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A Primer On the United States Supreme Court: An Indispensable Party in Creating a Legal Cannon

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ABSTRACT: *This study, consisting of two discrete parts, will explore the creation, jurisdiction and practices of the United States Supreme Court. Part I of the article ["A Primer on the United States Supreme Court: An Indispensible Party in Creating a Legal Cannon"] will discuss issues relating to the important "Rule of Four," by which the Supreme Court controls its docket, issues relating to the adjudication of "political questions," provides judicial biographies of the Justices of the Court from the website of the Court itself, and discusses the various judicial philosophies which guide individual judges in their determination—including a commentary on the leadership of Chief Justice John Roberts.Part II ["A Discussion of Major Supreme Court Cases from the Spring 2022 Term"] will discuss and summarize the decisions of the Court in important cases, termed the "Big Five," dealing with abortion, hand-guns and the Second Amendment, religious liberty, immigration, and the reaches of administrative law as these are delivered by the Supreme Court during the Spring of 2022.*

KEY WORDS: United States Supreme Court; jurisdiction; "Rule of Five"; political questions; judicial restraint

INTRODUCTION

During the 2022 Spring Term of the United States Supreme Court, the Court announced that it would consider more than thirty cases. Among these, which we term the "Big Five," include cases relating to abortion, hand-guns and the Second Amendment, religious liberty, immigration, and administrative law—that the United States Supreme Court will decide before it adjourns for its summer recess. In Part I of this two part study, we will discuss the United States Supreme Court as an *institution.* In Part II, we will summarize the actual decisions handed down by the Court by quoting from the Supreme Court *syllabus* or summary (de Vogue, 2022).

The Supreme Court of the United States, often abbreviated in the media as SCOTUS, is the highest court in the hierarchy of the federal judiciary of the United States. Bonneau and Stricko-Neubauer (2007) write: "The United States Supreme Court is a judicial institution unlike any other in the world. The Court sits at the pinnacle of the American judicial system and is a powerful court of

last resort with extensive discretionary powers of judicial review." The Court exercises ultimate appellate jurisdiction over all cases which arise in U.S. federal courts (Sachs, 2020), as well as over state court cases that involve a "federal question" (see Treanor, 2010).

Under 28 U.S.C.A. § 1331 (1993), in determining the jurisdiction of federal courts, U.S. district courts "shall have original jurisdiction of all civilactions arising under the Constitution, laws, or t reaties of the United States." The Supreme Court may also exercise *original jurisdiction* over a narrow range of cases, specifically "all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party" (Shelfer, 2018).

Since the historic decision in *Marbury v. Madison* (1803), the Court has exercised the power of judicial review (Franck, 1990; Schotten, 2004; Whittington, 2020), the ability to invalidate a statute because it is found to be in violation of a provision of the Constitution (Nelson, 2018). According to Ray (2019, p. 205), "… Marshall's opinion located legitimacy in several aspects of the Constitution, including its protection of rights, its embodiment of the consent of the governed, and its ability to organize and direct national politics." Its importance may be summed up in one important oft-quoted phrase: "It is emphatically **the province and duty of the judicial department to say what the law is."**

The Court is also able to strike down administrative actions (Bell, 2019) or presidential directives [executive orders] (see *Youngstown Sheet & Tube v. Sawyer*, 1952; Newland, 2015; Wittern-Keller, 2017; Driesen, 2018/2019) for violating either a provision of the United States Constitution or a provision of statutory law (Elinson & Gould, 2022).

The jurisdiction of the Supreme Court, however, is limited in that the Court may act only within the context of a *case* or *controversy* in an area of law in which it has jurisdiction. As such, the Supreme Court will not render advisory or speculative opinions or decisions.

Kannan (1998, p. 771) notes that:

> "the basic elements of the meaning of case and controversy given in *Muskrat v. United States* are as follows: By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it had become a case. The term implies the existence of present or possible adverse parties, whose contentions are submitted to the court for adjudication" (*Muskrat v. United States*, 1911, p. 352).

Kannan (1998, pp. 771-772) continues:

> "This definition of case and controversy includes the requirements that the issue be justiciable, that the plaintiff have standing to raise the issue, that the issue not be

> moot, and that the court have authority to enter an enforceable remedy. If any of these is absent, the pronouncement by a federal court would be non-binding and hence advisory."

Political Questions

While the Court may decide cases which have political implications (for example, its role in the 2000 Presidential election, cases involving voting rights, partisan gerrymandering, etc. (Ercolano, 2022)), the Court has generally refused to exercise jurisdiction over *purely* political questions (see Dimino, 2020; Dodson, 2021).

Find Law (2022) notes that "The Supreme Court identified six factors relevant to the "political question doctrine" in *Baker v. Carr* (1962):

> "Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question" (*Baker v. Carr*, 1963, p. 217; see also Fawbush, 2022).

Creation, Composition, and Procedures

The Supreme Court was established by Article III of the Constitution of the United States:

> *Article III*
>
> ***Section 1***
>
> *The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.*
>
> ***Section 2***
>
> *The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to*

> *Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.*
>
> *In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.*

The composition and procedures of the Supreme Court were initially established through the Judiciary Act of 1789 (Lee, 2020/2021). Lee (2020/2021, p. 1897) notes:

> "As the first statute that the First Congress passed to prescribe forms and modes of proceedings in the newly created federal courts, it was the ultimate antecedent of the modern Federal Rules of Civil Procedure. The statute lasted less than three years (it was implicitly repealed on May 8, 17928)…. But, given its vintage, the First Process Act is a crucial piece of evidence for divining the original understanding of how the national courts were intended to operate and the original meaning of Article III of the Constitution."

As later set by the Judiciary Act of 1869 (Hessick & Jordan, 2009), the court consists of the Chief Justice of the United States and eight Associate Justices (Kelly, 2019). Each justice has lifetime tenure, meaning they remain on the court until they die, retire, resign, or are removed from office (Chabot, 2019). When a vacancy on the Supreme Court occurs, the president of the United States, with the *advice and consent of the United States Senate* (see Sekulow, 2016; Adler, 2021), appoints a new justice. Each justice has a single vote in deciding the cases argued before the court. When in majority, the Chief Justice decides who will write the opinion of the court. When the Chief Justice is not in the majority, the most senior justice in the majority assigns the task of writing the opinion. Individual Justices may pen both concurring and dissenting opinions.

The "Rule of Four"

The Supreme Court controls the cases it will and will not hear—essentially controlling its own docket. Fontana (2011, p. 624) states:

> "There are many reasons why giving courts the power of docket control can contribute to their success. Deciding what cases to decide permits a court to issue the right decisions at the right times, what this chapter calls 'issue timing'. A court can avoid encountering an issue until the country is ready to discuss the issue, and perhaps ready to resolve the issue in the manner the court is contemplating – or the

> court can decide to avoid the issue altogether because the issue is too polarizing for the court to encounter."

The Justices determine which cases they will and will not hear under the "rule of four" (Lax, 2003; Gould, 2021; Johnson, 2022) which **is a** Supreme Court practice that permits four of the nine justices to grant a *writ of certiorari* (Leiman, 1957; Johnson, 2021), enabling the full Court to hear a case. Yingling (2015) notes: "Because the Rule of Four constitutes the basis for a judicial convention in a country governed by a legal constitution — the meaning of which is determined by a supreme court instead of a supreme legislature — the rule can have a real effect on the meaning of the U.S. Constitution and the pace of constitutional change."

The rule has the purpose to prevent a majority of the **Court's** members from controlling their docket, essentially shutting out the minority from even discussing a case. The rule of four is not a requirement found in the United States Constitution, any law, or even the Court's own published rules (Lax, 2003; Bartels & Lindstadt, 2008). In *Rogers v. Missouri Pac. R. Co.* (1957), Justice Felix Frankfurter described the rule as follows:

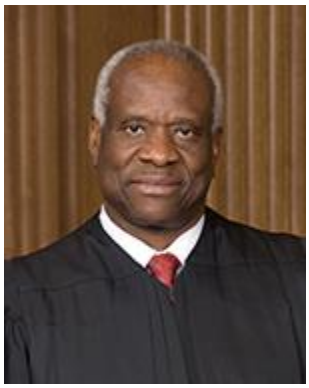
> "The 'rule of four' is not a command of Congress. It is a working rule devised by the Court as a practical mode of determining that a case is deserving of review, the theory being that if four Justices find that a legal question of general importance is raised, that is ample proof that the question has such importance. This is a fair enough rule of thumb on the assumption that four Justices find such importance on an individualized screening of the cases sought to be reviewed."

The Current Membership of the United States Supreme Court (see Greyson, 2022)

Greyson (2022) notes: "In the United States, democracy relies on maintaining a balance of power between three key branches of government: the executive branch, the legislative branch, and the judicial branch, which is where the Supreme Court of the United States (SCOTUS) resides. Deemed experienced legal experts, the Chief Justice and eight Associate Justices who sit on the court have the final say when it comes to interpreting American laws and the Constitution."

The biographies of the current member of the United States Supreme Court may be found on the website of the Court (2022). The members of consists of:

"John G. Roberts, Jr., Chief Justice of the United States, was born in Buffalo, New York, January 27, 1955. He received an A.B. from Harvard College in 1976 and a J.D. from Harvard Law School in 1979. He served as a law clerk for Judge Henry J. Friendly of the United States Court of Appeals for the Second Circuit from 1979–1980 and as a law clerk for then-Associate Justice William H. Rehnquist of the Supreme Court of the United States during the 1980 Term. He was Special Assistant to the Attorney General, U.S. Department of Justice from 1981–1982, Associate Counsel to President Ronald Reagan, White House Counsel's Office from 1982–1986, and Principal Deputy Solicitor General, U.S. Department of Justice from 1989–1993. From 1986–1989 and 1993–2003, he practiced law in Washington, D.C. He was appointed to the United States Court of Appeals for the District of Columbia Circuit in 2003. President George W. Bush nominated him as Chief Justice of the United States, and he took his seat September 29, 2005."



"Clarence Thomas, Associate Justice, was born in the Pinpoint community near Savannah, Georgia on June 23, 1948. He attended Conception Seminary from 1967-1968 and received an A.B., cum laude, from College of the Holy Cross in 1971 and a J.D. from Yale Law School in 1974. He was admitted to law practice in Missouri in 1974, and served as an Assistant Attorney General of Missouri, 1974-1977; an attorney with the Monsanto Company, 1977-1979; and Legislative Assistant to Senator John Danforth, 1979-1981. From 1981–1982 he served as Assistant Secretary for Civil Rights, U.S. Department of Education, and as Chairman of the U.S.

Equal Employment Opportunity Commission, 1982-1990. From 1990–1991, he served as a Judge on the United States Court of Appeals for the District of Columbia Circuit. President Bush nominated him as an Associate Justice of the Supreme Court and he took his seat October 23, 1991."

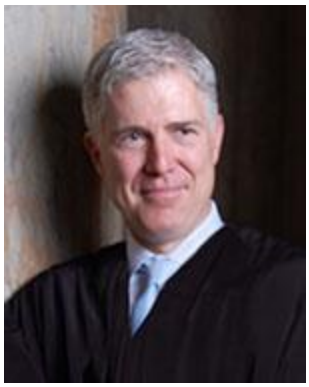
"Stephen G. Breyer, Associate Justice, was born in San Francisco, California, August 15, 1938. He received an A.B. from Stanford University, a B.A. from Magdalen College, Oxford, and an LL.B. from Harvard Law School. He served as a law clerk to Justice Arthur Goldberg of the Supreme Court of the United States during the 1964 Term, as a Special Assistant to the Assistant U.S. Attorney General for Antitrust, 1965–1967, as an Assistant Special Prosecutor of the Watergate Special Prosecution Force, 1973, as Special Counsel of the U.S. Senate Judiciary Committee, 1974–1975, and as Chief Counsel of the committee, 1979–1980. He was an Assistant Professor, Professor of Law, and Lecturer at Harvard Law School, 1967–1994, a Professor at the Harvard University Kennedy School of Government, 1977–1980, and a Visiting Professor at the College of Law, Sydney, Australia and at the University of Rome. From 1980–1990, he served as a Judge of the United States Court of Appeals for the First Circuit, and as its Chief Judge, 1990–1994. He also served as a member of the Judicial Conference of the United States, 1990–1994, and of the United States Sentencing Commission, 1985–1989. President Clinton nominated him as an Associate Justice of the Supreme Court, and he took his seat August 3, 1994." [Justice Breyer announced his retirement in 2022 and his successor, Judge Ketanji Brown Jackson, was confirmed by the United States Senate on April 11, 2022. She will join the Court for its October 2022 term (Chowdhury, Lee, Wagner, & Macaya, 2022].

"Samuel A. Alito, Jr., Associate Justice, was born in Trenton, New Jersey, April 1, 1950. He served as a law clerk for Leonard I. Garth of the United States Court of Appeals for the Third Circuit from 1976–1977. He was Assistant U.S. Attorney, District of New Jersey, 1977–1981, Assistant to the Solicitor General, U.S. Department of Justice, 1981–1985, Deputy Assistant Attorney General, U.S. Department of Justice, 1985–1987, and U.S. Attorney, District of New Jersey, 1987–1990. He was appointed to the United States Court of Appeals for the Third Circuit in 1990. President George W. Bush nominated him as an Associate Justice of the Supreme Court, and he took his seat January 31, 2006."

"Sonia Sotomayor, Associate Justice, was born in Bronx, New York, on June 25, 1954. She earned a B.A. in 1976 from Princeton University, graduating summa cum laude and a member of Phi Beta Kappa and receiving the Pyne Prize, the highest academic honor Princeton awards to an undergraduate. In 1979, she earned a J.D. from Yale Law School where she served as an editor of the Yale Law Journal. She served as Assistant District Attorney in the New York County District Attorney's Office from 1979–1984. She then litigated international commercial matters in New York City at Pavia & Harcourt, where she served as an associate and then partner from 1984–1992. In 1991, President George H.W. Bush nominated her to the U.S. District Court, Southern District of New York, and she served in that role from 1992–1998. In 1997, she was nominated by President Bill Clinton to the U.S. Court of Appeals for the Second Circuit where she served from

1998–2009. President Barack Obama nominated her as an Associate Justice of the Supreme Court on May 26, 2009, and she assumed this role August 8, 2009."

"Elena Kagan, Associate Justice, was born in New York, New York, on April 28, 1960. She received an A.B. from Princeton in 1981, an M. Phil. from Oxford in 1983, and a J.D. from Harvard Law School in 1986. She clerked for Judge Abner Mikva of the U.S. Court of Appeals for the D.C. Circuit from 1986-1987 and for Justice Thurgood Marshall of the U.S. Supreme Court during the 1987 Term. After briefly practicing law at a Washington, D.C. law firm, she became a law professor, first at the University of Chicago Law School and later at Harvard Law School. She also served for four years in the Clinton Administration, as Associate Counsel to the President and then as Deputy Assistant to the President for Domestic Policy. Between 2003 and 2009, she served as the Dean of Harvard Law School. In 2009, President Obama nominated her as the Solicitor General of the United States. A year later, the President nominated her as an Associate Justice of the Supreme Court on May 10, 2010. She took her seat on August 7, 2010."



"Neil M. Gorsuch, Associate Justice, was born in Denver, Colorado, August 29, 1967. He received a B.A. from Columbia University, a J.D. from Harvard Law School, and a D.Phil. from Oxford University. He served as a law clerk to Judge David B. Sentelle of the United States Court of Appeals for the District of Columbia Circuit, and as a law clerk to Justice Byron White and Justice Anthony M. Kennedy of the Supreme Court of the United States. From 1995–2005, he was in private practice, and from 2005–2006 he was Principal Deputy Associate Attorney General at the U.S. Department of Justice. He was appointed to the United States Court of Appeals for the Tenth Circuit in 2006. He served on the Standing Committee on Rules for Practice and Procedure of the U.S. Judicial Conference, and as chairman of the Advisory Committee on Rules of Appellate Procedure. He taught at the University of Colorado Law School. President Donald J. Trump nominated him as an Associate Justice of the Supreme Court, and he took his seat on April 10, 2017."

"Brett M. Kavanaugh, Associate Justice, was born in Washington, D.C., on February 12, 1965. He received a B.A. from Yale College in 1987 and a J.D. from Yale Law School in 1990. He served as a law clerk for Judge Walter Stapleton of the U.S. Court of Appeals for the Third Circuit from 1990-1991, for Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit from 1991-1992, and for Justice Anthony M. Kennedy of the U.S. Supreme Court during the 1993 Term. In 1992-1993, he was an attorney in the Office of the Solicitor General of the United States. From 1994 to 1997 and for a period in 1998, he was Associate Counsel in the Office of Independent Counsel. He was a partner at a Washington, D.C., law firm from 1997 to 1998 and again from 1999 to 2001. From 2001 to 2003, he was Associate Counsel and then Senior Associate Counsel to President George W. Bush. From 2003 to 2006, he was Assistant to the President and Staff Secretary for President Bush. He was appointed a Judge of the United States Court of Appeals for the District of Columbia Circuit in 2006. President Donald J. Trump nominated him as an Associate Justice of the Supreme Court, and he took his seat on October 6, 2018."

"Amy Coney Barrett, Associate Justice, was born in New Orleans, Louisiana, on January 28, 1972. She received a B.A. from Rhodes College in 1994 and a J.D. from Notre Dame Law School in 1997. She served as a law clerk for Judge Laurence H. Silberman of the U.S. Court of Appeals for the D.C. Circuit from 1997 to 1998, and for Justice Antonin Scalia of the Supreme Court of the United States during the 1998 Term. After two years in private law practice in Washington, D.C., she became a law professor, joining the faculty of Notre Dame Law School in 2002. She was appointed a Judge of the United States Court of Appeals for the Seventh Circuit in 2017. President Donald J. Trump nominated her as an Associate Justice of the Supreme Court, and she took her seat on October 27, 2020."

The Court Today: A Clash of Philosophies, Personalities, and a Test of the Role of the Chief Justice

The Supreme Court appears to be behind its normal pace for releasing opinions. In 2021, at this time, the Court had decided 63% of its outstanding cases. As of the first week in June in 2022, the Court has announced decisions in about half of its caseload. The outstanding cases before the Court, described in Part 4 of this study, involve some of the most divisive cases to come before the Court in many years. In addition to the marquee abortion, the Court is also considering a Second Amendment lawsuit that could expand the right to carry handguns, the government's ability to address climate change, religious freedom, and President Biden's immigration policies.

At the same time, the Court is conducting an aggressive investigation into the leak of a draft opinion issued by Justice Alito (Biskupic, 2022), with an "internal criticism of the court's culture bursting into view." As a result, the Chief Justice's leadership of the Court has been severely tested.

The Chief Justice, John Roberts, enunciated a clear message expressed during his confirmation hearing in 2005. His approach would be found in both *judicial restraint* (Pomerance, 2018/2019; Molony, 2020) *and stability* at the Supreme Court (Whelan, 2005; Whelan, 2021). The Congressional Research Service (2018) summarized Roberts' views as follows:

> "At his confirmation hearing in 2005, Chief Justice Roberts famously described his view of judges as umpires, pledging that, if confirmed, he would "call balls and strikes" when applying the law. Chief Justice Roberts emphasized the constitutional structure that underpins the Supreme Court and the rest of the federal judiciary, which is based on independence from political influence."

Chief Justice Roberts himself noted: "Given my view of the role of a judge, which focuses on the appropriate modesty and humility, the notion of dramatic departures is not one that I would hold out much hope for" (Fritze, 2022). Diedrich (2019, p. 235) frames the issue as follows: "…'judicial restraint' refers to the principle that the judiciary should respect and defer to the elected branches. In cases interpreting Article III, then, judicial restraint instructs the Court to refrain from asserting its own power and to instead decide in favor of another branch's power."

Whelan (2005) wrote:

> "Roberts' understanding of judicial restraint -- and of its opposite, judicial activism -- is comprehensively spelled out in two articles he drafted for Atty. Gen. William French Smith in 1981 and 1982. In these draft articles, Roberts explained that judicial restraint was required by "the institutional role of the courts in our federal system and the scheme of separation of powers."
>
> "Judicial activism occurs when "[j]udges read their personal predilections into the flexible terms of the Constitution, at the expense of the policy choices of the elected representatives of the people." Indeed, the "greatest threat to judicial independence occurs when the courts flout the basis for their independence by exceeding their constitutionally limited role and engaging in policymaking."

As a practical matter, Justice Roberts was once considered as a "swing vote" on the Court, but has seemingly lost that power when Associate Justice Amy Coney Barrett came to the Court in October of 2020. The ascension of Justice Barrett to the Court has given the Court a 6-3 conservative advantage for the first time in many decades. Ford (2021) writes:

> "Naturally, Justice Amy Coney Barrett's confirmation shifted the court decisively to the right. But the perception of the Supreme Court's ideological balance is almost as important as the reality itself. Now that this perception has taken root, we're starting to see it bear fruit. Call it the Barrett effect: A variety of conservative political actors are now doing things they might have hesitated to consider when Chief Justice John Roberts or former Justice Anthony Kennedy cast the deciding vote. This dynamic, in turn, is poised to push the country even further to the right."

As a result, the Chief Justice is no longer able to build a majority by joining either the liberal or the conservative wing.

The "leaked" memo of Justice Alito in the case of a frontal challenge to *Roe v. Wade* (1973) (Hunter, Shannon, & Lozada, 2022) underscores this point. Reports have indicated that the Chief Justice Roberts was *not* one of the five supporting the Alito draft, and was instead seeking a less dramatic outcome (Liptak, 2022). However, while a more narrow decision is still possible, for example, one which upholds restrictions based on science or the viability of a fetus, Roberts would still be required to convince Associate Justices Kavanaugh or Barrett to uphold Mississippi's ban on most abortions after 15 weeks of pregnancy, but leave *Roe*'s central holding in place which provided for a right of a woman to choose to have an abortion.

The Court itself has not been immune from criticism. Public opinion polls indicate public approval of the Supreme Court has fallen sharply in the period following the leaked draft opinion. A spring 2022 poll conducted by the Marquette Law School indicates that about 44% of Americans now approve of the way the nation's highest court is handling its job, down 10 points from March (Franklin, 2022).

Some Observations

Part I of this study indicates the immense role the United States Supreme Court has played in the development of the legal cannon of the United States. In Part II, we will explore some of the major cases decided by the Court in its Spring 2022 Term. These decisions reached by the Supreme Court underscore the principle of judicial review as a foundation of that cannon.

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