

Organization Citizens United decided to contest the decisions from the Commission and the lower court that their documentary "Hillary: The Movie" could not be broadcast on cable TV as video-on-demand, and employed an experienced litigator before the Court, namely Theodore B. Olson, to represent them. In the brief on merits and during the oral argument, Olson phrased his argument very narrowly; he only pointed out that the McCain-Feingold Act prohibited broadcasting TV commercials and did not address long documentaries. He never contested the constitutionality of the Act or broadened it to address the violation of the First Amendment – freedom of speech.

The first oral argument took place on 24 March 2009. After Olson presented his side of the argument, it was time for the Deputy Solicitor General Malcolm Stewart, who represented the F.E.C., to use his 30 minutes. During the argument, Justice Alito asked him:

> "Do you think the Constitution required Congress to draw the line where it did, limiting this to broadcast and cable and so forth? What's your answer to Mr. Olson's point that there isn't any constitutional difference between the distribution of this movie on video demand and providing access on the Internet, providing DVDs, either through a commercial service or maybe in a public library, providing the same thing in a book? Would the Constitution permit the restriction of all of those as well?"

To which Stewart replied:

> "I think the – the Constitution would have permitted Congress to apply the electioneering communication restrictions to the extent that they were otherwise constitutional under Wisconsin Right to Life. Those could have been applied to additional media as well. And it's worth remembering that the preexisting Federal Election Campaign Act restrictions on corporate electioneering which have been limited by this Court's decisions to express advocacy."

Conservative Justices Alito and Kennedy, and Chief Justice Roberts, who suddenly realized that this could be a good vehicle to address a different issue – freedom of speech –, kept pressuring Stewart, who eventually said that Congress could ban publishing a long book that had a brief mentioning for whom to vote in the end if the corporation, a publishing house, for example, used the corporate treasury funds and not PAC funds. What had started as a narrow

issue of a provision of the McCain-Feingold Act suddenly changed, according to some justices on the bench, into the issues of governmental overreach of censorship and freedom of speech.

Upon having heard the oral argument, the justices voted at a conference to reach the following standing: Chief Justice Roberts, Justices Scalia, Thomas, Kennedy and Alito voted in favor of Citizens United, while Justices Stevens, Souter, Breyer and Ginsburg voted against it. Chief Justice first assigned opinion-writing to himself, but after the circulation of Kennedy's concurring opinion, in which he asserted that the Court should give a more sweeping opinion on behalf of free speech, the justices in the majority joined Kennedy's opinion, which seemed to have become the opinion of the Court. On the opposing side, Senior Associate Justice Stevens assigned writing of the dissenting opinion to Justice Souter. Justice Souter, annoyed at the emergence of an issue that was not even raised in the case, "accused the Chief Justice of violating the Court's own procedures to engineer the result he wanted" (Toobin 2012).

Faced with such a bitterly divided Court, the Chief Justice cunningly decided that a case should be rescheduled for reargument in the following term, but this time with new Questions Presented. With this strategic move, the Chief Justice wanted to tone down the heated emotions that could be detrimental to the image of the Court. In addition, by changing the Questions Presented, he managed to change the direction of the case that could result in the policy outcome preferred by the conservative factions on the Court and beyond.

On 29 June 2009, on the last day of October Term 2008, it was announced that the case was to be rescheduled to the next term. The parties were asked to file new briefs in which they had to address the new questions. The curious fact was also that the reargument was scheduled for 9 September 2009, which was before the official start of the new October Term (Toobin 2012). This was not precedential, but it was hardly part of regular practice.

5.3 Reargument

It seemed that the justices came to the reargument with their minds already set. The only difference on the bench was that Justice Sonia Sotomayor had replaced Justice David Souter, who retired on 29 June 2009, but this did not change the ideological set-up on the bench.

Again, Olson started the reargument and was soon questioned by liberal justices, especially Justices Ginsburg, Breyer, and Stevens, who were all in favor of narrowly deciding the case to only address the issue of documentary under the BCRA. This time the amici curiae also got a

chance to represent their views. Floyd Abrams represented Senator Mitch McConnell, who acted as amicus curiae, in support of the Appellant.

Then it was time for the Appellee to present their side. The new Solicitor General Elena Kagan, who would soon replace Justice Stevens on the bench, started her argument by reminding the Court that the legislature had had a long tradition of treating corporations differently than individuals, and that the Court had never questioned that. Justice Scalia quickly interrupted her by saying that only because the Court had never questioned that did not mean that it had approved of it either, pointing that the Court was not a "self-starting institution". With Kagan, speaking about the dangers of corporate electioneering, it was now time for the conservative justices to question and analyze every detail of the government's view. Chief Justice Roberts especially pressed Solicitor General Kagan to give the government's view on some precedents that had led to the situation where First Amendment rights, according to some justices, could be violated. In addition, when the question of shareholders' potential disagreement with the corporations' use of finances was brought up, the Chief Justice expressed the concern that the government was perhaps too "paternalistic" and that it implied that shareholders were "too stupid to keep track of what their corporations [were] doing". This in my view is very characteristic of the conservative and Republican idea that the government should not interfere in business and economy, and perhaps pointed to a policy outcome that was favorable to Roberts.

After the reargument, the votes did not change. The Chief Justice assigned opinion-writing to Justice Kennedy, which many believe was a good strategic move. By not writing the opinion himself, the Chief Justice could deflect criticisms that he would probably have had to face if he himself had called for the overruling of two of the Court's precedents. In his confirmation hearing, he underlined the importance of stare decisis and explained that "[j]udges are like umpires. Umpires don't make the rules, they apply them" (in Chemerinsky 2010, 250), Second, even though Justice Kennedy was not considered as conservative as Justices Scalia and Thomas, he was a strong advocate for freedom of speech. Indeed, he wrote in the Court's opinion that freedom of speech should also extend to corporations; during the oral argument, he told the Solicitor General that it is wrong that the government wants to silence them. "Corporations have lots of knowledge about environment, transportation issues, and you are silencing them during the election." The opinion overruled two of the Court's precedents, namely *Austin v. Michigan Chamber of Commerce* (1990) and *McConnell v. Federal Election Commission* (2003), and declared parts of the McCain-Feingold Act unconstitutional. Limits

on direct corporate contributions were not addressed in the opinion and remained the same, but non-profit and for-profit organizations, labor unions, and other associations were allowed to spend their money without time restrictions. According to the majority, the government did not have the right to prohibit corporate and union expenditures on candidates and political parties in federal elections because it did not have the right to regulate political speech. *Citizens United* allowed corporations to spend their finances in the way they wanted as long as this was done independently of any candidate or political party. This gave rise to the so-called super PACs, which support individual candidates and political parties. Even though super PACs have to be completely independent from candidates' campaigns and are not allowed to coordinate with them, in reality, they are frequently run by candidates' former administrative staff or somebody close to them. Super PACs can essentially smear other candidates under the pretext of educating voters and can operate with higher amounts of money since they are much more loosely regulated than official candidates' campaigns, which have limits on how much they can receive from individuals and groups.

There were many separate opinions in *Citizens United*. Chief Justice Robert wrote a concurring opinion, joined by Justice Alito, in which he accused the government of censoring political speech. According to him, it was unconstitutional to prohibit speech "even if the speaker is a corporation or a union." Justice Scalia wrote another concurring opinion, joined by Chief Justice Roberts and Justice Alito, and Justice Thomas wrote a third one, in which he was critical that the Court did not go "far enough"; among other things he called for abolishing donor disclosure and described how some people were threatened because they donated to certain campaigns. Justice Stevens wrote a dissenting opinion, joined by Justices Ginsburg, Breyer, and Sotomayor, in which he was critical of the Court's broad ruling. In a memorable dissent, he declared:

> "Essentially, five Justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law."

Sometimes, when justices want to make a point of disagreeing with the Court's decision, they will also read their separate opinion, the whole or parts of it, from the bench. Justice Stevens seized the opportunity and read excerpts of his 90-page dissenting opinion and chided the Court's decision, which eventually led to corporations and rich individuals having even more chance to reach and influence the wider public. He concluded:

> "While American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics."

5.4 Analysis

Even though most of the Supreme Court decisions are not subject to careful scrutiny from the public and other government branches – many of the decisions are reached unanimously (during the October Term 2013, the Court was unanimous in 66% of all cases, for more see Bhatia 2014, and Katyal 2014) – certain cases stand out for inciting the interest of the media and the public. *Citizens United v. F.E.C.* is a good example for a case study for many reasons; because it deals with campaign financing it has a direct applicative value that can be seen during every election period. The issues the case tackles are divisive not only among legal scholars but also among the broader public.

The divisiveness has split largely according to the ideological lines; liberals advocating for government regulation of large amounts of money that enter politics through corporations and thus change elections into a "one dollar, one vote" (Cassidy 2014) reality, meaning that the more money you invest in elections, the more influence you gain on government and policy outcomes. Some groups of citizens, especially the poor and some minority groups, could therefore no longer stand on equal footing with the well-to-do in the democratic processes. On the other hand, conservatives call for the government to stay away and not interfere with the basic right given to U.S. citizens with the First Amendment of the Constitution – freedom of speech. Any government interfering or regulating in this sphere is thus seen as censoring and distorting the democratic principles of the U.S.

Even though we do not know a lot about how the justices thought about the petition for certiorari for this case and the issues from the Questions Presented in the initial brief, the fact is that it was granted a writ of certiorari. The interesting part is that after the first oral argument, Chief Justice Roberts decided to reschedule the case for reargument to the following term and changed the Questions Presented. In this way the case was modified to suit the majority, albeit tentative, that formed already after the first argument. This was the kind of petition those five justices found certworthy and were willing to hear. One can speculate that even if the case came to the Court as it was formed for the reargument, the liberal justices, anticipating how the conservative wing on the Court viewed the rights of corporations and freedom of speech, would not be able to behave strategically and prevent the case from ending on the discuss list and be taken to the merits stage. Strategy, when justices

expect that their preferred outcome would be difficult to achieve, works differently at different stages. Firstly, in the cert. stage justices can try to 'bury' a cert. and leave the preferred status quo and, secondly, in the merits stage, justices can try to 'minimize the damage' and persuade the author of the opinion to decide on different or more narrow grounds.

One could suspect that the case was important and salient because of the large amount of amicus briefs; especially after the first oral argument, when the Court asked for parties to file merits brief to address the modified issues – there were more than ten on each side, from senators to unions and other organizations. The more the case is relevant and addresses issues that touch broader public, the more amicus briefs there will be, each trying to add a nuance and underline the importance of their views. In the reargument, the Court allocated some time for amici curiae on both sides; in support of Citizens United, Floyd Abrams spoke for Senator Mitch McConnell, and on the side of the F.E.C., Seth P. Waxman spoke for Senators John McCain and others. The fact that there were so many amicus briefs shows that many actors outside the Court were interested and had an opinion about the issue. There are many examples of how the Constitution and its amendments are read differently, according to one's ideology, and the question of government regulation in political campaigns is certainly one of them.

Since one of the parties in the dispute was a federal agency, the representation of that party was given to the Office of the Solicitor General. As mentioned before, the research shows that the presence of the Solicitor General increases the chances that the petition the office advocates for gets through the cert. stage, and has a higher rate of success in the merits stage, but let us now turn to Black and Owens' research (2012) on how the influence of the SG on the Court is determined by the presence or absence of legal and/or policy agreement with the justices. After the first argument, it was clear that the majority on the Court did not agree with the policy outcome favored by the SG, which did not change until the end. Both blocks, the one that agreed with the policy outcome favored by the SG (liberals) and the one that disagreed with it (conservatives), found legal support for their standing. So even though the research shows that the Court has a high regard for the recommendations of the SG, in a case where members of the Court feel strongly about issues, and policy outcomes are the result of different readings of the Constitution, the justices will less likely consider the SG's reasoning compelling. In this case study, it was partially the answer of the Deputy Solicitor General

Malcolm Stewart (who was the lawyer for F.E.C.) during the oral argument that led to changing of contents of the case and eventually to the defeat for the government.

This brings us to the importance of oral argument. In this case we can see an example of both views; the one that says that oral argument is not important and only serves as a show for the public and the one that says that it can decide the case. Even though justices are famous for asking hypothetical questions, which are sometimes only vaguely connected to the issues of the case, they normally do not change the substance of the case. In *Citizens United* some justices managed to change the direction of the oral argument and the case so that they expanded the original issue; the original issue of whether one documentary functioned as electioneering communication and should therefore be banned from broadcasting during a designated timeframe before elections under the BCRA changed into the issue of whether the corporations and unions can spend their finances in political campaigns and thus exercise their rights under the First Amendment. The reargument, on the other hand, seemed to have changed nothing. Justices did not move their positions, even though Justice Stevens throughout the reargument kept asking the litigants and indirectly his fellow justices why the case could not be decided more narrowly and remain within the context of the initial position of the brief.

As has been mentioned (Black et al. 2011), justices behave and speak in a certain way during the oral argument that can reveal what they think about the case and where they see weaknesses and strengths. Justice Thomas was almost sure not to ask any questions, but in constitutional matters it was quite clear how he would vote since he was (and still is) a staunch advocate of originalism and had throughout his career on the Court solidly voted along very conservative lines. Throughout the two oral arguments, but especially during the reargument, the lawyer representing Citizens United was mostly questioned by the liberal justices, and when it was time for the SG, it was mostly conservative justices who were inquiring about the government views on different issues and some precedents. This is in line with research from Black et al. (2011), for example, that justices act emotionally and use more hostile language and ask more argumentative questions of the side that they do not agree with. Justices Sotomayor and Stevens said that oral argument served as a dialogue between justices and had the function of clearing up what other justices think about a case. This was clearly visible during the reargument. For example, when Justice Breyer asked the lawyer for Citizens United a question, it was Justice Kennedy who offered the answer, or when Justice Scalia asked the SG a question, it was Justice Stevens who offered his view. When justices

asked rather difficult or provocative questions, it was the justices from the other block who would sometimes offer an answer (with which the lawyers would agree) and indicate in which direction the lawyer should develop their reasoning.

Justices generally try to use neutral language during an oral argument, except for Justice Scalia, who was famous for regularly using provocative and colorful language; during the reargument, when the Citizens United lawyer was asked to clarify an issue in rebuttal, he quipped "Don't keep us in suspense!" and provoked laughter in the courtroom. When justices feel strongly about certain outcomes, they resort to more emotional language. The Chief Justice asked, for example, "[I]sn't it extraordinarily paternalistic for the government to take the position that shareholders are too stupid to keep track of what their corporations are doing and can't sell their shares or object in the corporate context if they don't like it?"

Justice Scalia openly questioned the intentions of Congress in regulating campaign finance. "Congress has a self-interest. I mean, we -- we are suspicious of congressional action in the First Amendment area precisely because we -- at least I am -- I doubt that one can expect a body of incumbents to draw election restrictions that do not favor incumbents. Now is that excessively cynical of me? I don't think so." This illustrates the mistrust between the branches and their need to regulate one another. This struggle for power and respect, and the mistrust of each other resulted in efforts to regulate campaign finances.

After the reargument, Chief Justice Roberts assigned opinion-writing to Justice Kennedy, who already started this task in the previous term after he had gathered the majority for his separate opinion after the first argument.

The case produced many separate opinions, opinions that partly concurred and/or partly dissented with the Court's opinion, which showed the reality of the fractured Court. Even though a majority was reached, there were differences of opinions in how to reach the decision. This fragmentation points to different issues. First, it is especially characteristic of the constitutional issues to be divisive and partisan because ideology often dictates how one reads and understands the Constitution and, consequently, how one sees the role of the government and relationship between state and federal levels. Second, we can see that reading the Constitution is not a straight-forward task if even the highest court in the country does not agree on it, even if they all have in mind the same underlying democratic values and principles. Third, it is a sign of democracy that people have different opinions and can present them to each other; in that respect, nine non-elected justices represent the versatility of the

ideas and views of U.S. society. Fourth, this fragmentation, on the other hand, can also contribute to the confusion and chaos on lower courts. Because state courts and lower federal courts have to follow the decisions of the Supreme Court, it makes it more difficult to follow them if decisions are a hash of different compromises.

The fact that five out of nine votes are needed necessarily creates versatility of ideas, and that versatility, in my view, points to the effectiveness of the separation of powers principle, that ensures scrutiny and control, so that none of the branches can become too powerful and/or silence the views of minorities or people who think differently. As James Madison wrote in the Federalist Papers, "If men were angels, no government would be necessary."

We can now proceed with the legal models of decision-making. Reading the Constitution is a complex affair because its wording is often vague and cannot be applied directly to the issues of modern times. The issue of corporations and labor unions having the right to spend vast amounts of money for political campaigns during a specific time frame is obviously not directly covered in the Constitution. Conservative justices equaled this right with the right to speak freely and viewed the Congressional efforts to regulate it as an act of censorship. Liberal justices and Solicitor General Kagan, on the other hand, saw the potentially harmful influence of money in political processes. During the reargument, Kagan said "when corporations play in the political process, they want winners, they want people who will produce outcomes for them." In the final opinion, the Court struck down fully or partially two precedents (*Austin v. Michigan Chamber of Commerce* was overruled and *McConnell v. Federal Election Commission* was partially overruled) and declared some provisions of the BCRA unconstitutional.

The doctrine of stare decisis is also a part of the legal consideration of the justices. On the one hand, precedents provide stability, certainty, and legitimacy, but if they had never been overruled, some practices that used to be perfectly normal, such as slavery, might still have been legal. Generally, justices say that they have a great respect for precedents; many justices (e.g. Harlan, O'Connor and Souter) believe that changes should occur gradually and due to new information and knowledge. Experience, however, shows that justices are not always consistent. When it suits their policy outcome not to overrule a precedent, they might urge for judicial restraint and accuse the other justices of indulging in judicial activism. When they do not agree with the precedent, they can always point to some bad decisions from the past, such as *Dred Scott v. Sandford* (with which they declared that black people were not citizens

according to the Constitution), and justify their behavior by saying that the precedent is not "an inexorable command" (Chief Justice Rehnquist in O'Brien 2012, 184). Also, in *Citizens United* the Court decided to overrule and partially overrule two precedents – one of almost 20 years (*Austin*) and one recent one (*McConnell*). As Justice Thurgood Marshall said once "Neither the law nor the facts […] underwent any change in the past […] years. Only the personnel of this Court did" (in O'Brien 2014, 185). Even though the conservative and liberal wings have both accused each other of judicial activism to produce certain policy outcomes and, broadly speaking, agenda, they have both engaged in such decision-making. Judicial activism as such is not so problematic if it is done in a consistent and principled way with careful consideration.

It seems that in *Citizens United*, the decision-making was done according to some justices' preferences for a certain policy outcome, for an agenda that was advantageous to elites and the well-to-do. Justice Thomas's concurring opinion, in which he called for an even broader "constitutional analysis", is especially interesting if we compare the opinion to *Morse v. Frederick* (2007), where a high-school student in Alaska was suspended from school for ten days for holding the sign "Bong Hits 4 Jesus" in front of a TV camera. In that case, Justice Thomas wrote a separate opinion saying that the Court should decide in a sweeping way and declare that students have no right of freedom of speech at all. According to his research, the First Amendment did not extend to student speech in public schools in the 19th century. Justice Thomas (and late Justice Scalia) describes himself as an originalist and claims that his ideology or preferred policy outcomes do not interfere with his reasoning and are only restrained by the Constitution and the original intent.

Justices claim that their moral values and ideologies do not play a role in how they decide on the Court, but that they rely on the Constitution and legal traditions. Justices and legal scholars describe themselves as originalists, living constitutionalists, living originalists, textualists, etc. But sometimes it seems that their reading depends on their preferred policy outcomes. This is one of the reasons one can attempt to explain the difference in justices' opinions on who has the right to freedom of speech – corporations and/or students.

If we look at strategic behavior on the Court in *Citizens United*, the most obvious example would be rescheduling the case to the following term with a different set of issues. We do not know a lot about the opinion-writing process in this case, but from the past experience, we can assume justices tried to persuade each other and especially the author. From the large

number of separate opinions we can conclude that eventually there was not much strategy-seeking going on or that the author did not agree with some suggestions from his colleagues, so they decided to vocalize their different views separately.

It is difficult to ascertain what the justices' exact motives were, firstly, when they decided to grant a writ of certiorari and, later, during the merits stage, when they were examining the case in detail. From the analysis of the two oral arguments, separate opinions and the Court's opinion, we can say that two blocks with ideologically opposite views were formed. The two blocks did not agree on the government's role in regulating campaign finance, with each individual citing their own understanding of the Constitution and relying on legal restraints depending on the attitudinal judgment of the issues presented in the case. In my view, different elements could indicate the presence of strategic behavior; in the cert, stage, some justices might already have seen the possibility of broadening the scope of the case and saw it as a good vehicle for their preferred policy outcome. Furthermore, the fact that five votes after the first argument remained unchanged can also point to strategic behavior of those justices, who might have felt that they found a majority on the issue that was important to them and tried to protect it. Effectively, all of the justices work with a certain legal doctrine in mind that would result in a certain set of public policies and, ultimately, agenda. Justices' legal philosophies range from quite liberal (on this Court there are no very liberal justices) to very conservative justices, but, fortunately, at least five votes are needed to reach the final decision. The question of judicial activism on the Court, in my view, is not so important because especially constitutional cases are divisive and it is difficult to give an ultimate answer as to who is right and who is wrong, and there will always be somebody who will find the Court's opinion flawed and accuse it of judicial activism. Many people thought the Warren Court (1953–1969) engaged in judicial activism, while others claimed the Court was only responding to the realities of a society that was changing significantly. Had the Court not responded and exercised judicial restraint, segregation would have remained legal. On a daily basis, the Supreme Court is asked to give their view and rule in different statutory and constitutional matters, and they respond by filling the lacunae or "voids" in the Constitution that so many of the cases address. In this sense, they are advancing their views and visions and, by choosing which voids they will fill, creating their own agenda. Obviously, in 2009, the conditions were ripe for the Court to decide that corporations had the right to spend their finances how they liked in the political campaign at the most crucial time, just before elections. It seems also that the time was right to overrule some precedents and decide that

Congressional efforts on the issues had to be modified. Most of the justices who were in the majority generally favor(ed) judicial restraint, but their argument for overruling cases can always be that they were only trying to fix the damage that had been done by previous decisions. Incidentally, three of the justices from the *Citizens United* majority (namely, Justices Scalia, Kennedy, and Thomas), who are either originalists and/or proponents of stare decisis, were also in the majority in *Bush v. Gore* (2000), which reversed the decision of the Florida Supreme Court and stopped the recount of votes during the presidential campaign. This was an act of judicial activism, with which the Rehnquist Court decided not to defer this political question to the elected branches and to the state of Florida, but decided to intervene.

Fortunately, the Supreme Court agenda is not created by one person, but is the result of at least five (not always the same five) opinions and legal doctrines that can to an extent regulate each other and improve the final result.

To put *Citizens United* in a practical perspective, let us briefly describe the case's consequences on U.S. society. The decision gave rise to contributions to super PACs and individuals who now contribute large amounts of money for various activities and services and whose primary goal is to have an influence on who gets elected and in this way try to pursue the policy outcomes of their preference. Various research shows (for more see Mayer 2011 and Confessore et al. 2015) that this influence is mostly in the hands of "white, rich, older and male" individuals (Confessore et al. 2015), who are far from an accurate representation of the country's population. This money is not allowed to finance advertisements that directly oppose or favor the election of a certain advocate, but many of them have no informative value and are used mostly to smear and portray candidates in a very disagreeable manner. In her research of campaign financing in North Carolina, Mayer (2011) described how the wealth of one individual was able to creep even in the education system of the state. The state Republican legislative majority, which this individual helped get elected by financing them in abundance, managed to cut the budget for education. On the other hand, he contributed large amounts to fund the academic programs of his liking. This is a chilling example of the perfidious way money (or in the words of the Court's majority, free speech) can be used to advance interests and policy outcomes of the elites who do not necessarily have in mind the greater good of a broad population. Of course, the Court's majority in *Citizens United* could maybe not have predicted this course of events or perhaps prefers to have it this way than restricting freedom of speech, but this shows the necessity of people knowing and engaging actively in the civic processes to be able to consciously make

decisions about what kind of society they would like to live in and which candidates they want to represent them. The good news is that the Founding Fathers built a solid foundation, with which they tried to prevent accumulation of power in the hands of individuals or elites. The 'bad' news is that people need to actively engage and learn about politics and policies, so that they can make educated decisions and not let individuals or groups decide instead of them, or even against their well-being. After all, "all men are created equal" and have the right to "Life, Liberty and the pursuit of Happiness" (Declaration of Independence).

6 CONCLUSION

Decision-making on the Supreme Court is influenced by many internal and external factors. The judiciary is one of the three co-equal branches and has some responsibilities that stem from the Constitution, but some that are the result of legal philosophies and that were hard fought for. Through his interpretation of the Constitution, Chief Justice Marshall transformed the least dangerous branch (and the Supreme Court) into a branch that is respected and considered by the legislative and executive branches. It has not always been easy; the Court had to rely on the President, Congress, and the public to implement its decisions and help build the authority that it has today. Relying on legal traditions, the Constitution and the Amendments provide the Court with stability and legitimacy.

The Court receives thousands of petitions every term, but since the Congressional Act of 1925 gave it the right to choose to which they will grant a writ of certiorari, they can actually manage their docket and set an agenda of their own. By choosing issues that are worthy of the Court's attention and that through its decisions become the law of the country, the Court has an opportunity to shape its agenda according to its views on the role of the judiciary. But justices have different views on the intent of the Framing Fathers – from the type of policies that should be regulated by government and to what extent, to the relationship between the state and the federal levels.

Some say that justices rely only on legal considerations and give a lot of attention to legal precedents and traditions of the institution. This is without a doubt a relevant factor, but it cannot explain why justices sometimes have different views on issues, especially on the ones related to the Constitution. After all, they are reading the same text. Reading and understanding the Constitution is a combination of internal factors, such as ideology, attitudes and legal philosophies, and external factors, such as legal traditions and precedents. Adherence to precedents seems to be affected by the same factors; when justices agree with the precedent, they will rely on it and try to incorporate it into other decisions, so it becomes more difficult to overrule it. If they do not agree with it, they will generally try to find the most compelling reasons to overturn it. Their attitudes and ideological beliefs to an extent guide justices to vote for certain policy outcomes. Strategic behavior can also be found on the Court; justices themselves admit to trying to persuade (but not coerce) each other with their reasoning. But this type of behavior is more prominent in the cert. stage, when, for instance, they reject the writ of certiorari and preserve the status quo instead of granting it and possibly

making the situation worse with the final decision. The Chief Justice can assign writing of the opinion strategically, but that does not mean this position has the most influence. In recent decades, the most influential justices were those in the ideological center. On this Court, it is Justice Kennedy who is often the swing vote, as the others are often divided along the ideological lines in the constitutional cases.

Those three models (legal, attitudinal, and strategic) can be combined into a fourth one – an agenda-based model that takes into consideration the legal constraints of the environment, justices' ideological preferences, their acknowledgment of the situation, and their appropriate action thereupon. Each of the three models offers an important insight into the process, but is insufficient by itself. The agenda-based model relies on the ideology of the Court's members, but also on their ideas about the direction that the Court should be taking and the legal doctrine it should be pursuing. In this respect, the Court sets the example for the lower courts and leads the direction of the judicial branch.

There are also other players who affect the decision-making process; namely law clerks and the Office of the Solicitor General. Law clerks, sometimes also called the junior justices, can help justices tremendously – by helping them research issues and by offering them a different perspective, especially when they differ ideologically. Generally, clerks stay on the Court for one year, which gives them just enough time to see how the Court works, but not enough time to really leave a lasting and powerful impact. The Solicitor General, on the other hand, is an experienced and recurring expert in Supreme Court litigation and is sometimes called the tenth justice. The institution of the Office of the Solicitor General enjoys respect because of its quality and experience. It has a high success rate, but it is the most influential when it is not a direct party, but called to give its independent recommendation. However, when the issues are ideological and connected to the constitutional matters, justices are less likely to be influenced by other actors, but follow their own legal philosophies.

My research into the Court's practices and the case study confirm that there are many factors at play in the decision-making process. Justices do behave strategically and engage in persuasion; in the cert. stage, they can vote against granting a cert., but if an issue is important, it will keep appearing on the Court's docket and eventually, when the conditions are ripe, it will get through to the merits stage. In the merits stage, justices will through separate opinions try and influence each other how sweeping the final decision should be.

Personal political and ideological preferences are less important in statutory cases, but are more prominent in constitutional cases. Since adopting the Constitution, its reading and application to cases has resulted in a continual struggle and clash of differing ideas. Attitudinal judgments of the government's role and its extent in regulation affect legal reasoning. Conservatives are more likely to find reasoning and compelling precedents to do away with government regulation in economic matters, while liberals come up with their reasoning and other compelling precedents for the government not to interfere in private issues and ones of morality.

Ideology and political preferences, however, are not the only driving force on the Court. Justices are legal experts who have been trained in law schools and have varying legal experience in lower courts, private practice, and as law professors. If they pursued their agenda purely on ideological and political grounds, the legitimacy of the institution would suffer and they would lose their credibility.

It is a combination of personal efforts to build the institution's credibility by establishing a legal doctrine that does not change every time the composition on the bench changes and institutional constraints, such as needing a majority to decide cases, that affect how the Court establishes its agenda.

The hypothesis that the decision-making on the Court creates an agenda that is influenced by legal considerations, preferred policy outcomes that reflect justices' ideological attitudes, and their conscious decisions to assess whether their preferred policy outcomes have a realistic chance of prevailing at the merits stage can be confirmed. The decision-making process on the highest court in the country is still intriguing as justices react to new and emerging issues of today's reality. The fact that there are nine individuals on the Court ensures that no individual's agenda prevails, but that the agenda is the effort of all nine justices, who modify, ameliorate, and enrich each other's views to steer the direction of the judiciary. Hopefully, all the Court members decide according to the underlying principles and ideas of the Constitution and Declaration of Independence that all people are equal and free, and that they deserve to have those rights protected.

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8 POVZETEK MAGISTRSKE NALOGE V SLOVENSKEM JEZIKU

Vrhovno sodišče Združenih držav Amerike je najvišje sodišče v državi. Člen 3 Ustave ZDA ustanavlja zvezno sodno vejo oblasti; člen 3, razdelek 1 pa eno vrhovno sodišče.

Sodni sistem ima na zvezni ravni tri ravni: 94 je okrožnih sodišč, 13 pritožbenih sodišč za prav toliko zveznih sodnih okrožij in eno vrhovno sodišče. Na vrhovnem sodišču je osem vrhovnih sodnikov (*Associate Justice*) in predsednik vrhovnega sodišča (*Chief Justice*); število vrhovnih sodnikov ni določeno z ustavo in se je skozi zgodovino spreminjalo, leta 1869 pa se je ustalilo na devet, kar se do danes ni spremenilo. Od leta 2005 je predsednik sodišča John Roberts. Vsi vrhovni sodniki so imenovani dosmrtno, kar jim zagotavlja visoko stopnjo avtonomije, da lahko svoje delo opravljajo brez zunanjih pritiskov.

Če se hoče nekdo pritožiti na vrhovno sodišče, mora najprej vložiti predlog za dovolitev vsebinskega pravnega sredstva. Na sodišče vsako leto prispe blizu 8000 zadev, v vsebinsko obravnavo pa jih je sprejetih približno 80. Vrhovni sodniki imajo diskrecijsko pravico, katere zadeve bodo obravnavali, in tako sami določajo agendo, ki jo razumemo kot opredeljevanje prednostnih vsebin, ter pozornost javnosti in političnih udeležencev usmerijo v posamezne teme in politike. Njihove odločitve postanejo enakovredne zakonu. Sprva je sodišče obravnavalo vse zadeve, ki so prišle do njih, zato se je soočalo s čedalje večjim sodnim zaostankom, ki je naraščal na račun povečanja števila prebivalstva, ozemeljske širitve in v 20. stoletju predvsem na račun vojn, v katerih so bile ZDA udeležene. Sodišče se je problematike sodnih zaostankov lotevalo z različnimi ukrepi, kot na primer z uvedbo različnih tehničnih pripomočkov (fotokopirni stroji, računalniki itd.), z zaposlovanjem različnih kadrov (pravne službe, strokovni sodelavci, knjižničarke itd.) pa tudi z zakonodajnimi spremembami. Sprva so morali vrhovni sodniki poleg opravljanja nalog na vrhovnem sodišču redno sodelovati tudi na okrožnih sodiščih. Sčasoma so te naloge odpravili, sodniki pa zdaj svojo službo ves čas opravljajo v Washingtonu, kjer je tudi sedež vrhovnega sodišča, od prvega ponedeljka v oktobru do konca junija. V začetku poletja na sodišče prispejo novi strokovni sodelavci, ki svojo prakso običajno opravljajo eno leto. Strokovni sodelavci so običajno mladi, ki so končali najboljše pravne šole in so pogosto opravili prakso pri sodnikih na nižjih stopnjah. Po opravljeni praksi na vrhovnem sodišču se pogosto zaposlijo kot profesorji na različnih univerzah, v različnih odvetniških pisarnah, nekateri pa čez čas tudi sami postanejo vrhovni sodniki. Strokovni sodelavci imajo pomembno vlogo na različnih stopnjah procesa

odločanja. Večina sodnikov je del skupine za obravnavanje predlogov za certiorari oz. za dopustitev pravnega sredstva (*cert. pool*) – njihovi strokovni sodelavci pripravijo povzetke zadev z najpomembnejšimi podatki in jih nato pošljejo vsem sodnikom, da jih pregledajo. Strokovni sodelavci, ki niso del te posebne skupine, pripravijo povzetke zadev samo za svojega sodnika in morajo v nasprotju z drugimi strokovnimi sodelavci, ki si zadeve razdelijo, vse zadeve prebrati sami. S to prakso naj bi sodnikom olajšali delo, da jim ne bi bilo treba brati vseh zadev, ki prispejo na sodišče. Strokovni sodelavci sodnikom pomagajo tudi pri pisanju odločitev in ločenih mnenj, kar po navadi vzame največ časa.

Oglejmo si na kratko, kako poteka postopek na vrhovnem sodišču. Ko stranka izgubi na pritožbenem sodišču ali na najvišjem sodišču zvezne države, se lahko obrne na najvišje sodišče v državi. Strokovni sodelavci pripravijo kratke povzetke vseh zadev, ki jih nato pregledajo v vseh kabinetih. Predsednik vrhovnega sodišča nato pripravi seznam zadev, ki se mu zdijo primerne za obravnavo, in ga pošlje še drugim sodnikom, ki na seznam zadeve lahko dodajajo, nobene pa z njega ne smejo odvzeti. Primeri, ki na seznam niso uvrščeni, so avtomatsko zavrnjeni. Na posebni seji (*conference*) se sodniki na kratko dotaknejo zadev s seznama in glasujejo, ali jih bodo vzeli v nadaljnjo obravnavo. Če za zadevo glasujejo vsaj štirje, je sprejeta v nadaljnjo obravnavo, drugače pa je samodejno zavrnjena. Stranke, katerih zadeve uspešno prestanejo glasovanje, morajo Sodišču poslati dodatno vlogo o zadevi, t. i. vsebinsko ali meritorno vlogo (*brief on merits*) z utemeljitvijo, zakaj naj bi sodišče odločilo njim v prid. V tej fazi, pa tudi ko stranka vloži zadevo na sodišče, lahko svoje mnenje o zadevi podajo tudi intervenienti oz. „prijatelji Sodišča“ (lat. *amici curiae*). Stranke imajo nato čas, da se pripravijo na ustno obravnavo, na kateri na kratko predstavijo svoje stališče, predvsem pa odgovarjajo na vprašanja sodnikov. Po obravnavi imajo sodniki nejavno sejo, na kateri glasujejo, kako bi odločili v zadevi. Predsednik sodišča, sicer pa tisti od sodnikov, ki je najvišji po senioriteti, določi, kdo bo napisal mnenje Sodišča. Sodniki se pisanja mnenja lotevajo različno – večina pisanje prvega osnutka zaupa strokovnim sodelavcem, nekateri pa osnutek napišejo sami. Vrhovni sodniki lahko s svojo interpretacijo ustave in s svojim pogledom na pravo skušajo vplivati na avtorja mnenja, da spremeni svojo argumentacijo, da kak del mnenja izpusti ali doda. Na koncu Sodišče izda mnenje, sodniki pa lahko napišejo tudi ločena mnenja. Če se strinjajo z mnenjem sodišča, ne pa tudi z argumentacijo, lahko napišejo pritrdilno ločeno mnenje (*concurring opinion*). Če pa se z mnenjem ne strinjajo, lahko napišejo odklonilno ločeno mnenje (*dissenting opinion*).

Vrhovnega sodnika predlaga ameriški predsednik, pri izbiri pa mu pomagajo njegovi bližnji sodelavci. Nekateri predsedniki s kandidaturo „nagradijo“ svoje prijatelje ali znance, drugi pa izbirajo ideološke kandidate, ki podpirajo določene vrste politik, saj prek svojih kandidatov na vrhovnem sodišču lahko vplivajo na razvoj različnih politik tudi po tem, ko niso več na položaju predsednika. Znani so primeri, ko so predsedniki zagotovili, da bodo predlagali samo kandidate, ki nasprotujejo splavu, da bi tako prej ali slej zavrnili precedens (*Roe proti Wadeu*), ki ženskam omogoča pravico do splava, s katerim se sami niso strinjali. Ker je funkcija vrhovnega sodnika dosmrtna, lahko predsednik vpliva na razvoj agende vrhovnega sodišča, tudi ko sam predsedniške funkcije ne opravlja več. Ko predsednik predlaga kandidata, mora ta še na zaslišanje pred senatom, v katerem mora zanj glasovati navadna večina senatorjev. Zadnjih nekaj desetletij so ta zaslišanja postala prizorišče ideoloških bojev – senatorji kandidate sprašujejo o točno določenih zadevah in od njih zahtevajo jasne opredelitve do ideološko razdvajajočih vprašanj, kot sta na primer pravica do splava, orožja, kandidati pa se trudijo, da se do teh vprašanj ideološko ne opredelijo.

Sodniki se morajo ves čas odločati, katere zadeve se jim zdijo pomembnejše in katere bodo vzeli v obravnavo. Glede na ogromno število zadev, ki pridejo na vrhovno sodišče, si za vsako ne morejo vzeti veliko časa. Obstaja nekaj razmeroma preprostih meril, po katerih sodniki prepoznajo, ali je zadeva primerna za obravnavo. Kadar gre za konflikt med različnimi nižjimi sodišči ali celo na enem nižjem sodišču, ko eden od sodnikov napiše ločeno mnenje, je to lahko znamenje, da mora vrhovno sodišče razsoditi, kaj je prav, in razrešiti spor. Če je ena od strank v postopku ZDA, je to skorajda zagotovilo, da bo zadeva sprejeta. Ko državni pravobranilec (*Solicitor General*) vloži svoje mnenje kot *amicus curiae*, je to prav tako znamenje, da gre za zanimivo zadevo. Veliko raziskav se ukvarja z odnosom državnega pravobranilca in vrhovnega sodišča. Sodniki prvemu zaupajo, saj imajo na državnem pravobranilstvu veliko dobrih strokovnjakov in izkušenj s sodnimi postopki na vrhovnem sodišču. Ena od nalog državnega pravobranilca namreč je, da kadar sta v sporu dve zvezni agenciji, on določi, katera bo prevladala in imela možnost obravnave na vrhovnem sodišču. Vsaka zvezna agencija, ki izgubi na nižjem sodišču, mora za dovoljenje, da se pritoži na vrhovno sodišče, vprašati državnega pravobranilca.

Po drugi strani pa sodniki pogosto zavrnejo zadeve, če vsebujejo absurdna vprašanja ali če gre za zelo specifično situacijo, na primer, ali je nekdo v točno določeni situaciji prevozil rdečo luč ali ne in mora zato plačati kazen. Včasih se zgodi, da so dejstva v zadevi tako nejasna in zapletena, da je težko razvozlati, za kaj pravzaprav gre, in je enostavneje, če se zadeva ne

sprejme. Sodniki se včasih odločijo, da bi bilo koristno, da bi o nekaterih zadevah z nižjih sodišč več sodnikov podalo svoje mnenje, da bi se ustvarila bolj jasna slika. Sodniki po navadi ne tehtajo veliko, ali bi kakšno zadevo zavrnili ali ne; če je tema dovolj pomembna, se bo na Sodišče zagotovo vrnila v kakšni drugi zadevi.

Raziskave o odločanju na vrhovnem sodišču kažejo, da so se oblikovali predvsem trije teoretski modeli o tem, kaj vse vpliva na odločanje vrhovnih sodnikov.

Prvi, legalistični modeli (*legal models*) se opirajo predvsem na zakonske okvire in precedense. Na ta način, tako zagovorniki teh modelov, se zagotovi stabilnost in ohrani avtoriteta institucije, ki se ne spreminja vsakokrat, ko se na sodišču zamenja sodnik. Seveda pa če do sprememb nikoli ne bi prišlo, bi bilo suženjstvo, na primer, še vedno zakonito.

Drugi, vrednostni modeli (*attitudinal models*) pravijo, da se sodniki odločajo glede na svojo ideološko usmeritev in preference. Zakonske omejitve naj bi bile samo krinka za njihovo ideološko odločanje. Sodniki so seveda pravni strokovnjaki, ki jih vežejo zakonske omejitve in bi lahko z nespoštovanjem pravnih norm omajali avtoriteto institucije ali jo celo razvrednotili.

Tretji, strateški modeli (*strategic models*) pravijo, da so sodniki pravni strokovnjaki, ki sicer imajo svoje ideološke in politične preference, vendar se zavedajo, da zaradi drugih sodnikov ali zaradi predsednika in kongresa svojih preferenc ne bodo mogli uresničiti. Značilen primer strateškega vedenja se lahko pojavi, kadar sodniki glasujejo, ali naj zadevo sprejmejo v obravnavo ali ne. Kadar so mnenja, da končni rezultat, ki so mu naklonjeni, ni uresničljiv, raje glasujejo proti sprejetju zadeve in ohranijo položaj, s katerim se sicer ne strinjajo, kot pa da zadevo sprejmejo v obravnavo in na koncu pridejo še do slabše odločitve, ki postane celo precedens. Kritiki teh modelov pravijo, da je težko napovedovati odzivanje in odločitve drugih sodnikov, predsednika ali celotnega kongresa.

V študiji primera natančneje opišemo primer *Citizens United proti Federal Election Commission* (2010) od začetka do razglasitve mnenja Sodišča in pogledamo, kakšen vpliv je imel na vsakdanje življenje v ameriški družbi. Primer je še posebno zanimiv, saj je le nekaj sodnikom uspelo spremeniti vsebino zadeve in odločiti o nečem, česar sprva zadeva sploh ni vsebovala. Na začetku se je v zadevi spraševalo, ali se dokumentarni film o Hillary Clinton, ki očitno naslavlja volivce, naj na naslednjih predsedniških volitvah ne glasujejo zanjo, sme predvajati v predvolilnem času, kar je bilo v nasprotju z zakonom, ki je uravnaval financiranje

političnih kampanj (*Bipartisan Campaign Reform Act*). Na koncu pa so se sodniki v večini usmerili v vprašanje, ali je različnim korporacijam, organizacijam in sindikatom kratena pravica do svobode govora, če svojega denarja ne smejo porabljati po svoji volji za politične namene v času tik pred volitvami. Primer je zanimiv tudi, ker je zvezno volilno agencijo (*Federal Election Commission*) zastopal državni pravobranilec in ker je bilo na koncu veliko ločenih mnenj, kar kaže na nestrinjanje pravnih strokovnjakov glede pomembnih ustavnih vprašanj. O tej zadevi in vprašanju se v ZDA še vedno krešejo mnenja, saj so mnogi zaskrbljeni nad vdorom velike količine denarja v politiko, drugim pa se omejitve zdijo nezakonito vmešavanje države v posameznikovo pravico do svobode govora. Raziskave kažejo porast velikih finančnih vložkov v politiko, zlasti v času volitev, pri čemer se zdi, da so v prednosti tisti, ki so finančno sposobnejši in imajo zato več možnosti, da so slišani in da vplivajo na odločanje in ustvarjanje različnih politik.

Na začetku naloge smo postavili hipotezo, da izbira zadev in odločanje na vrhovnem sodišču ustvarja agendo, na katero vplivajo zakonski okviri, ideološke preference vrhovnih sodnikov glede končnega izida in strateško vedenje, ki se kaže tako, da sodniki ocenijo, kolikšne so možnosti, da bo o zadevi na koncu odločeno, kot si želijo.

Tri modele (legalističnega, vrednostnega in strateškega) lahko združimo v četrti model, katerega temelj je ustvarjanje agende. Vsak od teh treh modelov pomembno prispeva k spoznavanju procesa odločanja, vendar pa je sam po sebi nezadosten. Model na podlagi ustvarjanja agende sloni na ideologiji sodnikov, pa tudi na njihovem pogledu na pravo in na njihovi viziji o vlogi sodišč in zlasti vrhovnega sodišča v ameriški družbi. Vrhovno sodišče je vzor nižjim sodiščem in usmerja pravne razprave glede sodne oblasti v državi.

Devet različnih pogledov na pravo in pravno odločanje zagotavlja, da ne more prevladati agenda enega samega posameznika, ampak je ta rezultat različnih pogledov in stališč, ki se dopolnjujejo in drug drugega nadzorujejo. Vsem pa naj bi bilo skupno to, da imajo v mislih predvsem načela in ideje o enakopravnosti in svobodi vseh ljudi ter o spoštovanju in varovanju teh pravic, kar je zapisano že v ameriški ustavi, Deklaraciji o neodvisnosti (*Declaration of Independence*) in listini pravic (*Bill of Rights*) ter drugih amandmajih.