IDEOLOGICAL VALUES AND THEIR IMPACT ON THE VOTING BEHAVIOR OF JUSTICES OF THE FEDERAL CONSTITUTIONAL COURT OF GERMANY

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ABSTRACT

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Decisions of highest courts have a substantial impact on their respective societies. This thesis evaluates factors that influence a court’s decision and provides a novel approach to analyzing decision making processes at the Federal Constitutional Court in Germany. It poses the question whether observations made by American political scientists for the U.S. Supreme Court also apply to the German Constitutional Court. In the United States the attitudinal model has been developed as an explanation for the voting behavior of Supreme Court justices. It proposes that justices make their decisions according to their ideological values. In Germany, however, the prevalent perception is still that of the legal model, i.e. the theory that judges decide on the grounds of a defined canon of interpretive methods.

In order to determine whether the courts employ the legal or rather the attitudinal model, one decision made by the U.S. Supreme Court and one by the German Federal Constitutional Court are compared. They both deal with the widely recognized issue of abortion and thus provide an ideal basis for a comparative evaluation of decision making processes.

First, the decisions are tested for the use of interpretive methods. Next, the study asks whether the attitudinal model would also work in Germany. For this purpose, ideological values of individual German justices are measured and compared for the first time with their voting behavior. The findings are unambiguous. In both cases the legal model broke down. On the contrary, like the Supreme Court justices, the justices of the Constitutional Court voted in accordance with their ideological values. Therefore, this study demonstrates that there is a high probability that the attitudinal model can not only explain voting behavior at the U.S. Supreme Court but also decision making at the German Federal Constitutional Court.
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“No man is an island, entire of itself; every man is a piece of the continent.”
(John Donne)

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INTRODUCTION

While the process of judicial decision making is a significant area of study in the United States, voting behavior of German judges has been scrutinized only a little by political scientists. As a result, there is not much known about what factors influence judicial decision making on the German Federal Constitutional Court (FCC). Because of this lack of information, most observers still believe that German judges rely on a canon of interpretive methods for making their decision. This approach, generally known as the “legal model,” assumes that judicial opinions reflect sincere efforts at resolving disputes using legal reasoning. In the United States, by contrast, the presumption that decisions at the Supreme Court level are influenced by personal preferences of the judges is more widespread. This approach to explaining judicial decision making, the attitudinal model, has been widely embraced and rigorously tested by American political scientists for decades (Segal and Cover 1989; Segal and Spaeth 2002). These researchers have successfully quantified Supreme Court justices’ ideologies and correlated them with their votes, showing significant correlation between a justice’s political preferences and her voting patterns.

Regrettably, scholars have yet to apply this kind of attitudinal model to the FCC justices. To that end, this thesis undertakes the task of developing and applying a novel version of the attitudinal model to the voting behavior of the justices of the Federal Constitutional Court. Specifically, to assess the relative strengths of the two main decision making models, the legal model and the attitudinal model, this thesis presents a comparative study of two abortion cases, one heard by the German Federal Constitutional Court and one decided by the U.S. Supreme Court. The results of this study suggest that the attitudinal model is as successful in predicting judicial decisions on the FCC as it has been when applied to the U.S. Supreme Court.
The plan of this work is as follows. Chapter One presents a literature review. Next, in order to understand the foundations of the legal model, Chapter Two provides a description of the methods that each court uses to interpret the respective constitution. In Chapter Three, the structure and work of the courts and requirements for becoming a justice are explained. This gives some background information for understanding the concept of the attitudinal model. Chapter Four discusses the methodology used in this study, focusing in particular on the changes that had to be made to the standard attitudinal model in order to apply it to the FCC for the first time. The two abortion decisions that comprise the case study are depicted in Chapter Five. Chapter Six shows that the legal model is an inadequate approach for understanding these cases. In Chapter Seven, the cases are tested for the attitudinal model. The data collected for the German justices is presented and analyzed. Also the already existing numbers for the ideological values of Supreme Court justices are described and interpreted. The results suggest that the attitudinal model can be applied successfully to the FCC justices. In the concluding remarks in Chapter Eight, the results of this study on applicability of the attitudinal model in Germany are summarized, and some implications of the findings are discussed.
CHAPTER ONE: LITERATURE REVIEW

Empirical analyses of decision making on the Federal Constitutional Court of Germany are rather rare. Generally speaking, studies of FCC decision making are largely done by legal scholars, not political scientists (Dyevre 2008). These legal scholars, of course, come from German law schools, where they were trained to be judges who apply interpretive methods as a neutral means to make decisions. Not surprisingly, therefore, judicial review is widely seen as a neutral process. That is, the prevailing view is that for FCC judges “rules + facts = decision” (Dyevre, 2008, p.27). In short, observing non-legal factors and their impact on the decision making process is a field that lies outside of classical legal research in Germany.

Literature on Decision Making in Germany

While some legal scholars acknowledge the limitations of the traditional canon of interpretive methods, many legal academics, such as Böckenförde (1976) and Hesse (1999), do not consider the possibility that decision making might be influenced by factors other than pure legal reasoning. For example, Ossenbühl (1998) observes that “constitutional jurisdiction is the decision of a dispute by means and with the methods of law not political judgment” (p. 85). This explains why Dyevre (2008) describes the European approach to studying judicial behavior as one that “has long associated itself with a descriptive picture of judicial decision-making, depicting judges as both neutral and benevolent actors” (p. 3).

Some efforts to explain the voting behavior of Justices have been made by experts in the field of sociology of law. For instance, Rottleuthner’s (1987) study of the sociological background of justices found that party affiliation does not influence decision making of the justices at the Federal Constitutional Court to a large extent. Such investigations have been
conducted rather rarely, though. Fortunately, within the last two decades scholars in political science have become more interested in questions regarding decision making at the Federal Constitutional Court. Consequently, the understanding of the court’s behavior has begun to change. Van Ooyen and Möller (2006), for example, identify the predominant point of view in Germany – the position that methods of interpretation guide the decision making process – as a myth that is still alive in jurisprudence as well as in jurisdiction. In their opinion, however, this view does not mirror reality.

Other scholars have echoed this idea that factors other than a neutral application of interpretive methods determine the decision of the Court as well. Landfried (1994) argues that the picture of a neutral judge is an ideal that does not meet reality, and that German judges do make value-oriented decisions. She states that “[j]udges elected on ‘party tickets’ represent the political mainstream and this will show up in judicial review” (p.118). However, Landfried still reinforces the assumption of neutral interpretation to some extent by saying that “[i]n Germany party affiliation of judges does not seem to play a decisive role in the decision-making process” (p. 118). In short she finds that judges’ preferences do not have a strong influence on judicial decision making.

Some scholars take a slightly different view. For example, Schlink (2007) remarks that for him it has become more difficult to forecast decisions of the Federal Constitutional Court since there seems to be less emphasis on the dogmatic approach to decision making among the judges now. “When I am asked for a prediction,” he states “I am giving the answer in the meantime less on the basis of what, from my perspective, would be dogmatically adequate and correct but more and more on the basis of my knowledge about and assessment of the Justices” (p. 162).
Although the theory of non-legal influences on decision making has made modest gains, these observations have not been tested yet. One exception is Vanberg (2005). In his study, he scrutinizes the interplay between legislature and the Federal Constitutional Court. Although he does not focus on the justices’ ideological values, his results show that the justices are not neutral players but rather influenced by public opinion and expectations of political parties. Somewhat similarly, Hönnige (2006) examines the relationship between the decisions of the Federal Constitutional Court and its composition. His main finding is that in seventy-seven percent of cases with dissenting opinions, the dissent was written by justices who were nominated by the defeated party. However, he also referred to the justices’ party affiliation only and not to their ideological values.

The upshot of all of this is that German FCC research has largely overlooked the possibility that personal preferences influence judicial decision making. The small number of scholars engaged in this field illuminates that cases are generally seen as the product of neutral methods.

**Literature on Decision Making in the United States**

Unlike Germany, in the United States judicial behavior has been examined for a long time. In the course of this research, many efforts have been made to identify court decisions as a result of the justices’ personal attributes. Schubert (1965) helped develop the most widely-used theory for explaining judicial decision making. He stated that the crucial questions of a case, or “case stimuli,” and the justices’ ideology could be depicted on a scale. The justice’s position on this scale in relation to the case stimuli would then predict the justice’s vote. This study can be seen as a starting point in the development of the attitudinal model. Other scholars such as Rohde and Spaeth (1976) or Tate (1981) also focus on the justices’ attitudes as a basis for voting.
behavior. From these seminal works, Segal and Cover (1989) developed a method for testing the hypothesis that the votes of Supreme Court Justices reflect their attitudes.\(^1\) They quantitatively measured ideological values of Supreme Court justices and compared them with their votes. This led to the result that the justices’ ideology and their voting behavior correlate.

Segal’s and Cover’s approach is not without critics. For example Baum (1994) argues that the sources Segal and Cover (1989) and later Segal and Spaeth (1993, 2002) use are imprecise indicators for determining the justices’ ideology. According to Baum (1994), justices’ statements about certain policy areas in favor or against a political standpoint do not prove that they themselves lean toward these political ideas. Another major criticism of Segal’s and Cover’s (1989) approach focuses on the fact that the attitudes were tested empirically but the use of interpretive methods has not been examined quantitatively (Canon, 1993, Rosenberg, 1994). Meanwhile, Songer and Lindquist (1996) answer Segal’s and Spaeth’s (1996) observation that precedent plays a less important role than commonly assumed by providing numbers that prove the significance of this interpretive method. They find that “in a substantial number of cases, justices whose policy preferences conflict with the policy embodied in precedent often join opinions that nevertheless reaffirm those precedents” (p.1061). They admit, however, that in some categories of cases the justices’ attitudes have a crucial impact on the decision.

Another line of critique comes from Epstein and Knight (1998), who argue that focusing solely on the justices’ votes gives an incomplete picture of the decision making process at the Supreme Court. Although they agree with Segal and Spaeth (1993) that justices want to implement their own political preferences, Epstein and Knight hold that strategic considerations play a decisive role as well. Similarly, Martin and Quinn (2002) point out a shortcoming of Segal’s and Cover’s method. By measuring a justice’s ideological value prior to the appointment,

\(^1\) Segal and Cover’s methodology is discussed in greater detail later in this paper.
Segal and Cover overlook value changes during the term of office. This can decrease the accuracy of evaluating the relationship between ideological values and votes and weaken the precision of predicting the cases’ outcomes, according to Martin and Quinn (2002).

Other legal scholars disavow the attitudinal approach altogether in favor of an alternative approach called the “legal model.” Advocates of the legal model see neutral constitutional interpretation in the center of the decision making process. Markovits (1998), for example, states that the Constitution provides “internally-correct answers to all legal questions” (p.1). From this position it follows that he rejects Segal’s and Spaeth’s (2002) assumptions and rather holds that judicial behavior is determined by the words the constitution provides. Greenawalt (1992) shares this view by arguing that “any extreme thesis that the law is always or usually indeterminate is untenable” (p. 11).

There also have been other attempts to predict Supreme Court decision making. Ruger, Kim, Martin, and Quinn (2004) compare predictions of a statistical model based on case characteristics with the forecasts of legal specialists. They conclude that “there is some value to assessing the Court’s behavior in accordance with factors of intermediate generality – more general than particularized doctrine, text, or facts, and more specific than simple ideological assumptions” (p.1194). Hence, they are among those scholars who, contrary to Segal and Cover (1989), espouse a mediating proposition.
CHAPTER TWO: INTERPRETIVE METHODS

Scholars who adhere to the view that judges use legal reasoning to resolve cases generally believe that there are certain acceptable methods of interpretation that judges use in their decision making. In the United States, approaches to interpreting the Constitution include textualism, originalism, doctrinalism, and prudentialism (Bobbitt, 1982). In German constitutional jurisprudence, grammatical, historical, systematical, and teleological interpretation are commonly accepted as means to read the constitution. Moreover, certain principles are meant to guide the process of finding answers in the constitution. The following part describes these methods and principles in greater detail.

Constitutional Interpretation in the United States

Although there is no exhaustive canon of interpretational methods in American constitutional jurisprudence, certain ways of making arguments that are considered reasonable are used frequently. These approaches to interpretation are not mutually exclusive but can complement one another. Since there is no agreement on standards for interpretive methods the following description focuses on the most common approaches. They therefore have to be understood as archetypes rather than as a precise explanation of all existing approaches.

Textualism

Since the Constitution is a written document, each interpretative process begins with a careful reading of the text. A textualist argument, however, involves more than using the text of the Constitution as a starting point for interpretation. It attaches greatest importance to the words of the written law and assumes that a constitutional provision “either requires or forbids a certain conclusion, irrespective of what might be said about that conclusion on other grounds” (Fallon, 1987). Thus, Murphy, Fleming, Barber, and Macedo (2003) describe textualism as an approach
that “refers to an insistence on the literal meaning of a provision...without the insertion of any ‘ifs, ands, or buts’” (p. 391). The textual argument leads to clear results as long as a provision is unambiguous. However, since the Constitution frequently uses vague terms, pure textualism often cannot provide satisfactory results. Thus, further methods are needed to find acceptable answers to interpretive questions.

**Originalism**

Originalism is one of these supplemental approaches. It is founded on the idea of finding solutions for ambiguity in the Constitution by seeking the original meaning of a provision. However, it is debatable whose perceptions should be considered. One possibility is to follow the understanding of those people who were leading figures in the constitutional convention. Another path to finding original meaning is looking at the public and how it understood the provisions when they were enacted (Fallon, 1987). Thus, two approaches can be identified which both are labeled as orginalism.

Originalists who employ the first approach interpret the Constitution with regard to its framer’s intent. In order to determine what the subjective intentions of those who wrote the constitution were, they look at several sources including the contemporary writings of the framers, the Federalist Papers, and the notes from the Constitutional Convention itself. However, most modern originalists choose the second approach to originalism. They focus on the general public’s understanding of the Constitution’s provisions at the time when they were ratified or amended (Goldsworthy, 2006).

**Doctrinalism**

Another approach to constitutional interpretation is doctrinalism. According to Murphy et al. (2003), “Doctrinalists understand fidelity to the Constitution not in terms of adherence to an original text but principally to an ongoing tradition of authoritative interpretation which is largely
the responsibility of judges” (p.407). This description of doctrinalism illustrates that it is based primarily on judicial precedents. Once the Supreme Court has made a decision this ruling is binding for disputes that arise later. Hence, the doctrinal approach converts principles according to which court decisions have been made from merely advisory to normative standards. However, doctrinalism cannot serve as a universal approach to interpretation. If there is no case that has addressed this issue before, this method is inapplicable. If, in contrast, too many cases on the same issue exist – a problem more prevalent today – then the different ways the cases have been decided will not provide a clear precedent.

**Structuralism**

When using a structuralist approach to constitutional interpretation, decisions are based on an analysis of the constitution’s general arrangement. These arguments are therefore “inferences from the existence of constitutional structures and the relationships which the Constitution ordains among these structures” (Bobbitt, 1982, p. 74). In order to draw conclusions from the organization of the Constitution interpreters have to examine how these structures are intended to function as a coherent, harmonious system. Bobbitt (1982) describes this way of finding arguments as “logical moves from the entire Constitutional text rather than from one of its parts,” (p.74). Thus, structuralism is an approach to interpretation that derives its arguments from the concept and the system underlying the Constitution.

**Prudential Argument**

The prudential approach to interpretation focuses on factors external to the law. It is a “constitutional argument which is actuated by the political and economic circumstances surrounding the decision” (Bobbitt, 1982, p. 61). The reasoning for using such a method according to Murphy et al. (2003) is that “[t]he words of the document, its surrounding practices, the commands of tradition, and the meaning of underlying normative theories must…be
construed…as practical guidelines for flawed people in a flawed world.” (p. 426-427). Thus, applying the prudential method leaves the text aside to a large extent while looking for pragmatic solutions which match the actual political and societal situation.

Other Arguments

As mentioned above the canon of methods is not exhaustive and there is no agreement on which approaches to use. Therefore, besides the methods that have been explained above other ways of interpreting the Constitution exist. Some of them are briefly depicted below.

Developmentalism is an approach that takes into consideration societal and cultural changes. It “rejects static understandings on constitutional meaning. By locating the sources of constitutional evolution in the broad political culture, developmentalists claim to build innovations on the solid ground of broad popular consensus” (Murphy et al., 2003, p.401). Thus, building on an already existing basis this approach wants to develop the system by focusing on a wider range of aspects.

Whereas some words are unambiguous, others are lacking a clear definition and a definite idea of what their meaning implies. Terms such as “cruel” or “unreasonable” are examples of such vague expressions in the Constitution. Thinking critically about these terms and consequently defining a standard for them can be described as a philosophical approach (Murphy et al., 2003, p. 415). A further way of finding an answer to a constitutional question is to analyze constitutional intentions. This is done by defining the “political system’s basic purposes as they relate to and inform the enterprise of constitutional interpretation” (Murphy et al., 2003, p.419). Thus, justices who employ this approach argue on the basis of the Constitution’s intentions and functions.
Constitutional Interpretation in Germany

The main idea guiding the German legal system is one of self-containment, coherence, rationality, and logic deduction. This form of legal positivism called conceptual jurisprudence (Begriffsjurisprudenz) differentiates precisely between moral norms and law and has “sought to create a science of law marked by its own internal standards of validity” (Kommers, 1997, p. 40). By assuming that these internal standards exist, conceptual jurisprudence implies that external factors such as sociological aspects or politics do not have an influence on judicial decision making. Law is rather seen as based on the ideas of independence, logic, and reason. Under these premises a court’s role is to apply laws and statutes systematically. Therefore Justices of the Federal Constitutional Court as well as other judges and scholars are still keen to found their point of view on reason, logic, and systematical deduction rather than on pure opinion.

In the process of interpretation the justices of the Federal Constitutional Court are guided by the idea of discovering an objective will of the constitution’s framers and of deriving from that an objective order of values. This assumes that there is a “right” meaning. However, most commentators are aware of the limits of this “objective will” theory. Nevertheless, it is still the basis of decision-making in the Federal Constitutional Court. Many scholars have tried to close the gap between theory and constitutional reality. Wolfgang Zeidler, president of the Federal Constitutional Court from 1983 to 1987, has found a rather pragmatic way of describing this problem. According to Zeidler “‘objectivity’ in constitutional interpretation manifests itself most clearly when the justices of a given senate who collectively represent diverse career backgrounds, ideologies, and political attachments, manage to surmount their differences and reach unanimous agreement” (Kommers, 1997, p.45).

This approach to constitutional jurisprudence and the lack of a principle comparable to the American stare decisis rule has led to a dogmatic framework which serves the function of filling
in the blank where provisions do not provide a clear answer to a constitutional question or where conflicts appear. Schlink (2007) describes the functioning of such dogmatics of law as follows: “By interpreting and applying laws courts decide individual cases; jurisprudence puts the decisions, interpretations and applications developed by courts and jurisprudence into a system, and courts make their judgment on the basis of this system” (p. 160). This means, as Schlink explains, that courts first make sure whether the system already provides an answer to the problem. If not and if a new solution has to be found it has to blend in with the system or at least has to be connected to it (Schlink, 2007, p. 160).

Hesse (1999) summarizes the purpose and conception of constitutional interpretation as “finding the constitutionally ‘right’ result in a rational and controllable procedure, substantiating this result rationally and in a controllable manner and by these means generating legal certainty and predictability – not just deciding for the sake of making a decision” (p. 21).

After having described the assumptions constitutional interpretation in Germany is based on and formed by it is of interest to present the actual methods and techniques of interpretation. Interpreters of the constitution use four standard interpretive methods: grammatical, historical, systematical, and teleological. These, however, are not the only aspects to be considered. The methods are guided and limited by certain principles.

Unity and Consistency

The Basic Law is seen as a system of norms that is coherent and self-contained. In one of its first decisions, in the Southwest State Case (1951), the Court pointed out this theory: ”No single constitutional provision may be taken out of its context and interpreted by itself. Every constitutional provision must always be interpreted in such a way as to render it compatible with the fundamental principles of the constitution as a whole“ (BVerfGE 1, 14, 32). Underlying this approach is the perception that all norms are logically connected and form a coherent entity
(Zippelius, 2003, p. 43). This requires that a provision is not to be interpreted separately. It has to be read in a way that avoids contradictions with other provisions.

_Protortionality_

Proportionality is the overarching principle of constitutional decision making and the heart of every constitutional decision. As the Basic Law lacks a provision similar to the due process clause, such a technique is needed to justify limitations of rights and liberties and to come to balanced decisions.

After having examined if a certain statute or other governmental action affects the area protected by a constitutional provision, the law or the action of public authority has to undergo a three prong test in order to be proven consistent with the Basic Law: First, a law or an action restricting a basic right must be appropriate (_geeignet_). This means it must be able to achieve a legitimate end. The second step is to test whether the statute is required (_erforderlich_), or, more precisely, whether the means used to achieve the valid purpose have the least possible restrictive effect on the constitutional value. According to Kommers (1997) this test is, compared to American constitutional law, “less than the “strict scrutiny” and more than the “minimum rationality” test” (p.46). The third and most complex test is to find out whether the statute is proportionate in a narrow sense (_verhältnismäßbig im engeren Sinne_). Here, all other approaches to constitutional interpretation come into play in order to balance rights of the citizens, duties of the state and eventually to find a widely acceptable solution.

_Practical Concordance_

Another challenge to a dogmatic system is finding a means to address the problem of conflicting constitutional norms. The principle of Practical Concordance, introduced by Konrad Hesse, is therefore fundamental to German constitutional law. This method requires that rights and duties covered by the constitution have to be harmonized when they conflict. He argued that
whenever constitutional norms collide the concept of unity and consistency requires an optimization of both interests: “Constitutionally protected interests have to be combined to such an extent that each of them becomes reality…. Both interests need to be limited in order to bring both of them to bear as well as possible” (Hesse, 1999, p. 28). This means that one interest should not be realized at the expense of the other. However, the limitations of this approach are obvious since there are interests that cannot be weighed.

The principles described above give an impression of what justices have to take into consideration when ruling. However, they do not provide an approach to read and interpret the text of the Basic Law. Applying the classical methods of interpretation is therefore meant to serve the purpose of understanding constitutional provisions. The four main approaches to reading the constitution are, as stated above, grammatical, historical, systematical, and teleological interpretation. These concepts were developed by Friedrich Carl von Savigny, the founder of the ‘historical school of jurisprudence’ in 1840 and are similar to the methods that can be found in American interpretation.

*Grammatical Interpretation*

Textual or grammatical interpretation plays a central role in interpreting the Basic Law. All interpretation arises from the general assumption that words mean what they say and thus, philological methods are used to analyze the meaning of a word or a sentence. As words always draw their meaning from the context in which they are used, their meaning depends on their location in the constitution (Zippelius, 2003, p. 45-48). However, many words that are used in the constitution are relatively vague. Therefore, the words of the Basic Law do not provide an unambiguous source from which justices can draw significance. They rather have to look for the putative meaning of the words. Thus, textual interpretation gives justices the opportunity of bringing their own ideas and values to bear. However, this approach can become
counterproductive to discovering the objective will and objective order of values of the Basic Law. Due to this ambiguity, textual interpretation is rarely used as the only means to read the constitution.

**Historical Interpretation**

Since the Basic Law is a rather young constitution – having come into effect in 1949 – all drafting documents including protocols and exact descriptions of the discussions in the constitutional convention still exist. Thus, they can serve as a source for finding the original will of the framers. Furthermore, the historical method allows looking at rules and laws preceding the Basic Law and at traditions and ideas the Basic Law is based on.

However, although historical aspects are often considered in reasoning against or in favor of a certain position, history is not a primary source for constitutional arguments. Goldsworthy (2006) describes it this way: “The drafting history of the Basic Law is most often cited when neither text nor context provides a clear answer to an interpretive problem” (p.198). This shows that historical interpretation plays a rather secondary role in decision making.

**Systematical Interpretation**

Systematical interpretation is closely related to the principle of the structural unity of the Basic Law. It seeks to derive its reasoning from the structure of the constitution. This is only possible on the basis of the assumption that the Basic Law follows a unified structure of values and consistent relations of the clauses to each other. Thus, the meaning of a certain clause has to be found by reading a provision in conjunction with other related provisions and by examining the structure of the law. By these means the ideas guiding the law can be revealed and the objective will of the constitution can be found (Zippelius, 2003, p. 43).

Since this assumption is still “deeply ingrained in Germany’s culture of interpretation” (Goldsworthy, 2006, p. 199) it plays an important role in German jurisprudence. However, this is
a more open-ended and less precise method than most scholars will want to admit. The structure of the constitution seems to be a rather objective frame, but drawing conclusions from it is subjective.

*Teleological Interpretation*

The teleological approach to constitutional interpretation focuses on the intention of the constitutional provision as the name derived from ‘telos,’ Greek for ‘goal,’ implies. The question the justices have to ask by applying this method is what a specific basic right intends. Brugger (1994) describes it as follows: “In teleological analysis, the historical will of the framers is devalued: Instead of being accorded critical emphasis as to what was then willed, their declarations of intent are only deemed indicative, not determinative, of the contemporaneous purpose of the legal provision or document” (p. 397). Thus, the main question guiding the teleological approach is what the purpose of a certain provision is.

*Application of Methods and Principles*

The principles and methods mentioned above are used by the justices to examine whether a constitutional provision has been violated. To examine the constitutionality of a law or of an act of public authority they follow a certain scheme: First the area of protection has to be defined. This means that the justices have to clarify what exactly a specific constitutional provision means or, in other words, what is protected by this provision. This is done by applying the described methods and principles.

After having defined this area of protection, the question if the challenged law or official action has interfered with this protected area has to be answered. If an intrusion is found the justices have to weigh whether the interference was justifiable. In this third step the principle of proportionality is employed. Thus, all theories and methods come into play here.
CHAPTER THREE: THE COURTS

The preceding chapter illustrates the legal interpretive methods that judges on the respective courts can use in resolving cases. But how do these courts actually make decisions? Examining the structure and process of the U.S. Supreme Court and the Federal Constitutional Court is essential to understanding the factors that might influence decision making. Moreover, readers may be especially unfamiliar with the workings of the FCC. Accordingly, a brief review of those structures in both courts follows here.

The United States Supreme Court

*Organization and Procedures*

The United States Supreme Court in Washington D.C. consists of one Chief Justice and eight Associate Justices. During the term of the court which starts on the first Monday in October and ends late June or early July the justices conduct sittings in which they hear cases and deliver rulings. In recesses which alternate with sitting periods, cases are discussed, and opinions are written. Chambers support the justices in their daily work. In them three to four law clerks assist each Justice in summarizing, analyzing and preparing cases or drafting opinions. Therefore, their direct impact on the decisions is undeniable. Usually the clerks are recent graduates of prestigious law schools who have clerked at a federal court of appeals (Baum, 2004, p. 15). Besides the justices and the law clerks there is other staff serving at the court in order to ensure a court operating efficiently. The clerk of the court is an officer who, according to Supreme Court Rule 1, is in charge of processing all cases that come to the court. Other officers include the reporter of decisions, who is supervising the preparation of the official record of the Court’s decisions, and the librarian (Baum, 2004, p. 15).
The Court’s main function is that of an appellate court but under certain circumstances it has also original jurisdiction. Those cases, which have not been heard by any other court, account for only a very small amount of the court’s workload and involve ambassadors, public ministers, or consuls from foreign countries. Appeals, certifications, and petitions for writs of certiorari constitute the larger part of the justices’ work. Certifications enable lower courts to ask the Supreme Court for clarifying federal law. These paths to appeal, however, are still much less common than a petition for writ of certiorari. In this case litigants ask the Supreme Court to request the records from the lower court. About one percent of the yearly number of approximately eight thousand petitions for certiorari is accepted. These cases are then subject to full review (Epstein & Walker, 2007).

**Decision Making Processes**

The decision whether a case is worthy to be reviewed by the Court follows certain mechanisms: The justices have to select approximately ninety cases each period. For this purpose copies of all acceptable cases are forwarded to the justices by the clerk’s office. Since the amount of cases submitted to the court is extremely high the court employs a system of “pooling” in order to make the process of selection less time consuming. In collaboration with other chambers, the justices’ law clerks read the petitions and write memos on the case. These pool memos and a law clerks’ assessment of a case help the justice to make a decision regarding the question which case should be heard fully (O’Brien, 2005).

Before meeting in a conference in order to decide which cases are accepted, the Chief Justice creates a list of petitions that in his opinion should be considered. Other justices can add cases, but not take any away. On the basis of this list, the justices meet in the Conference for discussion. Rule 10 of the Supreme Court Rules states that whether to allow “[r]eview on a writ
of certiorari is not a matter of right, but of judicial discretion.” It furthermore mentions that only for compelling reasons cases will be accepted for decision. What compelling reasons in particular are, however, remains in the justices’ assessment (Epstein & Walker, 2007).

The political, ideological, and legal considerations that are involved in this process remain subject to speculation since the conference takes place confidentially. Traditionally the court grants certiorari to cases which are affirmed by at least four justices. By applying this procedure the Court is setting its agenda relatively autonomously.

Once a case is accepted by the Court the parties have to explain their view in written as well as oral arguments. The appealing party has to formulate a brief which the opposing party has to answer. The Justices study these briefs in preparation for the oral argument. Based on the information and reasoning provided in the briefs they may ask questions in the oral argument. They can also consult them afterwards or even implement them into the final opinion. Actors other than the parties can formulate their points of view in amici curiae briefs after having received permission by the parties to the suit. Such briefs can be written by interested persons or organizations or governmental units. The latter do not need permission.

Another opportunity to bring a party’s position to bear is the oral argument. The attorneys can present the case for thirty minutes but the justices are allowed to interrupt them. Whether these oral arguments have much influence on the outcome of the case is questionable but they at least provide the public access to the court’s decision making process, and therefore they carry a symbolic meaning (Epstein & Walker, 2007).

The next step in the process of deciding a case is the conference. In these private meetings the Chief Justice is leads the discussions. After calling up a case he explains his view on the issues and his recommendation how to decide it. The other justices follow in advancing
their opinion in order of seniority. Regularly, the conference results in a tentative vote. In case the Chief Justice votes with the majority he has the right to assign someone to write the opinion. If he is with the minority the senior associate justice in the majority is responsible for assigning the writing of the opinion (O’Brien, 2005, p.260).

After having written a first draft of the opinion the writer passes it to the other justices who have the opportunity to bargain with him or her. During this circulation process which takes several months an average majority opinion is revised three to four times. The justices can also prepare a concurring or dissenting opinion. By writing an opinion or signing one of another justice each justice eventually has to declare his or her standpoint. Finally the decision and the vote are announced to the public.

*Justices and their Appointment*

The nine Supreme Court justices are all nominated by the president. Although the Constitution does not require a career in the judiciary most of the justices in the Supreme Court’s history had judicial experience prior to their nomination. Another common career path to the Supreme Court is service in public office as a governor or senator as well as working as an attorney (Segal, Spaeth & Benesh, 2005, p.250).

According to the Constitution the justices “shall hold their offices during good behavior.” A retirement age does not exist. This leads de facto to life time tenure of the justices. However, voluntary resignation or retirement is common, too. Justices can also be removed by impeachment or conviction.

If there is a vacancy, according to Article II of the Constitution, the president names a nominee who then has to be confirmed by a majority vote in the Senate. Although in theory this seems to be a simple procedure the actual selection of justices is influenced by various factors
which make the process much more complex. While the president is eager to nominate a justice who is in compliance with his views he has to take into consideration that a nominee who is not confirmed by the Senate could also weaken his position. Thus, partisanship, ideology, and political environment play a crucial role in nominating a justice. Also lobbying by the legal community as well as by special-interest groups influences the decision. Other parameters such as race, gender, or religion cannot be disregarded, either (Segal, Spaeth & Benesh, 2005, p.249).

In order to evaluate a candidate’s qualification for serving as Supreme Court justice, the Senate Judiciary Committee conducts hearings in which the nominees are questioned mainly regarding their views on legal issues (Baum, 2004, p. 35). The committee then votes on whether to send a positive, negative or neutral report to the full Senate. The final decision to approve a candidate or to reject him or her lies with the Senate.

The Federal Constitutional Court of Germany

The Federal Constitutional Court (Bundesverfassungsgericht) is vested with various competencies and therefore plays an outstanding role in Germany’s legal system as well as in its political and societal life. While deciding on the application of subconstitutional law is incumbent upon the administrative, labor, fiscal, social and – for criminal and civil cases – ordinary court systems, the Constitutional Court is solely concerned with constitutional questions which means the interpretation of the Basic Law. It reviews decisions of other courts which may have violated citizens’ constitutional rights, controls the executive branch as well as the legislature and decides on conflicts between constitutional organs. Moreover, it is responsible for an impeachment of the federal president and for prohibiting political parties. This illustrates that the Constitutional Court acts at the interface of law, politics and society.
Established 1951 in Karlsruhe, the Court has gained high acceptance among the population and is continuously ranked in the top three of the institutions citizens trust most (Schlink, 2007, p. 157). The court has its legal foundation in the Basic Law and in the Federal Constitutional Court Act (FCCA). It has moreover given itself rules of procedure. Since its founding the court has decided 167,000 cases as of December 31, 2007 (Das Bundesverfassungsgericht, Geschäftsanfall und Erledigungen).

**Function**

The Court serves two functions. It is a court as well as one of the highest constitutional organs of the Federal Republic of Germany, and it controls the legislative, the executive, and the judicial branch. As a court it rules in actual constitutional disputes by applying exclusively the Basic Law. A main task of the justices, therefore, is to concretize rather unspecific terms of the Basic Law. Thus, ruling on the basis of constitutional law leads, as widely accepted, to a relatively high degree of developing and creating law (Degenhart, p. 234). This results in political influence of the court. The awareness that “constitutional law is political law” (Degenhart, 2001, p. 234) derives from the structure of the Basic Law and the status of the Constitutional Court within Germany’s constitutional and political system. Constitutional law sets the rules and determines certain procedures for the political decision making process. Therefore, it defines the framework for political actions. Consequently, limiting the actions by interpreting this framework constitutes political action (Degenhart, 2001, p. 234).

This perception is relevant to the Court’s second function as a constitutional organ. Serving as the institution that gives binding directions in constitutional questions by deciding independently, the Federal Constitutional Court protects constitutional law even against other
constitutional organs such as the parliament. As a frequently used term describes it, it is the 

A practical result of its status as constitutional organ is its administrative autonomy. 
Unlike other highest courts, it is not part of the portfolio of the Ministry of Justice and therefore 
prepares its own budget in consultation with the Parliament and the Ministry of Finance (Hesse, 
1999, p. 279). It also decides independently about its rules of procedure.

Organization

The Federal Constitutional Court consists of two Senates, each of which has eight 
justices. Both Senates enjoy the same rank and rule as “The Federal Constitutional Court.” The 
president of the court is ordinarily heading one of the Senates while the vice president presides 
over the other one. Their vote, however, has the same weight as every other Justice’s vote; the 
president’s and vice president’s position has an administrative function only.

In order to ensure a high quality of rulings, each Senate is specialized on certain 
constitutional questions. The First Senate is concerned predominantly with conflicts between the 
state and citizens. The Second Senate decides on conflicts between state organs. This leads to an 
accumulation of certain topics in each Senate. For example the Second Senate regularly has at 
least one expert on tax law and one on international law. If a senate disagrees with a former 
ruling of the other senate in a question that is crucial to the actual constitutional problem the 
plenum meets. All 16 justices discuss the issue and decide whether it is justifiable to overrule the 
former opinion. Furthermore, the plenum is responsible for deciding on a dismissal or on the 
early retirement of a justice of the Constitutional Court.

In order to be able to handle the large number of cases submitted to the court every year, 
each Senate appoints Chambers (Kammern) consisting of three justices. They decide about the
acceptance of Constitutional Complaints – the most frequently instituted proceeding – and
admissibility of Judicial Requests. As for Constitutional Complaints the Chambers also rule on
the merits of the case. However, the ruling has to be unanimous and clearly based on standards
the Court has established before. Otherwise the Chamber is required to send the decision to the
Senate. Also, it remains solely in the hands of the Senates to declare the unconstitutionality of a
statute.

Since the workload for the justices is relatively high each one has access to three to four
law clerks, mostly judges, scholars, or civil servants who have already made legal careers. They
are assigned to the Court for two to three years in order to assist justices in doing research and
formulating legal statements. Their function is rather unspecified, as the rules of internal
procedure show: According to them “[t]he law clerks assist the justices they are assigned to in
their official business. They are bound to the instructions of the justice.”

The administrative department of the court, headed by the Director of the Federal
Constitutional Court, is responsible for the overall organization of the court. By coordinating all
procedures and actions of the court the Director’s office is crucial to the court’s ability to work
efficiently.

*Justices and their Election*

In order to be elected justice potential nominees have to demonstrate certain
qualifications which are specified in the FCCA as well as in the German Judges Act. First,
justices must be at least forty years of age and eligible for election to the parliament (*Bundestag*)
which, amongst other requirements, implies German citizenship. As for professional
qualifications they have to possess the criteria that enable a person to hold judicial office: The
pass of the first and second state examination. They, furthermore, are not allowed to hold any
office in the legislative or executive branch or to pursue any other professional occupation except for professor at a German university. In order to ensure the justices’ independence they are appointed for twelve years and cannot be reelected. They have to retire at the age of sixty-eight.

Besides these constraints founded in a nominee’s vita there are other limitations to the list of potential candidates. As defined in the FCCA, three of eight justices per senate must be elected from the federal judiciary. Other nominees are often law professors, judges of other federal or state courts, public administrators, or members of the Bundestag (Schlaich & Korioth, 2007, p. 24). It is also a well established custom that justices with different specializations serve the court. Therefore, if for instance an expert on international law and immigration issues retires a justice who has a reputation in a similar field should be appointed.

The responsibility of electing justices lies in the hands of the Bundestag as well as the Bundesrat (Federal Council; representation of the states) in order to accommodate the principle of federalism. Half of the justices are elected by the Bundestag and the other half by the Bundesrat. The Bundestag has established a Judicial Selection Committee (Wahlmännerausschuss) consisting of 12 members representing the political parties of the parliament proportionate to their strength in the Bundestag. A two-thirds majority is required to elect a candidate. This is to avoid that in this highly political process one of the big parties determines the process and appoints solely justices who are affiliated with the party and its political interests. For the same reason, also the decision of the Bundesrat which votes as a whole needs a qualified majority. Therefore, in order to be able to elect a nominee the political parties have to negotiate the candidates with each other. This also prevents parties from proposing extremely biased candidates since it is unlikely to reach consensus on their appointment. Therefore, as long as one political party does not have a qualified majority in both houses for a
long period of time, it cannot elect solely justices that are leaning toward its political direction (Hesse, 1999, p. 279). In practice, a proportional system has been established: Four seats of each Senate are taken by justices proposed by the Christian Democratic Party or its coalition partner whereas the other four seats belong to the Social Democratic Party and its affiliates.

Proceedings

All jurisdiction of the Federal Constitutional Court is enumerated in the Basic Law and the requirements for each proceeding are specified in the FCAA. The proceedings with which the Court is mostly concerned are Constitutional Complaints, Concrete and Abstract Judicial Reviews, Disputes between High Federal Organs and Federal-State Conflicts. The bulk of the court’s work consists of Constitutional Complaints (*Verfassungsbeschwerde*). That means the justices decide on violations of an individual’s constitutional rights by public authority. If the individual thinks that his or her rights are violated by a legislative act, an administrative decree, or a judicial decision he or she can file a Constitutional Complaint. Since, contrary to all other proceedings, everybody (not just specific public authorities) has access to this proceeding the number of those who make use of this opportunity is much larger than in other proceedings. In the business year 2007 the court has completed 6,324 cases of which 6,175 were Constitutional Complaints (Das Bundesverfassungsgericht, Verfahrenszahlen). Only about one percent of the cases is fully reviewed, others fail at early stages of the process. However, this relatively small percentage of fully deliberated cases often raises significant constitutional questions as the number of published opinions illustrates: about 55 percent of them are Constitutional Complaints (Kommers, 1997, p. 15).

In principle the FCCA requires the Court to accept any complaint. However, in order not to be barred a priori further prerequisites for being accepted have to be fulfilled. The case must
comprise a certain constitutional significance and has to be not “obviously unfounded”. After being accepted, the case is scrutinized for its admissibility. The specific rules for this test are laid down in the FCCA. If the complaint has fulfilled all these requirements, the court decides whether the concrete action of the public authority indeed violated the complainant’s constitutional rights. If so, the action is voided or – in case of a complaint regarding a judicial decision – the ruling can be remanded (Schlaich & Korioth, 2007).

The Concrete Judicial Review (Konkrete Normenkontrolle) can only be induced by German courts. If a court is convinced of the unconstitutionality of a norm that is crucial to its decision it has to ask the FCC for concrete judicial review. The Constitutional Court has to allow highest federal organs and state governments as well as the parties involved in the proceeding at the ordinary court to comment on the constitutional question by means of written briefs. If the Constitutional Court comes to the conclusion that the statute is unconstitutional it declares the norm null (Schlaich & Korioth, 2007).

The compatibility of a federal or state law with the Basic Law or of state law with federal law is subject to the Abstract Judicial Review (Abstrakte Normenkontrolle). In this proceeding federal or state governments or one third of the members of the Bundestag can file the case. The parties have to formulate their standpoint in written briefs and – contrary to most other proceedings – oral arguments are permitted. Finding that the statute is unconstitutional or inconsistent with federal law, the court’s decision makes the law null and void (Schlaich & Korioth, 2007).

Parties in Disputes between High Federal Organs (Organstreitverfahren) can be the federal president, federal government, the Bundestag, or units of these organs who are granted own rights in other statutes. These controversies between constitutional organs about their rights
and duties laid down in the constitution are mainly disagreements regarding their competencies. The decision of the court does not change the status of the organ’s disputed action. It just determines whether the action was unconstitutional and therefore unfolds its effect rather in the future (Schlaich & Korioth, 2007, p.50) since it provides clarity regarding future actions.

In a Federal-State Conflict (Bund-Länder-Streit) the competencies between states and the federal government are subject to discussion. Regularly the problematic issues are a state’s administration of federal law or supervision over state administration by the federal government. Only federal or state governments can bring such a case to the court. The result of a Federal-State Conflict clarifies the relationship between the states and federal competencies (Schlaich & Korioth, 2007).

Furthermore, proceedings exist for prohibiting political parties and impeaching the Federal President as well as other very specific proceedings which are rarely used.

**Decision Making Process**

When cases come to the court they are processed in the Director’s office and afterwards forwarded to the responsible Senate. Each case is assigned to a rapporteur (Berichterstatter). At the beginning of the business year the justices agree upon who of them should take which sort of cases. Regularly, justices become rapporteur for cases which lie in their field of expertise.

The rapporteur’s duty is to prepare a votum, which means a research report about the case. Assisted by his or her law clerks the rapporteur has to provide background information such as relevant scientific data, prepare a literature review and give an overview over precedents of the court. Furthermore, he or she is required to prepare all arguments on each problem and all aspects of arising questions.
At the end of the report, he or she has to give a recommendation of how to decide the constitutional problem and explain his or her point of view. This is the crucial stage in the decision making process of the Court, and the justices seek to provide an elaborate, balanced and well-organized report on which consensus might be obtained. In order to achieve such an acceptable votum, they usually try to follow the established dogmatic and interpretational standards, as Limbach (2001) former President of the Court explains (p. 27). It takes several weeks or months to prepare the report, which regularly comprises about hundred pages and more. Often the votum becomes a large part of the final decision.

The rapporteur passes his or her votum to the other justices who study it in depth. In weekly meetings – sometimes even twice a week – the justices deliberate the cases the presiding justice of the Senate has put on the agenda. During these discussions, which are secret, the rapportuer’s skills and personality come into play: “The rapporteur who does his homework, solicits the views of colleagues, and negotiates artfully is likely to prevail in conference” (Kommers, 1997, p. 26). The presiding justice’s role at this stage is to guide the decision making process. He or she leads the discussions, frames the questions the Senates votes on and is responsible for finding the largest possible majority. For making the final decision a simple majority of votes satisfies procedural requirements. In the case of a tie a violation of the constitution or other Federal Law cannot be declared (Schlaich & Korioth, 2007, p. 29).

Oral arguments although in § 25 I FCCA described as the rule are heard rather rarely. Each Senate holds only three to four formal hearings a year (Kommers, 1997, p. 26). If, however, they are conducted, they are public. In Abstract Judicial Reviews and Disputes between High Federal Organs they are mandatory.
The final opinion is usually written by the rapporteur. He or she can request, however, that a colleague takes on this duty if he or she has strong resentments regarding the majority’s decision. Although the style of the opinion as well as the issue of the case contains a reference to the author of the opinion his name is not officially mentioned. Dissenting or concurring opinions, however, are marked with the dissenting justices’ names. The possibility to write dissenting and concurring opinions has been introduced in 1970 but has remained an exception: More than ninety percent of the reported cases of the court are decided unanimously (Kommers, 1997, p. 26). Traditionally, only if a Justice is severely opposed to the majority’s opinion he will formulate his concerns. Nevertheless, even if there are dissents, all eight justices have to sign the (majority-) decision (Kommers, 1997, p.26).

Due to its structure and its efforts to deliver well-balanced judgments the Federal Constitutional Court of Germany has become a highly respected symbol of the protection of the Basic Law in general and individual rights in particular.
CHAPTER FOUR: METHODOLOGY

Having established the basic parameters in which the respective supreme courts operate – i.e., their structure and the methods of interpretation they are expected to use – this thesis now turns to its main goal: determining whether legal influences really control decisions on the FCC. To test this, two approaches to judicial decision making are compared: the legal model and the attitudinal model. The legal model assumes that “the decisions of the Courts are substantially influenced by the facts of the case in light of the plain meaning of statutes and the Constitution, the intent of the Framers, and/or precedent” (Segal & Spaeth, 2002, p.48). The attitudinal model, in contrast, states that justices decide according to their personal preferences. But the question to be answered is which of these two approaches are more accurate when it comes to explaining individual decisions.

First, with regard to the legal model, a fairly straightforward and simple test is used. Specifically, in order to examine if the legal model can serve as an explanation for the outcome of the cases, the application of interpretive methods to the cases is tested using careful textual analysis. Analyzing the texts of the decisions and scrutinizing single arguments should reveal if these methods are really used as faithfully as the traditional perspective on decisions suggests.

The assessment of whether the attitudinal model can be used for explaining the outcome of the cases is more complex. It is based largely on Segal’s and Cover’s (1989) method. In order to test the assumption quantitatively that Supreme Court justices base their votes on personal preferences, Segal and Cover developed a method to measure the justices’ ideology. They analyzed the content of newspaper editorials arguing that these publications are reliable in measuring ideology independent of the justices’ later votes (Segal & Cover, 1989, p.557). This was done by coding paragraphs for political ideology and led to a categorization of paragraphs...
into liberal, conservative, or moderate. The justices’ ideology (JI) was then measured by employing the equation “JI = (liberal – conservative) / (liberal + moderate + conservative)” (Segal & Cover, 1989, p.559). The results could be found on a scale between +1.0 (unanimously liberal) and -1.0 (unanimously conservative). Those ideological values were then juxtaposed with the votes the justices had cast in civil liberty cases. The correlation between votes and values in civil liberty cases was significant at .80.¹

The ideological values of justices at the Federal Constitutional Court are measured in a similar way. Like Segal and Cover (1989), each paragraph is coded for political ideology: Liberal, conservative, moderate, or not applicable. Examples for a conservative standpoint are, among others, statements in favor of harsher punishments and strict law enforcement by the executive branch. Other conservative standpoints would be advocacy of as much individual freedom as possible and of the traditional family model. A liberal position is characterized by more rights for defendants, less influence of established institutions such as churches or opposition to the rather selective educational system. Moderate paragraphs contain either both, liberal and conservative views, or statements that are explicitly mediating. Each justice’s ideology is then measured on the basis of Segal’s and Cover’s equation, which leads to values on a scale from -1 to +1. Comparing these results with each justice’s vote in the decision on abortion provides a picture of whether the justices vote along the lines of their ideological values.

The Attitudinal Model and the FCC

Applying this approach to the Federal Constitutional Court faces many difficulties. Specifically, in most of the decisions of the Federal Constitutional Court the votes are not published. Only in rare cases the Court decides to reveal the votes of the justices. Therefore, if justices do not write their own opinions the way they voted is normally unidentifiable. Due to this

¹ A detailed discussion of this coding process appears in Appendix A and B.
constraint, it is very difficult to conduct a study that is as complete as in the United States. However, it is not impossible. Specifically if one can find a case in which the votes are known it may be feasible to conduct an attitudinal study. The *Abortion II* case from 1993 provides just such an opportunity because all of the justices votes are known.

Applying the attitudinal model to the FCC also requires a change from the Segal and Cover approach to the way that ideological values are determined. Segal and Cover (1989) used newspaper editorials in order to examine the justices’ worldviews. This study takes a different approach: using publications by the justices themselves. This choice is based on the fact that these publications provide a better insight into judicial ideologies for FCC justices than newspaper editorials. Crucially, contrary to the concerns advanced by Segal and Cover, publications by FCC justices do not present the same problems that they might for U.S. Supreme Court justices. Specifically, the culture of publishing decisions in Germany differs from the way decisions at American courts are presented. In the United States the way judges vote is made public, and dissenting and concurring opinions are part of the legal culture. Therefore, Segal and Cover (1989) argue, publications by the justices themselves can be biased since they want to justify former voting behavior. The voting behavior of German judges is regularly not published. Thus, the justices cannot be identified with their votes. Moreover, only a minority of justices has served as judges before. Therefore, the need for justifying their voting behavior is less pressing for German justices than for their American colleagues. Hence, publications by the justices can be used as a source for identifying their ideological values. Moreover, since this study examines specific cases rather than the justices’ voting behavior during their entire term in office, it is not necessary to rely exclusively on publications prior to their election but only prior to the decision itself. Therefore, publications by the justices and interviews with published prior to the *Abortion II* decision are examined.
Contrasting the investigation regarding the use of interpretive methods with the results of the attitudinal approach will give an idea of what factors influence the outcome of a case. Moreover, it provides a survey of on the question if different legal cultures generate different approaches or if, despite differing theoretical and procedural conditions, similar problems are addressed in similar ways.
CHAPTER FIVE: THE CASES

Scrubing how the interpretive methods described above are used in actual cases requires a basic understanding of the decisions’ content. Therefore, Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) and Abortion II (BVerfGE 88, 203) are summarized below.

Planned Parenthood of Southeastern Pennsylvania v. Casey

In Planned Parenthood of Southeastern Pennsylvania v. Casey (505 U.S. 833 (1992)) the U.S. Supreme Court had to decide on the constitutionality of several Pennsylvania state regulations regarding abortion. The Pennsylvania legislature had amended its abortion control law in 1988 and 1989. Among the new provisions, the law required informed consent and a twenty-four hour waiting period prior to the procedure. A married woman seeking an abortion had to indicate that she notified her husband of her intention to abort the fetus and a minor seeking an abortion required the consent of one parent. Several abortion clinics and physicians challenged these provisions.

First and foremost the Court stated that the essential holding of Roe v. Wade (410 U.S. 113 (1973)) should be upheld. The plurality held that overruling Roe would have negative impacts on the Court as well as on the country. Applying the stare decisis principle is, according to this argumentation, crucial to the Court’s reputation. Not to follow the precedent, the court concluded, would decrease its legitimacy because frequent overruling leads to excessive demands of the citizens’ trust in the Supreme Court’s good faith. Therefore, the Court reaffirmed a right to abortion before viability of the fetus arguing that having an abortion is a unique act that is too intimate to allow the state to interfere. This very private decision should be left to the
woman. But the Court also acknowledged a power of the state to regulate abortion after viability. It stated that the state has an interest in potential life that limits the woman’s liberty to terminate her pregnancy. Thus, it had to be determined at which point a woman’s liberty ends and the state’s concern comes to the fore. Basing its reasoning on the argument that from the time on at which the fetus has a realistic chance to live outside the womb the state can justify its interest in protection of life, the Court concluded that viability of the fetus is the decisive moment. From this time on, the state is allowed to restrict terminations. Furthermore, the Court again emphasized the state’s legitimate interest in maternal health as well as in potential life.

The majority rejected the trimester framework at the heart of the *Roe*, however. It found that the required balancing of the state’s interest in promoting prenatal life and the woman’s liberty had to be rethought. The trimester framework was seen as too rigid. Moreover, the justices found that the woman’s interest was misjudged and that the *Roe* solution failed to take into consideration the state’s interest to an appropriate extent.

Therefore, the trimester framework was replaced by an “undue burden” test. According to this test, a pregnant woman’s right to liberty is violated if a law imposes an undue burden on her ability to make a decision regarding abortion. Without imposing an undue burden on the woman, the state would only need a rational reason for the regulation whereas the existence of an undue burden would require a strict scrutiny test. In order to determine when an undue burden is on hand, state regulations limiting abortion prior to fetal viability have to be examined on the basis of the question whether the regulation is a “substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus” (p. 986). By means of this test the justices thought to be able to reconcile the interest of the involved parties, namely the liberty of the woman and the state’s efforts to protect prenatal life.
Applying this undue burden test to the challenged regulations, the Court found that the parental notification, the informed consent and twenty-four hours waiting period requirements did not impose an undue burden on the woman while the spousal notification requirement failed the test. Therefore, only the spousal notification requirement was found unconstitutional.

Abortion II

In 1993 the German Federal Constitutional Court had to decide about a new abortion law the parliament had passed due to the need for a uniform legal situation in the country. In the unification treaty the German Democratic Republic and the Federal Republic of Germany had agreed upon staying with different laws in the different parts of the country until a newly elected parliament representing West and East Germans would pass a new pan-German statute. In West Germany physicians were forbidden to perform an abortion without determining that certain indications exist and an additional opinion of another physician on this issue. When birth defects were diagnosed abortions were permitted up to the twenty-second week. Pregnancies based on crime or a "general situation of need" could be terminated until up to twelve weeks. Women were required to receive counseling concerning public and private assistance at least 72 hours before the abortion from authorized counselors or physicians. The East German law allowed women to terminate their pregnancy within the first twelve weeks without any further requirements.

The new pan-German law the Parliament passed in 1992 eliminated the requirement of the third-party determination of indications during the first twelve weeks of pregnancy. Instead, the abortion would be "not unlawful" if the woman herself decided to terminate her pregnancy, after counseling intended to assist her in "making her own decision of conscience with awareness
of responsibility," and a three-day waiting period (Bundesministerium der Justiz, 1974, 1297-1298).

Among other provisions, the law would have decriminalized abortion at the woman's option during the first twelve weeks of pregnancy, so long as the woman received medical advice and counseling concerning public and private assistance that would be available if she chose to continue the pregnancy. After twelve weeks, abortion would have been permitted at any time if the pregnancy threatened the life of the woman or caused serious damage to her health and within twenty-two weeks if it appeared that the child would be born with severe birth defects. The second question the court had to answer was the constitutionality of providing financial help for abortions from social security funds. The new law would have allowed for such assistance.

The majority of the Senate reaffirmed the conclusions drawn in *Abortion I* (BVerfGE 39, 1) that the human fetus, at least from the moment of implantation on, possesses human dignity, and that the state therefore has a duty to protect the fetus’ life. The textual basis for this duty was seen in Article 1 (1) of the Basic Law which says “Human dignity is inviolable. To respect and protect it is the duty of all state authority,” and its content was more closely specified by Article 2 (2): “Everyone has the right to life and bodily integrity” (BVerfGE 88, 251). The Senate first elaborated the function of Articles 1 and 2, the importance and meaning of human dignity and the right to personality as well as what is protected by these Articles.

Following these considerations, the Court stated that the described constitutional provisions also include the state’s duty to protect the fetus against the mother. This assumption required a prohibition of abortion in principle, and a legal duty to carry the child to term imposed by the state upon the woman. The justices recognized, however, that the interest in fetal life
conflicted with the constitutional interest of the human dignity of the pregnant woman, as well as her own right to life and bodily integrity, and her right to personality.

In order to provide a framework that enables the legislature to develop a law that matches constitutional requirements, the Federal Constitutional Court formulated several considerations. First, the right to life does not vary in strength with time. It is rather independent of the stage of fetal development (BVerfGE 88, 254). Second, while balancing the rights of the woman and the fetus it has to be recognized that abortion involves the total destruction of the fetus; thus, there is no room for compensatory measures. Still, the justices argued, abortion can be legal under certain circumstances where the pregnancy imposes hardship beyond the magnitude of the typical pregnancy.

The majority upheld its view towards the underlying constitutional standards for abortion: abortion has to be forbidden unless a continuation of the pregnancy is an ‘unreasonable demand’ (unzumutbar) which means unless it involves a more intense sacrifice from the woman than the legal system can reasonably expect. As a result, the woman has the legal duty to carry a fetus to term as long as it does not impose unreasonable demands upon her. This perception is ordinarily expressed through criminal law. However, the Court stated that the state is permitted to express this legal duty in other ways, without threatening criminal punishment, but only if it provides constitutionally sufficient protective measures.

Criminal law categories continued to play a significant role in the analysis because of the majority’s reliance on the German criminal law doctrine of "justification." Under that doctrine, an action that has all factual elements of a crime may nonetheless be justified, and therefore lawful. This lawfulness generates a variety of other legal consequences. The Court found that only unreasonable demands can turn an abortion into a justified action. Therefore, even if
abortion in the absence of unreasonable demands was decriminalized, it would still be unjustified and unlawful.

The Court concluded that, as a result of these considerations, a termination of the pregnancy is unlawful but exempt from punishment within the first trimester if the woman has undergone a mandatory counseling process. A lawful termination is possible at all stages of pregnancy if the pregnancy causes serious threats to the mother’s physical or mental health. In the second trimester a termination is lawful if there is a so called criminological indication (rape, for example). In case of a termination without medical indication between the twelfth and twenty-second week of pregnancy the mother is exempt from punishment if she underwent counseling while the physician incurs a penalty. Thus, the Court decided that a woman cannot incur a penalty as long as she has sought counseling. As for the constitutionality of financial assistance from social security funds the Court stated that an action that is in general unlawful cannot be subject to public funding.
CHAPTER SIX: THE LEGAL MODEL AND THE ABORTION CASES

The preceding description of these two cases shows that the two courts produced similar outcomes: in both cases the woman does not face punishment within the first trimester of her pregnancy. However, the reasoning differs. This is an indicator for the weakness of the legal model because similar interpretive methods should lead to similar results.

Planned Parenthood of Southeastern Pennsylvania v. Casey

Although the Court does use the typical methods of interpretation, such as doctrinal, textual, and structural, the major part of the decision does not follow these approaches. In other words, the standard methods of interpretation are used but only where it matches the justices’ concept of argumentation. The following analysis demonstrates this.

In *Casey* the majority opens its ruling with a statement in favor of the doctrinal approach and the rule of stare decisis. It argues that “[a]fter considering the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity, and the rule of stare decisis, we are led to conclude this: the essential holding of *Roe v. Wade* should be retained and once again reaffirmed” (p. 844-845). Later on, the majority argues that “[n]either the Bill of Rights nor the specific practices of States at the time of adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects” (p. 848). Thus, in saying that the text of the Constitution does not impose any limits on “liberty,” the Court refers to a textual argument. Moreover, in order to support the finding that the Fourteenth Amendment includes the liberty to terminate the pregnancy, the Court draws on the structural argument that other personal decisions are protected as well. As the Constitution is meant to be a
coherent system, the right to personal decisions like marriage, procreation, and family relationships cannot be treated differently from the decision regarding abortion (p. 851).

However, investigating the Court’s statements more in-depth reveals inconsistencies in the use of interpretive methods. The reasoning to uphold *Roe* because of the principle of stare decisis demonstrates this: While the justices agree to what they call the main holdings of *Roe* – the right to abortion before viability of the fetus, the state power to regulate abortions after viability, and the state’s legitimate interest in the health of the mother as well as potential life – the trimester framework is rejected. Thus, although purporting to use the doctrinal approach in the shape of the stare decisis rule, the Court does not adhere to it completely.

The justices also have to decide what the term “liberty” means. Specifically, they have to justify why a right to terminate the pregnancy falls under the term “liberty,” which is – according to the Court itself – “[t]he controlling word in the case” (p. 846). Here, the Court rejects a textual argument in saying that the text of the Constitution might suggest something else but that prior cases came to different conclusions. Moreover, instead of adhering to the common methods of interpretation the justices rather try to balance the right of the woman and the state’s interest in protecting potential life. As an example one can cite the statement: “the woman’s liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State’s interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted” (p. 869).

As shown above, in the *Casey* decision, the legal model cannot explain results of the case. Therefore it is in question if similar observations can be made in the German *Abortion II* decision.
Abortion II

In the *Abortion II* Case the Federal Constitutional Court starts its argumentation by stating that the state according to Article 1 (1) and Article 2 (2) has to protect human life. This assumption derives from the formulation in Article 1 (1): “Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority,” and in Article 2 (2): “Everyone shall have the right to life and to inviolability of his person. The liberty of the individual shall be inviolable. These rights may be encroached upon only pursuant to law.” Stating that these provisions include protection of life is undoubtedly an analysis of the constitutional text. Thus, in order to meet the standards the Basic Law requires regarding the protection of life, it is necessary to define the term “life.” The first means by which the justices try to find an acceptable solution in the *Abortion II* decision is to scrutinize the intent of the framers. Therefore the Justices have to find an answer to the question: What is the objective will by which the Basic Law is guided regarding prenatal life? In other words, they examine whether the authors of the Basic Law included the fetus in the realm of protection of Articles 1 (1) and 2 (2). The decision refers to and agrees with the Court’s *Abortion I* decision from 1975 which gives a detailed description of the history of origins by illustrating the discussions and arguments when the Basic Law was drafted (BVerfGE 39, 1). In doing so the justices try to base their definition of life on an objective view and therefore claim to refer to the objective order of values underlying the Basic Law. The formulations “The Basic Law commits the state to protecting human life. Unborn life falls under human life. The state’s protection appertains to it as well” (BVerfGE 88, 251) illustrate that the justices want to demonstrate the objectivity by which they have found this solution. The perception of an objective will becomes even clearer when the Court states: “The constitution predetermines protection as the state’s goal” (BVerfGE 88, 254).
Besides looking at the origins of the constitution and deriving their conclusions from there, the justices also consult precursors to Germany’s legal system of today. In citing the Prussian General Law which explicitly mentioned the rights of an unborn child, the Court argues that the objective value underlying the Basic Law can be found in and derives from former laws such as the Prussian General Law. Thus, the Court stresses the teleological as well as the historical approach in order to define the term “life.”

From this standpoint the Court starts to analyze which rights and values are affected by the assumption that the potential life has to be protected. It tries to find a proportionate solution by balancing the right of the unborn to life and its human dignity on one side and the woman’s human dignity, her right to life and bodily integrity, and her right to personality on the other side by the means of Practical Concordance. However, it acknowledges the shortcomings of this method in saying that ”the colliding rights in this case cannot be harmonized in a proportionate way” (BVerfGE 88, 255). Thus, although the Court tries to apply the principle of Practical Concordance, it realizes that it is unable to come to a satisfying result due to facing a dilemma.

Moreover, analyzing the justices’ arguments depicts the limits of interpretive methods. A crucial factor in this decision is the definition of “life.” The justices of the FCC have to determine what this word means in order to come to a result. Even if “life” seems to be a rather clear term at first sight, in this case in which life of an unborn comes into play, this clarity becomes blurred.

A further shortcoming in this case is the result that under certain circumstances abortion is decriminalized but still unlawful. This outcome conflicts enormously with the notion of a coherent legal system. Therefore, this result is not in accordance with the principle of unity and consistency of the law.
Observations

The comparison of the argumentations used by the US Supreme Court in *Casey* and employed by the German Constitutional Court in *Abortion II* leads to surprising results. For example, the methodological approaches do not differ much. Drawing arguments directly from the text and looking back to the origins of the constitutional framework is common to both legal cultures, as are deductions from the system the provision can be found in. But both courts fail to apply these methods consistently. For instance, the Supreme Court in *Casey* heavily bases its decision on the method of precedent. However, the rejection of the trimester framework developed in *Roe v. Wade* contradicts the Court’s proposition to follow the rule of stare decisis. Similarly, the Federal Constitutional Court sets aside the principle of unity and consistency of the legal system – treated in previous decisions almost as a dogma. By defining an abortion as unlawful but exempting it from punishment, the FCC violates it. Neumann (1995) rightly points out that for “German observers, the compromise is blatant in the inconsistency with which the majority treats unevaluated abortions as ‘lawful’ and ‘unlawful’ transactions” (p. 291). If jurisprudence is based on the perception that methods and principles exist prior to the constitution, it is difficult to agree with the argumentation the Court uses in *Abortion II*. Furthermore, although the justices pretend to balance rights and duties by the means of Practical Concordance they develop a system that basically bans abortions and allows exceptions only under certain circumstances. This is contradictory and, in addition, it emphasizes predominantly one side.

A second observation is that in both cases textual interpretation is limited to providing a starting point for the argumentation without offering a final solution to the problem. The justices at both courts identify terms that are crucial for the decision, such as “liberty” in *Casey* and “life”
in *Abortion II* by referring to the texts of the constitutions. They are unable to define them, though, by means of pure textual interpretation. In order to determine the meaning of these words, they have to use other parameters and have to go beyond the constitutional text. Furthermore, no matter what the decision explicitly says, the courts try to balance the rights and duties of the affected parties. In Germany this becomes manifest in the principles of Proportionality and Practical Concordance. In the United States, even if there is no standard method for this, the Justices still weigh and balance interests.

A further finding confirms Eberle’s (2002) assumption that “German and American constitutional law proceed from different premises, illuminating two paths to accommodation of self-determination and respect for life” (p.165). Interestingly, however, these different premises derive from methods of interpretation that differ only a little. Nevertheless, the de facto outcome – the possibility to have an abortion at an early stage of pregnancy – is similar while the theoretical basis differs. Specifically, the U.S. Supreme Court focuses on the woman’s liberty and thus emphasizes her right to self-determination, while the FCC entails the duty of carrying the fetus to full term on the woman.

After having decided cases on abortion in the 1970s almost antithetically, the U.S. Supreme Court and the Federal Constitutional Court of Germany have made steps towards more convergence. Different constitutional premises are visible but the status quo of abortion laws in both countries is similar. This illustrates the different perceptions of constitutional interpretation. Whereas in the United States constitutional interpretation is “the means by which the Constitution is recurrently revised to accommodate the general values embodied in the Constitution with the realities of governance in a changing world” (Goldsworthy, 2006, p. 49), in Germany methods of interpretation mainly seek an “objective order of values” which is said to
be underlying the Basic Law. To adapt the Basic Law to reality is outside of the justices’ province and is the duty of the legislature. In other words, constitutional interpretation in these two countries is guided by different questions. While U.S. justices ask which result societal reality requires, their German colleagues question which outcome the Basic Law and its underlying principles call for.

However, even if the courts come from different backgrounds, the differences in what they do are in general of a rhetorical nature as the development regarding abortion in both countries shows. Interestingly, the usually strictly applied idea of consistency and unity of the legal system is violated in the Abortion II decision by stating that abortion cannot regularly be called lawful but is still permitted under certain circumstances. Looking at the stare decisis rule Casey illustrates that although pretending to follow it, the Court in fact does not use it.

Although the courts argued in different ways and provided unlike solutions, the de facto outcome was similar. The U.S. Supreme Court focuses on the right of the woman to choose while the Federal Constitutional Court seems to uphold its strict approach to protection of the fetus. However, as the application of the laws in both countries show, these different perceptions are only nomenclature. To have an abortion within the first trimester is accepted in both countries. Therefore, one can state that in dealing with complex issues such as abortion the application of interpretative methods are often not used or break down. This leads to the question if the attitudinal model is the more accurate explanation for the voting behavior of the justices.
CHAPTER SEVEN: THE ATTITUDINAL MODEL AND THE ABORTION CASES

The finding that interpretive methods have not been used strictly in the two abortion cases opens up the possibility that other factors play a decisive role in the decision making processes of the courts. In the United States “[i]t is commonly assumed that Supreme Court justices’ votes largely reflect their attitudes, values, or personal policy preferences” (Segal & Cover, 1989, p. 557), and the numbers Segal and Cover have provided confirm this. Therefore, it has to be examined if ideology is a reason for the outcome in the case Planned Parenthood of Southeastern Pennsylvania v. Casey and if in the Abortion II case ideological values can better explain the justices’ voting behavior than interpretive methods.

Votes and Ideological Values in Casey

Segal and Cover (1989) and Segal, Epstein, Cameron, and Spaeth (1995) provide numbers for the ideological values of the justices who are involved in Casey (505 U.S. 833 (1992)). Their results are summarized in Table 1. A value of -1.0 shows a perfectly conservative attitude, +1.0 shows a liberal ideology, and a 0 means moderate (Segal & Cover, 1989, p. 559). To examine the relationship between the justices’ votes and their ideological values in Casey, it has to be defined what characterizes a liberal and what a conservative vote. Since Casey provided the first opportunity to overrule Roe v. Wade, a vote in favor of upholding the decision from 1973 and therefore confirming a woman’s right to seek an abortion can be seen as liberal. Conservative, by contrast, is an opinion that opposes Roe’s findings.

Having defined these positions, it can be examined how the justices’ voting behavior and their ideology relate to each other. Table 1 displays the justices’ votes: Justices O’Connor, Kennedy, and Souter, the authors of the plurality opinion, voted liberally and were joined in the

Table 1.

*Ideological Values and Votes in the Casey Decision*

<table>
<thead>
<tr>
<th>Justice</th>
<th>Ideological value</th>
<th>Vote in Casey</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rehnquist</td>
<td>-0.91</td>
<td>conservative</td>
</tr>
<tr>
<td>White</td>
<td>0.00</td>
<td>conservative</td>
</tr>
<tr>
<td>Blackmun</td>
<td>-0.77</td>
<td>liberal</td>
</tr>
<tr>
<td>Stevens</td>
<td>-0.50</td>
<td>liberal</td>
</tr>
<tr>
<td>O’Connor</td>
<td>-0.17</td>
<td>liberal</td>
</tr>
<tr>
<td>Scalia</td>
<td>-1.00</td>
<td>conservative</td>
</tr>
<tr>
<td>Kennedy</td>
<td>-0.27</td>
<td>liberal</td>
</tr>
<tr>
<td>Souter</td>
<td>-0.34</td>
<td>liberal</td>
</tr>
<tr>
<td>Thomas</td>
<td>-0.68</td>
<td>conservative</td>
</tr>
</tbody>
</table>


Comparing this voting behavior with the ideological values measured by Segal and Cover (1989) and Segal, Epstein, Cameron, and Spaeth (1995), the votes of the justices are notable in three ways. First, although eight of nine justices have been measured with a negative ideological value, the decision itself has a liberal tendency. The second observation is that the only justice with a perfectly moderate value of 0, Justice White, voted conservatively. Another interesting
point is that although Justice Blackmun is described as conservative with a JI of -.77 he voted with the majority. Thus, the question has to be posed if these observations reinforce the findings of research on the attitudinal model.

A closer look at the numbers reveals that the values of four of five justices of the plurality lie between -.5 and -.17, which is rather moderate. From this it follows that a liberal vote is not contrary to the justices’ ideology. Considering how the ideological values have been measured, this makes sense. Moderate numbers can be generated in different ways: One possibility is that a large number of paragraphs in newspaper editorials have been coded as liberal. This is the case if the justice is either portrayed explicitly as moderate or if a paragraph contains both, liberal and conservative standpoints. Another option to come to a moderate value is a similar number of liberal and conservative paragraphs in newspaper editorials. This demonstrates that those justices who are measured with a rather moderate value can lean towards the one or the other side. Thus, Justices Stevens, O’Conner, Kennedy, and Souter voted in accordance with their ideological values. The same reasoning explains Justice White’s voting behavior. Although he has, on the scale from -1 to +1, the most liberal ideological value of all justices he has voted with the conservative minority. Due to his perfectly moderate value of 0, however, this is not contradictory to the assumptions of the attitudinal model. On the other side of the ideological spectrum, the two most conservative justices, Rehnquist and Scalia, wrote conservative dissenting opinions in which Justice Thomas (with a conservative ideological value of -.68) joined.

Therefore, only Justice Blackmun deviates from the scheme of ideological voting. Since the resources on which Segal’s and Cover’s (1989) numbers are based are statements in newspaper editorials between the justices’ nomination and confirmation, the measured values
only display the justice’s attitude at this certain time. Appointed by Nixon as a conservative justice, Blackmun’s ideological value was measured with -.77. However, employing this method of measurement does not take into consideration possible changes. Martin and Quinn (2007) point this problem out. They state: “When scholars employ preference measures that are constant across time, such as Segal and Cover (1989) scores, the independent variable capturing preferences will be measured with systematic error” (p. 381). This might be an explanation for Blackmun’s voting behavior in *Casey* case. Greenhouse (2005) has described his shift to the left and therefore provides arguments for the assumption that the lack of correlation between values and votes in the case of Blackmun is caused by ideological change. The other justices, however, voted in accordance with their measured ideological values. Thus, it can be stated that the *Casey* case confirms Segal’s and Cover’s findings.

An alternative way of interpreting the numbers measured by Segal et al. (1995) is to look at them in relation to where the decision itself is ideologically situated. The numbers of the justices’ ideologies provide a scale from the least conservative justice on the one end to most conservative one on the other end of the spectrum. The decision marks a point on this scale, too. The way the justices voted in comparison to the position of the case reveals if they have voted according to their ideological values. Those who have a more conservative ideological value than the case are expected to cast a conservative vote while those with a less conservative ideological value than the case are likely to vote more liberal in relation to the case facts.

In *Casey* this leads to the observation that two justices deviate from the scheme of ideological voting. The least conservative justice, Justice White, cast a conservative vote. Justice Blackmun, located in the conservative part of the spectrum, voted liberally. The remaining seven justices voted as the case and their ideological values had predicted. Therefore, this approach
leads to slightly different results than the interpretation conducted before. However, also this approach to reading the numbers and the justices’ voting behavior supports the assumption that a majority of justices votes according to their ideology.

Votes and Ideological Values in *Abortion II*

The question now is whether this same success can be replicated by applying the attitudinal model to a case decided by the Federal Constitutional Court of Germany. An analysis of ideological values and votes in the *Casey* decision of the U.S. Supreme Court shows that there is a significant relationship between these two parameters. For this purpose the ideological values of the justices have been measured as explained above. Briefly, to review: Publications by the justices were coded for ideological content. The numbers of paragraphs with conservative, moderate, and liberal tenor found in these publications were plugged into an equation Segal and Cover (1989) used for quantifying the ideological values of Supreme Court justices. This led to results on a scale from -1 (unanimously conservative) to +1 (unanimously liberal) for the justices in the *Abortion II* decision.
Table 2.

*Ideological Values of Justices in the Abortion II Decision*

<table>
<thead>
<tr>
<th>Justice</th>
<th>Ideological Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mahrenholz</td>
<td>0.52</td>
</tr>
<tr>
<td>Böckenförde</td>
<td>-0.21</td>
</tr>
<tr>
<td>Klein</td>
<td>-0.93</td>
</tr>
<tr>
<td>Graßhof</td>
<td>-0.31</td>
</tr>
<tr>
<td>Kruis</td>
<td>-0.82</td>
</tr>
<tr>
<td>Kirchhof</td>
<td>-0.21</td>
</tr>
<tr>
<td>Winter</td>
<td>-1.00</td>
</tr>
<tr>
<td>Sommer</td>
<td>0.75</td>
</tr>
</tbody>
</table>

While, as Table 2 presents, three justices are measured with a strong conservative value – Kruis, Klein, and Winter between -0.82 and -1.0 – there are only two justices with rather liberal numbers. But even Mahrenholz (JI=.52) and Sommer (JI=.75) have less extreme numbers than their three colleagues from the right of the spectrum. Böckenförde, Graßhof, and Kirchhof with values between -0.21 and -0.31 and therefore close to moderate 0 form the ideological center of the Senate. For Justices Kirchhof and Graßhof this cannot surprise since they were elected as “neutral” members. As for them the numbers show that Kirchhof remains ideologically in the realm of the party he was nominated by. Graßhof, by contrast, is measured with an even more conservative value than her colleague Kirchhof although elected at the SPD’s instance. Even more surprising is the number measured for Böckenförde. Although a member of the SPD and
nominated as a liberal justice by his party he is measured as rather conservative with a value of \(-.21\).

Altogether, it is striking that the Senate shows a conservative tendency with six justices having negative ideological values. This is surprising considering the balanced party affiliation: Three party members of the SPD and three party members of CDU/CSU together with two neutral justices form this Senate. Therefore, in this Senate the affiliation to a certain party does not necessarily come along with the party’s predominant ideological values.

Having made these observations the relationship between different factors such as party affiliation, personal ideology and voting behavior has to be examined. In order to draw conclusions from the data collected for the *Abortion II* decision of the Federal Constitutional Court it has to be defined what liberal and conservative voting means in this case. The main holding of the Court is that abortions are in general unlawful and that a pregnant woman has a statutory duty to carry the child to term. After having received counseling the woman cannot be punished for having an abortion within the first trimester but aborting a child cannot be justified. Only under specific circumstances – a medical indication, which would be a threat for the mother’s mental or physical well-being or an indication for a pregnancy after rape or similar crimes – an abortion is legally justified. This rather strict framework established by the majority, which condemns abortions, can be perceived as a conservative standpoint. A liberal point of view focuses more on the rights of the woman and on autonomy in her decision. The Court had also to decide on the question of whether financing abortions by means of social security funds is constitutionally permissible. Obviously, a conservative position would not approve this whereas from a liberal standpoint public financial support is not necessarily objectionable.
Although the voting behavior of the justices of the Federal Constitutional Court is – as usual – not documented in the *Abortion II* decision it is possible to reconstruct it by reading the dissenting opinion and later publications. Mahrenholz’ and Sommer’s dissenting opinion reveals their opposition to the majority’s point of view. They state:

In the Senate’s judgment, during the entire time of her pregnancy a woman has a statutory duty to carry the child to term, which does not even end after counseling, unless there are exceptional circumstances, recognized by law, which fulfill the criterion of being unacceptable. We disagree with this (BVerfGE 88, 203, 340).

Regarding the question of financial support for abortions they found that “payments from social security funds for abortions that are conducted by a physician within the first twelve weeks after conception are in our opinion not contrary to the Basic Law” (BVerfGE 88, 203, 357). From this it follows that they did not agree with the majority’s arguments and voted against their colleagues.

However, there would have been the possibility that one more justice voted with Mahrenholz and Sommer, causing a five to three decision. From Böckenförde’s dissenting opinion it becomes clear that he joined the majority on the issue of permissibility of abortions, while he dissented in the question of public financial support. Regarding the remaining five justices, Graßhof (1993) explains that it was a majority of six justices who saw the child’s right to live as more important than the mother’s rights (p. 294). Hence, it was only Mahrenholz and Sommer who voted against the majority, joined by Böckenförde in the subject of social security funds for abortions.

Hence, Justices Klein, Graßhof, Kruis, Kirchhof, and Winter took up a conservative position on both issues. Their votes are therefore counted as conservative. Justices Mahrenholz’
and Sommer’s voting behavior can be viewed as consistently liberal, whereas Justice Böckenförde voted conservatively in the first and liberally on the second question.

Having defined what conservative and liberal in this particular question means and how the justices voted, the relationship between ideological values of the justices and their votes has to be examined. In Table 3 the ideological values measured for each justice can be found together with the way of voting.

Table 3.

*Ideological Values, Votes, and Party Affiliation in the Abortion II Decision*

<table>
<thead>
<tr>
<th>Justice</th>
<th>Party affiliation a</th>
<th>Ideological value</th>
<th>Vote</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mahrenholz</td>
<td>SPD b</td>
<td>0.52</td>
<td>liberal</td>
</tr>
<tr>
<td>Böckenförde</td>
<td>SPD</td>
<td>-0.21</td>
<td>conservative/liberal</td>
</tr>
<tr>
<td>Klein</td>
<td>CDU c</td>
<td>-0.93</td>
<td>conservative</td>
</tr>
<tr>
<td>Graßhof</td>
<td>none/SPD</td>
<td>-0.31</td>
<td>conservative</td>
</tr>
<tr>
<td>Kruis</td>
<td>CSU d</td>
<td>-0.82</td>
<td>conservative</td>
</tr>
<tr>
<td>Kirchhof</td>
<td>none/CDU</td>
<td>-0.21</td>
<td>conservative</td>
</tr>
<tr>
<td>Winter</td>
<td>CDU</td>
<td>-1.00</td>
<td>conservative</td>
</tr>
<tr>
<td>Sommer</td>
<td>SPD</td>
<td>0.75</td>
<td>liberal</td>
</tr>
</tbody>
</table>

a. shows Party membership or no membership/Party that nominated the Justice

b. SPD (Sozialdemokratische Partei Deutschlands) = Social Democratic Party; liberal
c. CDU (Christlich Demokratische Union) = Christian Democratic Union; conservative
d. CSU (Christlich Soziale Union) = Christian Social Union (CDU’s Bavarian sister party); conservative
The numbers and votes displayed demonstrate a strong correlation between the measured numbers and the votes cast: Those two justices whose ideological values lie on the positive part of a scale from -1 to +1 have voted liberally whereas the justices who were measured as conservative have voted this way. Only Böckenförde with his dissenting vote in favor of public financial support for abortions deviates to a small extent from this scheme. However, as for the key question of whether an abortion is constitutionally permitted he is following his other conservative colleagues. Considering that Böckenförde’s ideological value of -.21 is close to moderate this does not weaken the observation that all justices have voted according to their ideological values.

Clearly, while party affiliation does not say much about a justice’s ideology, a justice’s ideology is a decisive factor in this case. This observation, in addition to the analysis that interpretive methods have broken down in the Abortion II decision, is an indicator that the attitudinal model might also be applicable to decision making at the German Federal Constitutional Court.
CHAPTER EIGHT: CONCLUSION

This thesis has presented preliminary evidence that the attitudinal model, a frequently used paradigm for explaining voting behavior at the U.S. Supreme Court, has proven effective also for the Federal Constitutional Court of Germany. This raises a number of important implications and questions about the role of judges in the two countries.

To begin, although the legal cultures in the United States and Germany differ, the perception that interpretive methods should guide the process of constitutional review is prevailing since it seems to provide neutral and just results. Moreover, the canons of methods show remarkable similarities. Arguing on the basis of the plain meaning of the text, referring to the origin of the constitution, as well as deducing arguments from the structure can all be found in both traditions. In order to find out if these similar techniques result in similar outcomes two decisions were chosen that deal with the same topic – abortion – at the same time. In these cases the methods, although comparable, do not lead to structurally similar outcome. The theoretical foundation for abortion legislation, which the respective courts developed, differs fundamentally: The U.S. Supreme Court sees in the Constitution a woman’s right to seek an abortion whereas the German Federal Constitutional Court finds the fetus’ right to life and bodily integrity in the Basic Law which results in a woman’s duty to carry the child to term. One explanation for this is given in Chapter Six: The interpretive methods were not able to give answers to the question of the legal treatment of abortion.

If it was not interpretive methods that determine the outcomes of cases it might have been other factors such as personal preferences of the justices. Evaluating the personal views of the justices at the FCC – an endeavor that has not been done before – has quantified the ideological
value for every participating justice. The comparison with their voting behavior shows that they have voted analog to their measured values. This affirms the assertions made by several scholars for U.S. Supreme Court justices. Testing the abortion case *Casey* for the attitudinal model also reinforced the notion that in this case the justices were led by their ideology.

Contrasting the legal and the attitudinal approach in the two abortion cases it is obvious that the attitudinal model can explain better the justices’ voting behavior in both decisions. The analysis of the application of interpretive methods in the two abortion cases shows that they cannot provide a sufficient explanation for the outcome of the case since they are not applied strictly. In contrast, a relationship between ideological values and the justices’ votes is evident since the majority of justices voted in accordance with the ideological values measured for them. This reinforces former investigations on decision making at the U.S. Supreme Court and the argument deduced from the results.

Moreover, although the attitudinal model has been developed and proved for the U.S. Supreme Court, the relationship between ideology and votes of the justices is stronger in the *Abortion II* case of the German Federal Constitutional Court than in *Casey*. This can serve as an indicator for the assumption that an attitudinal model as developed by Segal and Cover (1989) can also explain decision making at the FCC. Furthermore, the fact that there is a significant relationship between the justices’ votes and their ideological values but that they still try to argue on the basis of interpretive methods as the analysis of the application of the methods demonstrates, reinforces Segal’s and Spaeth’s (2002) notion that claiming the use of interpretive methods is only a means to cover judicial reality.

The research conducted in this has some limitations. For example, the reason that the attitudinal model in the examined cases outweighs the legal approach may also lie in the
structure of the addressed issue. In highly controversial and ethically-laden cases such as abortion decisions, judges are more likely to incorporate their own opinion. Therefore, it is problematic to make general assumptions on the basis of the results at hand. However, for the Supreme Court a larger number of cases have been tested, and the significant relationship between votes and values remained. Judging from the comparable results in the abortion cases this can be seen an indicator for similar tendencies in Germany as well. Therefore, it will be important to evaluate decisions of other character in order to receive a more complete picture.

A further interesting question to be posed is if the process of interpretation can be neutral at all. The construct of a constitution is one of a general framework that requires to be concretized since words often do not have a plain meaning. They are rather ambiguous and open to interpretation (Landfried, 1994, p.122). Only by being interpreted does a constitution gain meaning and can it unfold its authority. This process of interpretation, however, must be inherently subjective to some extent. Habermas (2004) explains this as follows: “Subjects entangled in their own practices relate from the horizon of their life-world to something in the objective world, a world, that they…. assume to be existing independently and identical for everyone.” This shows that for a judge who seeks to understand the meaning of a constitutional text even the sincerest effort of interpreting a provision objectively cannot succeed. Certain subjectivity is inherent in the process of constitutional interpretation. If Landfried (1994) criticizes that “[q]uite often, irrational argumentation and methodological shortcomings can be an indication that it was unnecessary for the Court to make a value-oriented decision” (p. 122), one can reply with Habermas that it is impossible not to decide in a value-oriented manner. Thus, a breakdown of the methodology cannot serve as an indicator for decisions that are guided by ideology since no argument is value-free.
This thought should not be confused with the concept of a Living Constitution, an American theory in constitutional interpretation (McBain, 1927). Advocates of this view on constitutional interpretation argue that developments in society should be taken into account. Moreover, they state that the Constitution was written in such a general way in order to enable later generations to read it in the light of their time. This approach deals with the question of how to interpret constitutional provisions and of what nature the framework is. In contrast, the ideas elaborated before focus on psychological factors that affect the justices.

In summary, one can state that the results of the research conducted in this thesis show that interpretive methods and ideological values are not necessarily exclusive. Justices are – to a certain extent even unconsciously – preconditioned by their world views and political and ideological values. Even if they adhere strictly to a canon of interpretive methods they still cannot provide a fully neutral reasoning. Hence, the expectation that judges have to make their decisions neutrally might be a myth since neutrality does not exist. However, this does not mean that justices make politically biased decisions. Rather, they read the constitution with their inherent understanding. If a constitution becomes alive only by interpreting it, as assumed above, the justices’ personalities do have an impact but this does not lead to prejudiced results.

This thesis has given some views on what factors have an impact on decision making processes at courts. At the same time the research has raised a number of highly relevant questions about the context of judicial decision making which are worth further intensive investigation.
References


Appendix A

List of Topics/Coding Key

Below are the positions that were coded as conservative or liberal for the FCC justices. a Moderate paragraphs were those that contained conservative and liberal statements or explicitly moderate approaches to the topics mentioned below.

Table A1.

<table>
<thead>
<tr>
<th>Conservative positions</th>
<th>Liberal positions</th>
</tr>
</thead>
<tbody>
<tr>
<td>• less governmental interference</td>
<td>• More governmental control</td>
</tr>
<tr>
<td>• tax reductions</td>
<td>• redistribution of wealth, especially higher taxation of company revenues and high income households</td>
</tr>
<tr>
<td>• strict law enforcement</td>
<td>• more social benefits</td>
</tr>
<tr>
<td>• the traditional three-tiered school system</td>
<td>• more rights for defendants</td>
</tr>
<tr>
<td>• tuition for studying at a public university</td>
<td>• change in the school system: later tracking or no tracking</td>
</tr>
<tr>
<td>• the traditional Family model</td>
<td>• no tuition for studying at a public university</td>
</tr>
<tr>
<td>• Christian values (including protection of life, marriage)</td>
<td></td>
</tr>
<tr>
<td>• the churches as institutions that play a crucial role in society</td>
<td>• Stricter separation of church and state</td>
</tr>
</tbody>
</table>

a. The term “liberal” is used in an American context. In Germany these topics would be considered to be social democratic ideas.
Appendix B

Number of Publications for Each FCC Justice

Table B1.

<table>
<thead>
<tr>
<th>Justice</th>
<th>Publications</th>
<th>Paragraphs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mahrenholz</td>
<td>4</td>
<td>74</td>
</tr>
<tr>
<td>Böckenförde</td>
<td>3</td>
<td>82</td>
</tr>
<tr>
<td>Klein</td>
<td>4</td>
<td>77</td>
</tr>
<tr>
<td>Graßhof</td>
<td>3</td>
<td>79</td>
</tr>
<tr>
<td>Kruis</td>
<td>3</td>
<td>84</td>
</tr>
<tr>
<td>Kirchhof</td>
<td>4</td>
<td>88</td>
</tr>
<tr>
<td>Winter</td>
<td>3</td>
<td>76</td>
</tr>
<tr>
<td>Sommer</td>
<td>3</td>
<td>78</td>
</tr>
</tbody>
</table>