# 1 The Supreme Court of the United States

## Legitimate law-maker and constitutional interpreter[1]

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### Introductory remarks

One of the most famous justices in the Supreme Court's history, Robert H. Jackson, explained the character of the Court's decisions and the role of the justices by stating, "We are not final because we are infallible, but we are infallible only because we are final."[2] The issue of finality in the Court's jurisprudence has been discussed and researched for the last half-century, bringing several important conclusions as to the binding character of its precedents, and proving that the position of the judicial branch in the US legal system has been determined by both the theory of common law, and the active use of the power of judicial review.[3]

One of the foundations of the common law system, created in medieval England, is the law-making ability of judges. According to common law theory, while solving conflicts and deciding individual cases judges are able to establish general rules and principles which may be used in future cases. These rules, called precedents, may have a binding or persuasive character, depending on the scope of the similarity of two cases and the decision of a judge who applies the rule to the circumstances of the adjudicated case.[4] There is not much theory guiding the rule of precedent, except for the *stare decisis* doctrine, introduced for the first time in thirteenth-century England, which means the necessity to follow the

1 This article is the result of research conducted in the project "Constitutionalization of Politics as a Tool of the Checks and Balances System. A Comparative Analysis," funded by the Polish National Science Center (2018/31/B/HS5/02637). The background for this research was conducted by the author between 2008–2010 and presented in his book *Sąd Najwyższy Stanów Zjednoczonych Ameryki. Od prawa do polityki,* published in 2011 by the Jagiellonian University Press.

2 Concurring opinion in *Brown v Allen* 344 U.S. 443 (1953).

3 Jeffrey A. Segal and Harold J. Spaeth, *Majority Rule or Minority Will: Adherence to Precedent on the U.S. Supreme Court* (Cambridge University Press 2012); Michael A. Bailey and Forrest Maltzman, *The Constrained Court: Law, Politics, and the Decisions Justices Make* (Princeton University Press 2011); Paweł Laidler, *Sąd Najwyższy Stanów Zjednoczonych Ameryki. Od prawa do polityki* (Wydawnictwo Uniwersytetu Jagiellońskiego 2011).

4 Douglas E. Edlin, *Common Law Theory* (Cambridge University Press 2010).

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earlier-established precedents in all future similar cases.[5] The rule of precedent and *stare decisis* doctrine lay at the foundations of the English legal system and were implemented in the North American colonies, leading to the reception of common law in the future territory of the United States. The colonists, and later the representatives of the states who established the new country, followed the principles of common law, approving the ability of judges to create legal norms and the courts to operate in a system based on precedent.[6] During the Philadelphia Convention which adopted the federal constitution, the Founding Fathers did not devote much time to the discussion concerning the structure and powers of the judicial branch, but they all agreed that there should be a strong central court functioning within the federal government according to the rules of the common law.[7]

The Supreme Court of the United States (SCOTUS) has existed since the beginning of American statehood, since it was introduced in the federal constitution. The provision vested "the judicial power of the United States" in "one Supreme Court" and in lower courts which were to be created by Congress.[8] The process of the establishment of three levels of federal judiciary began with the famous Judiciary Act of 1789 and was followed by numerous pieces of legislation expanding the number of federal district and circuit courts of appeals, which also determined their membership and defined their competences.[9] In this way, Congress exercised an indirect influence on the operation of the SCOTUS, which decided most of the cases based on appeals from lower courts. The impact of federal legislature on the judiciary resulted also from the Senate's power to approve judicial appointments made by the President, as well as from the power to implement legislation setting the number of justices. Both branches, legislative and executive, were equipped by the supreme law of the land with strong checks on the functioning of the federal courts, including the SCOTUS. The Founding Fathers feared an accumulation of competences by any of the three branches of government; thus both the idea of the separation of powers, accompanied by the checks and balances system, became fundamental principles of American constitutionalism.[10]

In the initial phase of American statehood, the judicial branch did not exercise any serious checks on other branches of government; therefore, in 1803, the Court decided to equip itself with the power of judicial review, which opened the

5 Arthur R. Hogue, *Origins of the Common Law* (Indiana University Press 1966).
6 Frederick G. Kempin, Jr., *Historical Introduction to Anglo-American Law in a Nutshell* (West Academic Publishing 2007).
7 Christopher Collier, *Decision in Philadelphia: The Constitutional Convention of 1787* (Ballentine Books 2007).
8 Article Three, U.S. Constitution.
9 An Act to Establish the Judicial Courts of the United States, 1 Stat. 73 (1789). For analysis of further legislation see Justin Crowe, *Building the Judiciary: Law, Courts, and the Politics of Institutional Development* (Princeton University Press 2012).
10 Collier (n 7).

possibility of controlling the constitutionality of federal and state acts by judges, thus strengthening the position of the SCOTUS in relation to the President and Congress. Deciding the milestone case *Marbury v Madison*, Chief Justice John Marshall declared that it was "the province and duty of the judicial department to say what the law" was, naming "the government of the United States" as "the government of laws, and not of men".[11] The power of judicial review, along with its ability to establish binding precedents, made the SCOTUS a potential key player in defining the character of constitutional provisions, including the powers of the executive and legislative branches, and the scope of the rights and freedoms of individuals. It became apparent over time that the justices used their powers to be actively involved not only in the process of determining legal issues, but also in shaping political and social relations.[12] This soon led to the judicialization of politics, marked by the involvement of judicial actors in political processes, which could be recently observed in the American context especially with respect to the Supreme Court.[13]

This chapter discusses the position of SCOTUS precedents in US legal and political system, including the hierarchy of sources of law, the relations between the Court and lower judicial institutions, and the impact of international and national courts on its adjudication. The significant position of the SCOTUS in the US legal system should be analyzed from various perspectives, both legal and political, with reference to the Court's case law and individual opinions of the justices, additionally focusing on statistical data and various studies conducted in recent years, which may help us to understand the methodology of the Court's decision-making process. It is crucial to assess how much the common law theory—*stare decisis* doctrine and the rule of precedent—has determined the functioning of the highest judicial tribunal in the US, making it one of the most active constitutional courts in the world.

## The position of the Supreme Court in the U.S. legal system

The US Supreme Court is the highest judicial institution in the American legal system, adjudicating in cases coming from the lower federal courts (mostly circuit courts of appeals) or the highest courts of each of the 50 states. The SCOTUS decides cases based mostly on the appellate jurisdiction, rarely exercising its power as a court of first and final resort (original jurisdiction). Since 1869,[14] the Court consists of a chief justice and eight associate justices who are appointed by the

11 5 U.S. 137 (1803).

12 Laidler (n 3).

13 On the concept of the judicialization of politics see Ran Hirschl, 'The Judicialization of Politics' in Keith E. Whittington, Daniel R. Kelemen and Gregory A. Caldeira (eds.), *The Oxford Handbook of Law and Politics* (Oxford University Press 2008); Martin Shapiro and Alec Stone Sweet, *On Law, Politics, and Judicialization* (Oxford University Press 1999).

14 An Act to Amend the Judicial System of the United States, 16 Stat. 44 (1869).

President, with the advice and consent of the Senate, and who enjoy life tenure.[15] The SCOTUS operates in annual terms, usually from October until June or July, providing written opinions in about 60–80 cases in each term. Justices have the discretionary power to determine in which cases the Court should issue a writ of certiorari, which means their approval to review the case. Analysis shows that the SCOTUS issues such a writ in less than 1% of cases every year, proving that unless a dispute raises serious constitutional issues, there is limited access to the highest judicial instance. The analysis of the procedure of issuing writs of certiorari in recent decades reveals that there is consistency in the types of cases which are approved by the Court. They include disputes which raise serious constitutional questions, especially when a lower court has imposed judicial review, conflicts between lower courts over statutory or constitutional interpretation, cases which raise concerns over the constitutionality of an important federal act, or when the Solicitor General has filed a motion for review of a case in which the US government has an interest.[16] Later, the justices hear oral arguments of the parties, and they discuss the case and present their arguments during conferences which end with a voting procedure. If all justices are present, five votes are necessary to reach the majority, and the Court's decision is later announced and published in one or more opinions,[17] becoming binding law.

Theoretically, the position of SCOTUS precedents in the US legal system stems from the place the Court occupies within the judicial branch. As the court of last resort, it has the ability not only to review cases coming from lower federal and state courts, but also to reverse the decisions of these courts. In order to overrule a lower court's precedent, five out of the nine justices need to agree upon the verdict in the case. And, by analogy, a precedent created by the SCOTUS has a direct binding effect on the lower court(s) from which the case was brought on appeal. However, in order to fully understand how the process operates and what is the real value of the Court's precedents, it is necessary to determine the character of the legal norms established by judges in the common law system. Contrary to their counterparts in the civil law system, common law judges not only adjudicate in disputes reaching verdicts which apply to the parties to the disputes, but they also have the ability to create rules of more general character which may be used in similar future cases. Establishing a precedent in a concrete case does not directly mean its application in all similar disputes, since the decision to apply a precedential rule is made by the judge adjudicating in the future dispute. Hypothetically it is possible that, despite obvious similarities of the facts and circumstances of two cases, a judge decides not to apply the precedent and creates a new rule. Therefore, the general character of the precedential norm

15 Articles Two and Three, U.S. Constitution.

16 Louis Fisher and Katy J. Harriger, *American Constitutional Law* (Carolina Academic Press 2019).

17 Each justice can write an opinion, and there are three basic types of opinions: majority, dissenting, and concurring.

depends on the activity undertaken by the judges who have the opportunity to apply it in the case they are settling. From that perspective, the precedent may be defined as an individual norm with a general character in the future, applying only to those cases which are determined by the court to be similar ones.[18] The aforementioned theoretical remarks should be analyzed in the context of the Supreme Court's functioning, especially with reference to the binding character of its precedents. There is no other judicial instance in the US having such a potential to determine the substance of other courts' decisions. The structure of the judiciary stemming from the principle of federalism and from Article Three of the Constitution determines the position of SCOTUS precedents, placing them at the top of the hierarchy of judicial norms established in the US. Still, there have been a small number of examples of the reluctance of lower courts, mostly at state level, to implement the rulings of the Court, especially when the precedents have raised controversial social concerns.

Undoubtedly, the most manifest example of criticism of SCOTUS precedent by state judges happened in the mid-twentieth century, in the times of desegregation, as an aftermath of both *Brown v Board of Education* decisions.[19] The general rule declared by the Court in 1954, and reaffirmed a year later, stated that the separate-but-equal doctrine, which led to racial segregation in public facilities, was unconstitutional, resulting in an order to impose desegregation policies in public schools. As a consequence, southern states' governors and school boards were forced to begin the process of opening their education facilities to representatives of racial minorities. Apart from the strong opposition from conservative politicians, including state governors and senators, and efforts of school boards to delay the Court orders, some judges of state courts made public statements trying to undermine the *Brown* precedent.[20] The reaction of the SCOTUS was immediate and unambiguous, because the justices not only strengthened the desegregation orders, but they also evoked the *Marbury* precedent, reaffirming that the Court was the final interpreter of the Constitution.[21] The new precedent did not ease all tensions—soon Presidents Dwight Eisenhower and John F. Kennedy became involved in enforcing the desegregation orders, and congressional legislation was necessary to fully implement the principles set by the Supreme Court.[22]

Similar—but to a smaller extent—resistance to the Court's precedent occurred in 2015, when the justices declared that limitations to same-sex marriage were unconstitutional, thus forcing all state jurisdictions to allow same-sex couples to enjoy such a right.[23] Apart from the opposition from conservative justices

18 Laidler (n 3).

19 *Brown I* 349 U.S. 294 (1954) and *Brown II* 349 U.S. 294 (1955).

20 Richard Kluger, *Simple Justice: The History of Brown v Board of Education and Black's America Struggle for Equality* (Vintage Books 2004).

21 *Cooper v Aaron* 358 U.S. 1 (1958).

22 Frances L. Baer, *Resistance to Public School Desegregation: Little Rock, Arkansas, and Beyond* (LFB Scholarly Publishing 2008).

23 *Obergefell v Hodges* 576 U.S. 644 (2015).

who wrote dissenting opinions, many Republican governors and state attorneys general from southern states criticized the Court's ruling, trying to limit its applicability in their respective jurisdictions. There were also individual statements made by conservative judges who saw obstacles in implementing the *Obergefell v Hodges* ruling, and some state supreme courts issued writs which suspended the enforcement of the precedent, though these efforts did not affect the final outcome of the case.[24] It is important to acknowledge that the SCOTUS did not reach a unanimous verdict, because the justices' vote was split by 5–4. Although it seems more likely that a narrow decision margin should raise concerns from lower court judges who are bound to apply the rule created by the SCOTUS, the example of unanimous *Brown* verdict shows an opposite tendency.

The opposition of states to federal laws and Supreme Court precedents has a long history and is deeply rooted in the conflicts which could be observed during the Philadelphia convention and which shaped the character of American constitutionalism. Prior to the most far-reaching opposition towards the superiority of federal law which led to the Civil War in the 1860s, from the early years of the Republic there were doctrines imposed by the states trying to reject the binding character of national legislation and jurisprudence, like the nullification announced by South Carolina in the early 1830s.[25] Strong criticism of SCOTUS decisions came at the same time from President Andrew Jackson, who refused to execute some of the rules created by the Court and became a staunch critic of the rulings produced by Chief Justice John Marshall.[26] A hundred years later, Franklin D. Roosevelt fought an open battle with justices who declared his New Deal programs unconstitutional, forcing the President to initiate legislation aimed at changing the Court's membership in order to appoint "proper" justices.[27] These examples partly explain the criticism of judicial decision-making, appearing from time to time at the federal and state levels of government, but the situation is different when lower court judges oppose precedents created by the justices. Although such situations are very rare, they show the scope of impact of the SCOTUS on important social and political matters.

The Supreme Court has a potential to shape the direction of the judicial interpretation of the Constitution on a vast array of issues, from the institutional and systemic to the scope of the rights and freedoms of individuals. Historically, justices determined the meaning of all constitutional principles, such as the separation of powers, checks and balances, federalism, popular sovereignty, and due process of law; and the majority of constitutional provisions relating to the

24 William N. Eskridge and Christopher B. Riano, *Marriage Equality: From Outlaws to In-Laws* (Yale University Press 2020).

25 David F. Ericson, 'The Nullification Crisis, American Republicanism, and the Force Bill Debate' (1995) 61(2) The Journal of Southern History 249–270.

26 Keith E. Whittington, 'Presidential Challenges to Judicial Supremacy and the Politics of Constitutional Meaning' (2001) 33(3) Polity 365–395.

27 William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (Harper Perennial 2009).

powers of the executive, legislative, and judicial branches, federal-state relations, and the scope of the guarantees listed in the Bill of Rights. In that process, the justices have imposed different means of interpretation, from originalism and textualism, doctrinal or systemic interpretation, to functionalism, which became the leading mode of reading the Constitution in recent decades.[28] From that perspective, the SCOTUS has played a leading role as constitutional interpreter, or, in other words, as constitutional law-maker, deciding on the proper understanding of certain clauses which affect the everyday life of Americans. In that respect we can observe both positive and negative law-making roles, since there have been periods in which the justices broadened the rights of the people, which led to bigger control of the powers of the government, or they expanded the competences of national and state authorities, thereby limiting the constitutional guarantees of US citizens.

Some of the Court's precedents have limited or expanded the powers of various government institutions, affecting the policies of presidents, congresses, and state authorities, as well as economic, social, and cultural institutions. SCOTUS case law concerning federal-state relations has determined the scope of intrusion of central government into local affairs, affecting the pace of economic growth and the role of federal and state institutions.[29] There have been precedents which followed the general direction of the national government's policies, usually during times of emergency, such as the World Wars, the Red Scare periods, the War on Terror, and, recently, the Covid-19 pandemic.[30] From that perspective, the Court may be called a "national-policy maker,"[31] serving as a supporter and legitimizer of governmental policies, some of which were controversial due to the limitations they set for such rights as freedom of speech, freedom of assembly, religious freedoms, or the procedural rights of the accused.[32] On the other hand, there have been circumstances in which the justices declared the acts of executive or legislative branches unconstitutional, such as during the 1930s conflict over New Deal legislation between conservative justices and President Roosevelt, or in the period of intensified expansion of the rights of individuals in the 1960s.[33]

28 Richard H. Fallon, Jr., *Law and Legitimacy in the Supreme Court* (The Belknap Press of Harvard University Press 2018); Michael J. Perry, *The Constitution in the Courts: Law or Politics?* (Oxford University Press 1994).

29 Fisher and Harriger (n 16).

30 Paweł Laidler, 'Secrecy Versus Transparency in the U.S. National Security Surveillance' in Lora A. Viola and Paweł Laidler (eds.), *Trust and Transparency in an Age of Surveillance* (Routledge 2021).

31 Robert Dahl, 'Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker' (1957) Journal of Public Law 6.

32 Richard Pacelle, *The Role of the Supreme Court in American Politics: The Least Dangerous Branch?* (Taylor and Francis 2019).

33 Leuchtenburg (n 27); Mary Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* (Princeton University Press 2000); Keith E. Whittington, *Repugnant Laws: Judicial Review of Acts of Congress from the Founding to the Present* (University Press of Kansas 2019).

In these cases active judicial review affecting federal legislation resulted in Congress's efforts to overrule certain precedents created by the SCOTUS. In order to discuss that issue, we need to look at the position of the Court's precedents in the hierarchy of sources of law.

There is no doubt that Congress, of all the government branches, plays the main law-making role, since it was equipped by the Constitution with "all legislative powers."[34] Furthermore, acts of Congress have a high position in the hierarchy of sources of law, being located just below the Constitution, and at the same level as international treaties.[35] Considering that in some SCOTUS cases the justices undertake statutory interpretation, the position of such precedents must be at the same level as the position of acts of Congress, but if the Court is applying constitutional interpretation, explaining, defining, or modifying the meaning of certain constitutional clauses, the position of such precedents in the hierarchy should be higher than that of congressional legislation.[36] Such an argument, although controversial, can be defended by the results of analysis of congressional efforts to overrule constitutional precedents of the Supreme Court. Historically, there have been numerous cases in which members of Congress initiated legislation aiming at reversing SCOTUS precedents, but most of these efforts proved unsuccessful. When Congress used an ordinary legislative process as a tool to overrule the Court, the justices usually reacted by establishing a new precedent which limited the scope of the congressional act. For example, in the 1990s, the Religious Freedom Restoration Act, which was an effort to overrule a case concerning the free establishment clause.[37] was declared unconstitutional by the Court.[38] Similarly, after the controversial SCOTUS decision allowing the burning of the American flag as a form of the exercise of symbolic speech.[39] Congress quickly implemented the Flag Protection Act which, in turn, was declared unconstitutional by the Court.[40] These two examples do not set a principle, which makes it impossible for Congress to reverse SCOTUS precedents, but such situations have occurred rarely and the success of the legislative branch was dependent on the will of the justices. This does not mean that the Court could fully succeed in implementing its rulings without the support of Congress and the President, and there are studies showing the interdependence of the three branches of government in the process of constitutional law-making.[41] But even if we agree that there have been times when judicial restraint has prevailed over judicial activism, and that judicial review is not a process which can be undertaken freely and usually takes time, still

34 Article Two, U.S. Constitution.
35 Article Six, U.S. Constitution.
36 Laidler (n 3).
37 *Employment Division v Smith* 494 U.S. 872 (1990).
38 *City of Boerne v Flores* 521 U.S. 507 (1997).
39 *Texas v Johnson* 491 U.S. 397 (1989).
40 *United States v Eichman* 496 U.S. 310 (1990).
41 Louis Fisher, *Reconsidering Judicial Finality: Why the Supreme Court Is Not the Last Word on the Constitution* (University Press of Kansas 2019).

it is hardly possible for Congress to effectively use ordinary legislative process as a tool for diminishing the law-making ability of the Court.

A potentially different situation may be observed with regard to the process of implementing constitutional amendments which have the same position within the hierarchy of sources of law as the Constitution, having the potential to overrule all SCOTUS precedents. In the US constitutional system, an amendment may be initiated by Congress or by the convention of states;[42] but, historically, most such initiatives began in the federal legislative, some of which were clearly aimed at reversing politically controversial decisions of the Court. Statistics prove the small success rate of Congress, since there were only four SCOTUS precedents in history which became directly overruled by constitutional amendments: the Eleventh Amendment overruled *Chisholm v Georgia*;[43] the Thirteenth and Fourteenth Amendments reversed the infamous *Dred v Scott*[44] precedent; the Sixteenth Amendment overturned *Pollock v Famers' Loan & Trust Co.*;[45] and the Twenty-Sixth Amendment reversed *Oregon v Mitchell*.[46] Accordingly, since 1803 the SCOTUS has declared more than 200 acts of Congress unconstitutional in part or in whole.[47] thus strengthening the argument about its significant position in the US legal system and the finality of its decisions.

## SCOTUS and *stare decisis*

After discussing the position of SCOTUS precedents in the U.S. legal system with regard to lower federal and state courts, and in relation to the acts of Congress, we should analyze the Court's attitude towards the doctrinal foundations of *stare decisis*. Even if that doctrine seems a somewhat outdated in the twenty-first century, it still plays a significant role in the common law theory guaranteeing that established rules and principles will be applied in all similar cases, providing predictability, clarity, and continuity to the legal system.[48] American courts recognized the significance of *stare decisis* for the process of judicial decision-making from the beginning of the U.S. legal system, although the justices did not implement too-formalistic rules which would guide the process of the upholding of their prior decisions. As Justice Horace Lurton once stated, "The rule of *stare decisis* tends to uniformity and consistency of decision but it is not inflexible, and it is within the discretion of a court to follow or depart from its prior decisions."[49]

*Stare decisis* always played an important role in U.S. common law theory, but its interpretation by the justices, especially in the twentieth and twenty-first centuries,

42 Article Five, U.S. Constitution.
43 2 U.S. 419 (1793).
44 60 U.S. 393 (1857).
45 157 U.S. 429 (1895).
46 400 U.S. 112 (1970).
47 Whittington (n 33).
48 Edlin (n 4); see also *Payne v Tennessee* 501 U.S. 808 (1991).
49 *Hertz v Woodman* 218 U.S. 205 (1910).

has never forced the SCOTUS to follow its prior rulings unconditionally, defining circumstances in which adherence to a prior ruling was not demanded.[50] A reflection on the contemporary role of *stare decisis* can be found in the 2010 opinion of Chief Justice John Roberts, Jr., who stated that a precedent should be followed "unless the most convincing of reasons demonstrates that adherence to it puts [justices] on a course that is sure error."[51] In a recent labor law dispute, the Court listed five factors which should be taken into consideration while deciding whether to apply *stare decisis* or overrule the binding precedent. Arguing that departures from the doctrine "are supposed to be exceptional" and demand "special justification," Justice Samuel Alito declared that justices should consider "the quality of [case] reasoning, the workability of the rule it established, its consistency with other related decisions, development since the decision was handed down, and reliance on the decision."[52]

Although these factors seem quite rational from the perspective of judicial reasoning, it is important to note that in U.S. history there have been several cases in which the justices decided to overrule, in full or in part, prior precedents of the Court. According to data provided by the Congressional Research Service[53] there have been 233 such cases, in which the Court overruled its prior decisions, although the departure from the earlier established precedent does not always seem obvious. If there is a similar case which overturns a former legal rule, it is reflected in the Court's opinion, and the justices usually provide a legal justification for their decision. There are clear examples of disputes overruling former precedents which affected social and political relations in the U.S., such as the separate-but-equal doctrine cases (declared constitutional in *Plessy v Ferguson*[54] and overturned in *Brown v Board of Education*[55]), the right to privacy of homosexuals (neglected in *Bowers v Hardwick*[56] and declared constitutional in *Lawrence and Garner v Texas*[57]), or the right to counsel in criminal cases (limited in *Betts v Brady*[58] and overruled twenty years later in *Gideon v Wainwright*[59]).

50 Richard H. Fallon, Jr., 'Stare Decisis and the Constitution: An Essay on Constitutional Methodology' (2001) 76(2) New York University Law Review 570–597; Michael J. Gerhardt, 'The Role of Precedent in Constitutional Decision-making and Theory' (1991) 60(1) George Washington Law Review 68–159.

51 *Citizens United v Federal Election Commission* 558 U.S. 310 (2010). For more on *Citizens United* rationale see Mark Tushnet, *In the Balance: Law and Politics in the Roberts Court* (W.W. Norton and Company 2013) 247–280.

52 *Janus v American Federation of State, County, and Municipal Employees, Council 31, et al.* 575 U.S. 16–1466 (2018).

53 Brandon J. Murrill, 'The Supreme Court's Overruling of Constitutional Precedent' (2018) *Congressional Research Service Report*, https://sgp.fas.org/crs/misc/R45319.pdf accessed on September 2021.

54 163 U.S. 537 (1896).

55 347 U.S. 483 (1954).

56 478 U.S. 186 (1986).

57 539 U.S. 558 (2003).

58 316 U.S. 455 (1942).

59 372 U.S. 335 (1963).

All three examples provide an important social and/or political context, which was taken into consideration by the justices in their decisions to overturn former precedents. In the *Brown* case it was the social pressure inspired by the civil rights movement, as well as the memorandum prepared by the presidential administration.[60] In the death penalty cases, and the right to attorney disputes, apart from legal reasoning the Court used the arguments relating to public opinion and pressures from certain institutions, including state governments.

The analysis of the use of *stare decisis* by the justices is not easy, especially in the cases in which the reasoning refers to former case law and the Court decides to modify already existing precedent. Such circumstances have happened quite often and the secret of judicial reasoning lies in the facts of the case, which usually are slightly different due to the circumstances which surround them. SCOTUS adjudication in disputes concerning the commerce clause shows that despite similar constitutional questions occurring in these cases in the early- and mid-twentieth century, the justices took into consideration different economic factors while shaping the scope of the commerce powers of Congress in that period.[61] Similarly, the changing social attitude towards the rights of the LGBT community encouraged the Court to change its position on the right to privacy of homosexual couples from the late 1960s to the early 2000s.[62] The problem with the proper determination of justices' attitudes towards *stare decisis* lies also in the scope of the use of former precedential rule by the Court. Adherence to earlier precedents does not always mean direct application of the whole past rule created by the SCOTUS, but also reference to doctrines, theories, or principles raised in the majority opinion.[63] In such a broader context, the justices will almost always refer to some important Court findings from a past case which they find valuable for the proper adjudication.

Analysis of the use of *stare decisis* by the SCOTUS in recent decades provides interesting observations that can lead to conclusions about the ideological factor which may be the main determinant of justices' attitudes towards prior precedents. Even if *stare decisis* seems theoretically closer to the modes of constitutional interpretation presented by conservative justices, many liberal judges also invoked the doctrine as a justification for their jurisprudence. There are several examples of disputes in which the liberal majority outvoted the conservative bloc of justices by referring to the principles of *stare decisis*, concerning such issues as the right to privacy, affirmative action, school prayer, or the rights of the accused in criminal cases. And, contrary to this, in the same cases conservative justices decided to support overruling prior precedents, neglecting the opportunity to use *stare decisis* as a justification to adhere to these rulings. The analysis of the Court's historical

60 Dudziak (n 33).

61 Fisher and Harriger (n 16).

62 David A. J. Richards, *The Case for Gay Rights: From Bowers to Lawrence and Beyond* (University Press of Kansas 2005).

63 Thomas G. Hansford and James F. Spriggs, *The Politics of Precedent on the U.S. Supreme Court* (Princeton University Press 2008).

jurisprudence shows that even in the nineteenth and early twentieth centuries there were issues which clearly divided the justices, such as the scope of federal-state relations from the perspective of the commerce clause, when the conservatives supported states' rights and liberals opted for broader powers of the federal government.[64] In these cases, *stare decisis* was used consistently only to uphold existing precedents by one of the majorities in the Court, whereas the justices in minority voted to overrule the dominant interpretation of the commerce clause, forgetting about the necessity to follow the existing rule of precedent. Already during the first important Supreme Court era (1803–1835), justices were playing the roles of strategic actors who used the law to pursue their "personal policy preferences."[65]

The adherence to *stare decisis* by the SCOTUS, even if supported by the statistics showing that the justices rarely overruled their own precedents, does not seem the most important determinant of judicial decision-making. In a study conducted in late 1990s, Spaeth and Segal proved that among the justices serving in the last three decades of the twentieth century, hardly any showed systemic consistency towards the use of the *stare decisis* doctrine.[66] The lack of consistency of certain members of the Court in the use of *stare decisis*, or, in other words, the consistency with which they present their attitude towards a concrete legal issue, strengthens the argument of the impact of ideology on the Court's jurisprudence. If there is an opportunity to expand the scope of the rights of individuals, liberal justices will promote such reasoning, putting *stare decisis* aside for the sake of a constitutional interpretation which broadens the meaning of the Bill of Rights. Their attitude in cases concerning the right to abortion, the right to die, or same-sex marriages serves as a perfect example of the rejection of *stare decisis*, whereas conservative justices presented opposite views, criticizing the unconstitutionality of established precedents as inconsistent with *stare decisis* doctrine. But if a similar case concerning the right to privacy reaches the SCOTUS, conservative justices forget about the necessity of following established precedential rule and try to overturn the constitutional reasoning towards the right to privacy set by liberal justices. Surprising or not, the proponents of the broader meaning of the Constitution appear in this context as defenders of *stare decisis*. The best example of this can be seen with reference to the right to abortion cases, *Roe v Wade*[67] and *Planned Parenthood v Casey*[68]. When the latter dispute ignited social and political debates over the scope of the constitutional right to privacy, the 5–4 majority announced adherence to former precedent despite staunch criticism from conservative lawyers and politicians.

64 Fisher and Harriger (n 16).

65 Jack Knight and Lee Epstein, 'The Norm of Stare Decisis' (1996) 40(4) American Journal of Political Science 1019.

66 Potter Stewart and Lewis H. Powell, Jr. See Jeffery A. Segal and Harold J. Spaeth, 'The Influence of Stare Decisis on the Votes of United States Supreme Court Justices' (1996) 40(4) American Journal of Political Science 971–1003.

67 410 U.S. 113 (1973).

68 505 U.S. 833 (1992).

Regardless of the historical meaning of *stare decisis*, it seems that contemporary justices treat the doctrine as a proper justification of adherence to former precedents in cases in which they believe the Court rulings should be affirmed. However, the growing political role of the SCOTUS, reflected in the polarization of the attitudes of justices towards important social issues and in the use of ideology as a legitimization of expanding or narrowing down constitutional interpretations, diminishes the role of *stare decisis* in the current jurisprudence of the Court. It seems more likely that justices will invoke the doctrine only if it serves the purpose of reaching the expected results in the case in which they adjudicate. One of the former associate justices, Lewis Powell, Jr., argued that adherence to precedent by the judges is not what they *have to* do but what they *should*, and any departure from the existing mode of adjudication needs proper justification.[69] Thirty years later, it seems that the SCOTUS does not even need such a justification to overturn its former precedents, especially when cases concern socially sensitive matters, despite efforts to limit judicial discretion in that respect. As Associate Justice William O. Douglas stated once, "So far as constitutional law is concerned *stare decisis* must give way before the dynamic component of history."[70]

The last observation refers to the rules and procedures through which the justices decide to adjudicate in a dispute. As was mentioned before, it is a discretionary role of the Court's members to decide if they are willing to review a case. The procedure provides for the so-called rule of four, which means the necessary support of at least four justices to issue a writ of certiorari in a concrete case.[71] It seems obvious that the first important decision concerning the legal dispute is being made in the process of acceptance or rejection of the case, thus affecting the future approach of the Court towards the issue at stake. A negative decision may be treated as either a lack of interest of the SCOTUS to adjudicate in a concrete matter, or acceptance of the justices of a decision made by the lower court. In that sense one can argue that *stare decisis* prevails in most of the instances, because the Court rejects around 99% of cases awaiting its review. Of course, there are various reasons for the reluctance of justices to adjudicate in a legal conflict, but the desegregation cases serve as a perfect example of the attitude of the SCOTUS towards existing case law and precedents. Since the 1920s, the National Association for the Advancement of Colored People (N.A.A.C.P.), supported in the following decades by the American Civil Liberties Union (A.C.L.U.), tried to bring test cases to the Supreme Court which would enable the justices to overrule the infamous separate-but-equal doctrine. Before the SCOTUS decided to adjudicate in disputes concerning racial segregation, it rejected several applications prepared

69 Lewis F. Powell, 'Stare Decisis and Judicial Restraint' (1990) Washington and Lee Law Review 47, 281–311.

70 William O. Douglas, 'Stare Decisis' (1949) 49(6) *Columbia Law Review* 737.

71 Saul Brenner and Joseph W. Whitmeyer, *Strategy on the U.S. Supreme Court* (Cambridge University Press 2009).

by these organizations supporting the existing rule created in *Plessy v Ferguson*.[72] There is no doubt that the discretionary power of the justices to decide which disputes are settled by the highest judicial instance in the U.S. may play a crucial role in determining the final outcome in these cases. *Stare decisis*, although rarely directly referred to by the justices, not only exists, but also affects their decision-making process, often serving as a secret legitimizer of ideological adjudication.

## References to international and national court decisions

While deciding cases of constitutional stature, the U.S. Supreme Court often refers to decisions of lower federal and state courts, whereas it rarely considers international court decisions as binding or even persuasive for its jurisprudence. There is no surprise in such an observation, considering, on the one hand, the position of the SCOTUS as the court of last resort from both federal and state courts, and, on the other, the limited influence of international legal norms on American judicial reasoning. The position of international or foreign law in the U.S. legal system has been researched from various perspectives, and most of the studies have shown the small impact of international courts and tribunals on SCOTUS decision-making.[73] Obviously, at the beginning of the Court's functioning the reference to English or British precedents was both understandable and necessary, since Americans were following the patterns of English common law, including legal definitions and principles of law. As a result, in the first two decades of U.S. statehood, the SCOTUS often based its legal reasoning on precedents of English courts, some of which dated back to the thirteenth century.[74] Today, such an approach is unnecessary and highly unlikely, considering the reluctance of American judges to follow the rulings of exterior courts.

According to the Constitution, international treaties are positioned high in the hierarchy of sources of law, just below the Constitution, and on the same level as the acts of Congress[75]. However, constitutional practice indicates a smaller impact of international legal norms on both the federal legislation and the Court's jurisprudence. Historically, there were certain initiatives in Congress which aimed at limiting the impact of international treaties on U.S. legislation, and, at the same time, the Court rarely took a position on the scope of government powers concerning foreign policy-related issues.[76] If the justices adjudicated in disputes

72 Kluger (n 20).

73 Lawrence A. Baum, *The Supreme Court* (Congressional Quarterly Press 2021); Stephen A. Simon, 'The Supreme Court's Use of Foreign Law in Constitutional Rights Cases: An Empirical Study' (2013) 1(2) Journal of Law and Courts 279–301; David L. Sloss, Michael D. Ramsey and William S. Dodge (eds.), *International Law in the U.S. Supreme Court* (Cambridge University Press 2011).

74 James Shevory, *John Marshall's Law: Interpretation, Ideology, and Interest* (Greenwood Press 1994).

75 Article Six, U.S. Constitution.

76 Laidler (n 3).

concerning the relations between international and domestic law, they usually focused on the scope of powers of the President and Congress with respect to foreign policy matters, supporting the growing impact of the executive in that respect, especially in national security matters.[77] Recently, however, the Court had an opportunity to discuss the character and applicability of international legal norms in the U.S. legal system. Controversies over the position of international law in U.S. the legal system were ignited after the SCOTUS decision in *Medellin v Texas*,[78] a 2008 case concerning the right to consul of a Mexican national who was found guilty of a murder in Texas and sentenced to death. Although the U.S. was the party of international agreements guaranteeing the right to consul in such circumstances, Medellin's right was rejected, and he was later found guilty by state courts. Because there were more foreign nationals who were tried by U.S. courts without exercising their right to consul, all of these cases were brought to the International Court of Justice, which declared in 2004 that the U.S. was bound by international agreements which provided the right to consul for foreign nationals,[79] As a consequence, Medellin's case was brought to the SCOTUS and the justices had an opportunity to express their reflection on the relation between international and domestic law. The conservative majority declared that not all international treaties were directly binding, and, therefore, that they needed congressional legislation in order to become a binding element of the U.S. legal system. Furthermore, the Court stated that decisions of the International Court of Justice do not have to be followed by American courts. Such an approach strengthened the arguments about the reluctance of U.S. judges to follow the rulings of international courts, even if the liberal dissenters in *Medellin* supported a broader impact of international jurisprudence.

On the other hand, international organizations have been active in recent decades as third parties filing *amicus curiae* briefs to the Supreme Court, arguing for one of the parties to a dispute, and often using international legal norms and principles as a basis for their argumentation. Sometimes international organizations have joined their U.S. counterparts in preparing a brief, thus legitimizing the legal argumentation based on international law. In 2006, the Center for Constitutional Rights was joined by Human Rights Watch and the International Federation of Human Rights as "friends of the Court" in *Hamdan v Rumsfeld*,[80] supporting the plaintiff, who was a Guantanamo prisoner, but the Court did not apply the reasoning used in the brief. However, two years later, in a case determining the scope of the constitutional rights of another Guantanamo detainee, organizations like Amnesty International, the International Law Association, and the International Federation for Human Rights filed an amicus brief which

77 Daniel Farber (ed.), *Security v. Liberty: Conflicts Between Civil Liberties and National Security in American History* (Russell Sage Foundation 2008).

78 552 U.S. 441 (2008).

79 *Mexico v United States of America* known as *Avena* I. C. J. Reports 2004, 12.

80 548 U.S. 557 (2006).

became part of the final argumentation of the justices, who expanded the protection of enemy combatants by the Constitution.[81]

Other examples show that the issues relating directly to American law, mostly with reference to the rights of individuals, are also attracting international organizations using *amicus curiae* as the easiest lobbying tool in the Supreme Court. In the twenty-first century, several human rights organizations were highly concerned about the scope of the rights of the accused, mainly referring to death penalty cases in which the SCOTUS reviewed the constitutional status of capital punishment. In *Atkins v Virginia*,[82] in which the Court limited the possibility to impose the death penalty on the accused, who suffered from mental illness, the liberal majority referred to "national consensus" and "international opinion" as being among the factors supporting their majority opinion. In another capital punishment case, *Roper v Simmons*,[83] which concerned the question of the constitutionality of the death penalty for minors, one of the briefs was filed by the European Union, strongly opposing the imposition of capital punishment for people under the age of 18. This time, liberal justices, supported by Associate Justice Anthony Kennedy, followed the argumentation presented in the brief and declared that executing minors constituted a cruel and unusual punishment. Apart from procedural rights cases, international organizations have also promoted international law as the basis for expansions of the rights of individuals in cases concerning the LGBT community[84] and affirmative action.[85] Especially, the first dispute, *Lawrence and Garner v Texas*, raised the concerns of civil and human rights organizations, which protested against the anti-LGBT sodomy laws existing in a few American states, including Texas. In the majority opinion signed by Associate Justice Kennedy, who joined the liberal justices, not only was the amicus brief authored by the European Union mentioned, but the Court also made direct reference to the decision of the European Court of Human Rights in *Dudgeon v United Kingdom*,[86] thus supporting the right to privacy of LGBT groups. By referring to the ECHR ruling, justices claimed that the ruling "[a]uthoritative in all countries that are members of the Council of Europe … is at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization."[87] The *Lawrence* opinion remains the only SCOTUS decision in which the justices used a ruling of an international tribunal in order to strengthen the legitimization of the arguments presented in the majority opinion.

The U.S. Supreme Court rarely refers directly to the decisions or opinions of international courts and tribunals. The above-mentioned examples of the right to privacy and death penalty cases are exceptions, which may be more closely

81 *Boumediene v Bush* 553 U.S. 723 (2008).
82 536 U.S. 304 (2002).
83 543 U.S. 551 (2005).
84 *Lawrence and Garner v Texas* 539 U.S. 558 (2003).
85 *Grutter v Bollinger* 539 U.S. 306 (2003).
86 Appl. No. 7525/76, ECHR [1981].
87 539 U.S. 558 (2003).

understood by the arguments raised by the SCOTUS justices with regard to the role of international law. In 2005, two associate justices, Antonin Scalia and Stephen Breyer, discussed the role of international law in U.S. constitutional interpretation. While the conservative Associate Justice Scalia argued for a limited involvement of international jurisprudence on SCOTUS adjudication, opposing the possibility of citing foreign court rulings, the liberal Associate Justice Breyer supported a bigger influence of international law, stating that American judges should analyze foreign judges' approaches towards similar constitutional issues.[88] The debate shows that the ideological factor may play a crucial role in determining the opinions of justices on the relation between international and domestic law. While liberal judges usually support the necessity to expand the debate over American legal institutions and processes with reference to international legal norms and the voice of the international community, the conservatives hold the opposite view, arguing that application of international jurisprudence could be dangerous for the integrity and sovereignty of U.S. courts. This does not change the fact that direct reference in SCOTUS adjudications to the opinions of foreign judges is still exceptional and unlikely to be changed in the coming years, especially considering the dominant conservative ideology of the contemporary Court.

Quite contrary to this, the reference to opinions and arguments raised by lower federal and state courts seems one of the most common methods of the reasoning of justices. There are at least three reasons for which there is a direct citation of national courts' precedents or the arguments raised by judges of lower courts in their written opinions: the procedural, the historical, and the ideological. Firstly, justices are aware that their opinions are not only legally binding and thus important, but also that they are read and analyzed by social groups interested in the outcomes of SCOTUS decisions; therefore justices use lower courts' decisions in order to explain the procedure which took place before the dispute reached the Court. Usually, in the introductory part of the opinion there are direct references to the procedural history of the case providing information about the courts which adjudicated in the dispute and the decisions they reached. Additionally, when the Court makes a decision affirming or reversing that of the lower court, the justices often quote parts of the lower court's opinion in order to support or criticize it. Sometimes there are opinions in which justices repeatedly refer to the lower court's argumentation, especially when they are convinced about the necessity of upholding that court's decision.

Secondly, justices use national courts' opinions to shape the history of jurisprudence concerning the issue at stake, and such a reference has mainly historical purposes. There is hardly any written opinion of the Court which does not invoke historical precedents determining the scope of constitutional adjudication in the

88 Norman Dorsen, 'The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer' (2005) 3(4) International Journal of Constitutional Law 519–541.

matters reviewed. Regardless of the character of the case, whether it concerns institutional issues or the rights of the people, there is always a part of the opinion quoting former decisions related to these issues. Historical references have not only an informative role, but they also allow the tracing of the direction of judges' reasoning, which may be helpful in understanding the position the Court finally takes. Even if references to lower courts' historical decisions are less frequent than references to former SCOTUS precedents, justices are aware that state or federal judges' jurisprudence is an important legacy of the common law method of solving disputes.

Lastly, the analysis of references to national courts' decisions made by the SCOTUS brings a very strong argument for the existence of the ideological factor. In many of the twenty-first century Court's decisions in which justices invoked precedents and arguments raised by judges in lower courts, these cases served as a justification for the decision made by the author of the opinion, regardless of whether it was a majority or minority opinion. Liberal and conservative judges have used such arguments which supported their ideological attitude towards the adjudicated issue, but more rarely have they referred to such cases when they wanted to neglect their final outcome. The analysis of majority and dissenting opinions in the cases regarding affirmative action, LGBT rights, abortion, or freedom of religion that have been decided in the last two decades shows the adherence of their authors to lower courts' decisions, which were cited in order to present views opposite to those raised in these opinions.

Although lower courts' decisions play a significant role in the SCOTUS' adjudications—and one can always find a reference to such precedents—there is no doubt that the most common sources to which justices refer in their argumentation are former precedents of the Supreme Court. There was no single majority opinion of the Court in the twentieth and twenty-first centuries that did not refer to earlier SCOTUS jurisprudence, which serves both for historical and ideological reasons. Some opinions concerning issues which have been constantly adjudicated by justices are full of historical references to precedents which determined the character and scope of certain powers and rights throughout American history. The analysis of commerce clause cases decided in the late twentieth century,[89] disputes over the scope of freedom of speech,[90] or election campaign finance cases,[91] strengthens such an argument. Sometimes reference to historical precedents and argumentation made by former justices serves for the purpose of the dominant approach presented by the Court, as in *Gideon v Wainwright*,[92] in which the majority quoted all former SCOTUS decisions declaring the constitutionality of the right to counsel in criminal cases. However, they mainly focused on *Betts v Brady*,[93] showing "an abrupt break" the Court "made with its own

89 *United States v Lopez* 514 U.S. 549 (1995); *United States v Morrison* 529 U.S. 598 (2000).
90 *Texas v Johnson* 491 U.S. 397 (1989).
91 *Citizens United v Federal Election Commission* 558 U.S. 310 (2010).
92 372 U.S. 335 (1963).
93 316 U.S. 455 (1942).

well-considered precedents," thus criticizing and overruling the precedent to assure the constitutional right to counsel of every accused person.

In most cases, the justices use the majority opinions of their predecessors, which results from their binding character and impact on the U.S. legal system. Occasionally, however, there are circumstances which encourage the Court to follow a dissenting opinion created decades earlier by a single justice who raised arguments supporting the new approach presented by the SCOTUS. Probably the most evident example of such a situation occurred in 1996, when the Court decided about the scope of LGBT rights in *Romer v Evans*,[94] basing its argumentation on a 100-year-old dissent written by John Marshall Harlan in *Plessy v Ferguson*.[95] The famous, but isolated, statement of Harlan that the Constitution "neither knows nor tolerates classes among citizens," although made with reference to racial segregation issues, became the leading argument in the *Romer* precedent declaring the unconstitutionality of Colorado's constitutional amendment limiting the rights of the homosexual community. The arguments used in dissents written by justices are more likely to be used by a future Court, provided there is a narrow margin verdict in the case and the society is polarized over the issue at stake.

There is at least one more reason for which the use of its own former decisions plays a significant role for the Court. From time to time, in disputes mainly concerning freedom of speech, freedom of religion, or commerce clause issues, justices establish constitutional "tests" which become the final outcome of the case, providing a binding rule in all similar cases in the future. A test determines the constitutionality of legislation, which is analyzed by the SCOTUS and usually consists of two or three principles which have to be fulfilled by the legislator in order to uphold or overrule a concrete piece of legislation. These principles are made on the basis of references to precedents or arguments raised in prior Court decisions on the same issue. Justices often quote full paragraphs or sentences from their predecessors' opinions, setting the conditions which should be met by the legislation. There are various types of tests which can be applied by the justices in order to effectively solve a dispute: balancing tests taking into consideration opposing arguments, rational-basis tests searching for reasonableness of the law, purpose tests evaluating the intent of the framers of the legal norm, effect tests analyzing the practical consequences of legislation, and deliberation tests considering various factors determining the constitutionality of an act.[96] Tests have determined the Court's rulings in cases concerning various constitutional issues, including freedom of religion (the Lemon test, established in *Lemon v Kurzman*[97]), the commerce clause (the Lopez test, created in *United States v Lopez*[98]), and freedom of expression (*Brandenburg v Ohio*[99]). In that sense, the

94 517 U.S. 620 (1996).
95 163 U.S. 537 (1896).
96 Richard H. Fallon, Jr., *Implementing the Constitution* (Harvard University Press 2001).
97 403 U.S. 602 (1971).
98 514 U.S. 549 (1995).
99 395 U.S. 444 (1969).

new rule created by the SCOTUS is a combination of its own earlier-established precedents, which proves that the Court's adjudication, typically for a common law jurisdiction, is extensively based on its own historical decisions.

## Concluding remarks: let the end be legitimate

This chapter tried to answer a few important questions regarding the SCOTUS' adjudications, such as the real position of the Court's precedents in U.S. legal system, the scope of adherence to its prior precedents, and the impact of national and international adjudication on justices' decision-making. All of these questions are fundamental to the character of the Court's jurisprudence and the functioning of the judicial branch, as well as theoretical and practical aspects of American common law. Analysis of the aforementioned issues demands a thorough research of SCOTUS decisions from the 1790s to contemporary times, which means more than 230 years of adjudication during which the Court has made thousands of decisions of constitutional stature. In order to reach the expected goals and define the real position of the SCOTUS and its precedents in the legal system, one would have to read and analyze the case law in which justices checked the constitutionality of federal and state acts, which exceeds the number of acts declared in whole or in part as unconstitutional, which is above 1,200. But even evaluation of the most significant precedents to have shaped social and political relations in the U.S. allows us to derive a few conclusions from such a study.

There is no doubt that the Supreme Court's precedents are an important source of law, both for lower federal and state judiciary, as well as for other branches of government. Even if there were examples in history of Congresses or Presidents limiting the binding character of SCOTUS rulings,[100] in most cases the Court confirmed the finality of its decisions. The significant position of its precedents does not mean that the justices are continuously overturning federal and state legislation, or modifying the meaning of the supreme law of the land. The unique character of this institution and its jurisprudence lies in its potential to determine almost all matters concerning legal, political, social, or economic relations which are written in, or which can be derived from, the Constitution. The use of judicial review, founded in the early years of American statehood and actively exercised since the 1920s, has resulted in strengthening the position of the SCOTUS relative to the other branches of government, especially in the process of constitutional adjudication, making the Court a serious and often final interpreter of what the law means.

There are definitely numerous factors determining justices' reasoning in constitutional cases, and the research results presented in this chapter are not exhaustive, especially in the context of the means of constitutional interpretation imposed by the Court in history. Still, it seems obvious that SCOTUS precedents play a significant role in constitutional law, both as the source of rulings which

100 Fisher (n 41).

explain the scope of governmental powers and the rights of the people, and as the body of common law responsible for understanding the character and principles of the American legal system. In constitutional cases the justices usually focus on the Court's own prior rulings, referring not only to the holding of the precedent, but also to the arguments raised by their predecessors. They often use national courts' decisions as a basis on which to inform, explain, and justify the conclusion they reach, whereas references to international law and international jurisprudence are still an exception, proving the atmosphere of distrust between American judges and their counterparts from international tribunals. Although in history there were decisions in which the justices quoted foreign law as one of the references in building their arguments, rarely have foreign legislation or foreign court decisions become an important source of reference in SCOTUS reasoning. The *Atkins*, *Roper*, and, especially, *Lawrence* precedents are definitely exceptions.

The justices enjoy discretionary power to choose the cases for review, and to decide about the direction of adjudication, but the analysis of the Court's adjudication in the twentieth and twenty-first centuries leaves no doubt as to the impact of ideology on justices' reasoning. Although the SCOTUS operates within strict procedures and the justices cannot act overzealously in the process of constitutional interpretation, the legal system provides for several opportunities to impose judicial review, which the Court often uses. Regardless of their attitude towards the *stare decisis* doctrine and towards prior precedents, or the mode of constitutional interpretation, in cases of social and political concern the justices usually decide on the basis of their ideology. A fundamental principle established by the SCOTUS in *McCulloch v Maryland*,[101] introducing a "legitimate end" to all rulings which are "within the letter and spirit of the constitution," determines the effectiveness and finality of the Court's rulings. If the justices say what the law is, and the only limitation on their interpretation is the Constitution, the meaning of which they determine, the position of SCOTUS precedents is by no means unique, even for a common law jurisdiction. Therefore, the Supreme Court, as a constitutional court, serves as an active and legitimate law-maker establishing binding precedents and determining the real character of the supreme law in the United States.

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