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Surprisingly (Un)Inspiring Judicial Decisions: *Lochner*, *Brown*, *Roe*, and Others

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Introduction

Supreme Court decisions can quickly and dramatically change the constitutional landscape. They may provide rights or protections where none previously existed, help delineate the separation of powers, or even contain the final blow to a faltering presidency. But can they affect voter turnout? The consensus view among commentators and pollsters is that *Dobbs*¹ will galvanize voters towards the ballot box this November.² This may very well happen, and there have been signs that overturning *Roe* has invigorated voters.³ However, if the backlash from *Dobbs* does result in increased voter turnout, this will be an exception to the norm. Landmark court decisions do not often result in increased voter turnout. Surprisingly, many landmark cases have been followed by decreased voter turnout or very marginal voter turnout increases, suggesting that they may often placate rather than energize the electorate.

The interaction between court decisions and how they affect elections lies at the heart of the relationship between law and politics. But generally, we know little about how apex court decisions impact elections. While some research touches on how the Court and its decisions have influenced Presidential campaigns,⁴ there is a dearth of research on how the decisions of the Court factor into other things, such as midterm elections and voter turnout more generally.⁵ This brief essay attempts to remedy that, attempting to shed some light on the connection between landmark court decisions and voter turnout. Ultimately, it finds that landmark judicial decisions may at times

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¹ *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 597 U.S. ____ (2022).

² Tom Bonier, *Women Are So Fired Up to Vote, I've Never Seen Anything Like It*, N.Y. TIMES (September 3, 2022), <https://www.nytimes.com/2022/09/03/opinion/women-voters-roe-abortion-midterms.html>; See also, Catherine Lucey, *Support for Legalized Abortion Grows Since Dobbs Ruling*, WSJ Poll Shows, WALL ST. J. (September 3, 2022), <https://www.wsj.com/articles/support-for-legalized-abortion-grows-since-dobbs-ruling-wsj-poll-shows-11662210020>.

³ Gabriella Borter, *Kansas votes to preserve abortion rights in first post-Roe v. Wade election test*, REUTERS (August 4, 2022), <https://www.reuters.com/world/us/abortion-rights-face-voter-test-kansas-after-roe-v-wade-reversal-2022-08-02/>.

⁴ DONALD GRIER STEPHENSON, JR., CAMPAIGNS AND THE COURT: THE US SUPREME COURT IN PRESIDENTIAL ELECTIONS (1999); William G. Ross, *The Role of Judicial Issues in Presidential Campaigns* 42(2) SANTA CLARA L. REV. 391 (2002); William G. Ross, *The Supreme Court as an Issue in Presidential Campaigns*, 37 J. SUP. CT. HIST. 322 (2012); ANDREW E. BUSCH, THE CONSTITUTION ON THE CAMPAIGN TRAIL: THE SURPRISING POLITICAL CAREER OF AMERICA'S FOUNDING DOCUMENT (2007).

⁵ Brian Christopher Jones, *The Legal Contribution to Democratic Disaffection*, 75(4) ARK. L. REV. (2023). Of course, voter turnout at elections is an inherently complicated entity given the various moving parts involved, including: the individuals running for office, the various items on the agenda, citizen motivations, general access to the ballot, registration, etc.

help to galvanize voters, but they are more likely to lead to decreased turnout at the ballot box or not affect voting levels at all.

I. The Court, Elections, and Voter Turnout

For the copious amount of discussion in relation to the countermajoritarian difficulty, theories of constitutional interpretation, and the wide expansion of judicial power throughout the 20th and 21st centuries, there has not been much exploration into how judicial review affects campaigns and elections, and especially aspects like voter turnout. And much of what we do know in relation to how the Court and its decisions is used in elections is qualitative, not quantitative, evidence. Donald Stephenson's *Campaigns & the Court* is the most extensive and detailed study of how the Court gets entangled in election campaigns, charting presidential elections from the beginning of the republic through modern day.⁶ Although most election campaigns may "begin and end with little or no mention of the Supreme Court," Stephenson notes that "most political parties successful enough for opponents to notice at the polls...have had something to say about the Supreme Court."⁷ And while the author does an excellent job of detailing instances of Court-focused campaigns, he does not address how these interactions may affect voter turnout.⁸

William Ross has also thoroughly documented how the Court comes into focus during presidential campaigns.⁹ Although he determines that assessing the precise impact of judicial decisions on particular campaigns is "not possible," he does provide compelling evidence of when and how the Court has been used on the campaign trail. Ultimately, he concludes that using the Court on the campaign trail is tricky for politicians, and may ultimately be "politically perilous," as attacks on the Court may make candidates look extreme.¹⁰ Noting how candidates have moved away from a focus on individual decisions and towards appointments to the Court, Ross says that, "the judicial issue may motivate some voters to travel to the polls because they perceive that judicial appointments raise the stakes of the election."¹¹ While Ross' work helps explain how the Court and its work have impacted elections, it shies away from doing this in a quantitative manner. However, a couple authors have studied these interactions from an empirical perspective.

A fascinating study published in 1993 that analyzed judicial activism and voter turnout from the founding to the present concluded that an inverse relationship exists between the number of laws SCOTUS strikes down and voter turnout.¹² In particular, periods where SCOTUS struck

⁶ STEPHENSON, *supra* note 4.

⁷ STEPHENSON, *supra* note 4, at x, 218.

⁸ STEPHENSON, *supra* note 4, at 238. However, he does go on to say,

Denationalization or its prospect could also electrify the electoral process, because it would remove not only the Supreme Court but also other federal courts as decision makers and assign the "last word" to other institutions, such as state governments.

⁹ Ross, *supra* note 4 (2002); Ross, *supra* note 4 (2012).

¹⁰ Ross, *supra* note 4 (2012), at 332.

¹¹ Ross, *supra* note 4 (2002), at 479.

¹² Philip A. Klinker, *Dwarfing the Political Capacity of the People? The Relationship Between Judicial Activism and Voter Turnout, 1840-1988* 25(4) POLITY 633 (1993).

down a higher amount of laws resulted in decreased levels of voter turnout at the national level. Of course, Klinker was not naive enough to believe that citizens were paying attention to the work of the Court and adjusting their voting intentions accordingly. However, the author puts forward another possible explanation: that groups which mobilize voters—such as political parties, NGOs and others—may choose to put their efforts elsewhere during times of court activism.¹³ This seems to be a much more likely explanation of how mechanisms like judicial review may impact voter turnout.

Andrew Busch has also empirically assessed how SCOTUS and its decisions interact with the campaign trail, finding that the overall focus on constitutional rhetoric in elections has generally declined in presidential elections over the past two centuries.¹⁴ Supreme Court decision references are most common in party platforms and presidential debates, but less common in candidate messages and television advertising.¹⁵ However, it remains a complex picture, as commentary on Supreme Court decisions has increased in absolute terms in party platforms, something which began shortly after *Roe* was decided.¹⁶ Additionally, reference to individual Supreme Court decisions can still spark wide national debate, as Bush's reference to *Dred Scott* in the 2004 debate did.¹⁷ Indeed, as Ross and others have demonstrated, even though explicit references to Supreme Court decisions may be lacking in party or candidate messages, that does not mean that particular court cases are not impacting the campaign trail.¹⁸

Below I examine the landmark cases on national voter turnout figures. Using aggregate figures allows us to examine the potential impact SCOTUS decisions have on national politics, and especially during campaigns. Additionally, using these figures provides a crude, but important, view on voter turnout. If these decisions really matter as much as some commentators or political parties claim that they do, then the aggregate numbers could provide evidence to support this. Below all of my data on voter turnout comes from the United States Election Project, which focuses on voting-eligible population (VEP) turnout rates and stretches from 1789 to present day.¹⁹

II. The Usual Suspects: *Lochner*, *Brown*, and *Roe*

Whether landmark Supreme Court decisions galvanize voters to the ballot box is a significant question. Undoubtedly some SCOTUS decisions have staying power, and continue to be discussed

¹³ Klinker, *supra* note 12, at 640-45.

¹⁴ BUSCH, *supra* note 4, at 56-57, 198-200.

¹⁵ BUSCH, *supra* note 4, at 49-51, 91-92, 114-15, 136-37.

¹⁶ BUSCH, *supra* note 4, at 50-51, 58. But, discussion on these decisions used to make up a larger percentage of party platform statements (*See* BUSCH, at 62). Busch also presents evidence that mention of specific decisions occurs slightly more in Democratic Platforms (42.9%) than Republican Platforms (31.7%) from 1840-2004. However, when analyzing candidate messages, references to individual SCOTUS decisions becomes equal between Democrats and Republicans at 16.7% during the same time period (at 103).

¹⁷ BUSCH, *supra* note 4, at 137.

¹⁸ Ross, *supra* note 4, at 324 (“While the Republican platform did not actually mention *Dred Scott* by name, its disapproval of that decision was unmistakable.”)

¹⁹ United States Election Project, “National General Election VEP Turnout Rates, 1789-Present”, <http://www.electproject.org/national-1789-present>.

at major debates and in party platforms. However, for three landmark decisions that are still debated today, *Lochner*, *Brown* and *Roe*, none of them seemed to affect voter turnout in any significant manner shortly after they were decided.

Lochner is considered one of the most controversial decisions in Supreme Court history,²⁰ and the judgment set the stage for what is now known as the *Lochner*-era, where the Supreme Court was hostile to a number of laws protecting workers rights. Before *Lochner* was decided, midterm election turnouts were averaging in the 60s and high 50s (see Table 1 below). Yet in the midterm elections just after *Lochner* was decided, voter turnout fell more than four points, from 55.6% (1902) to 51.3% (1906).²¹

Table 1. Midterm elections pre-and post *Lochner*

Year	Voter Turnout (VEP)
1886	63.9%
1890	64.6%
1894	67.4%
1898	60.1%
1902	55.6%
1906	51.3%

Of course, *Lochner* was decided in April 1905, over a year and half before the 1906 midterm elections took place. Thus, even if citizens were outraged about the activism shown in the decision,²² keeping that momentum going into the 1906 midterms may have been difficult.

Brown v. Board of Education remains one of the most compelling and widely known decisions in US history. *Brown* was decided in May 1954, just a few months before the 1954 midterm elections in November.²³ And yet, turnout at the midterm elections was 43.5%, slightly lower than the midterm election turnout in 1950 (43.6%). Midterm elections are always difficult to navigate in terms of issues, and this one was no different. But *Brown* remained an issue in subsequent elections. *Brown II*, the “all deliberate speed” decision, was handed down in 1955. And yet, in the first presidential election following both *Brown I* and *Brown II*,²⁴ turnout in 1956 was 60.2%. This figure was lower than the turnout in presidential elections just preceding the *Brown* decisions

²⁰ *Lochner v. New York*, 198 U.S. 45 (1905).

²¹ Presidential elections post-*Lochner* show a slight uptick in voter turnout, but only just slight, from 65.5% (1904) to 65.7% (1908).

²² Keith Whittington calls the decision, “an activist island in a sea of judicial passivity.” (KEITH E. WHITTINGTON, *REPUGNANT LAWS: JUDICIAL REVIEW OF ACTS OF CONGRESS FROM THE FOUNDING TO THE PRESENT* (2019), at 149.

²³ *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954)

²⁴ *Brown v. Board of Education of Topeka*, 349 U.S. 294 (1955).

(1952 - 62.3%) and also lower than voter turnout one cycle after the first two *Brown* decisions (1960 - 63.8%).

Table 2. Midterm elections pre-and post-*Brown*

Year	Voter Turnout (VEP)
1950	43.6%
1954	43.5%

Table 3. Presidential elections pre-and post-*Brown*

<u>Year</u>	Voter Turnout (VEP)
1952	62.3%
1956	60.2%
1960	63.8%

It is difficult to know if the turnout figures were due to “simple shock,”²⁵ or perhaps something else, such as a feeling of contentment or complacency. However, for all its commentary and controversy, *Brown* failed to energize voters.

At the time it was decided, *Roe* also failed to galvanize voters to the ballot box.²⁶ Bear in mind that *Roe*, similar to *Brown*, took a number of years to decide. It was originally heard in December 1971, and then reheard in October 1972, just before the Presidential election between Richard Nixon and George McGovern. Although the previous three presidential election turnouts had been in the 60s (1960 - 63.8%; 1964 - 62.8%; and 1968 - 62.5%) the 1972 Presidential election garnered a 56.2% turnout. And in the first Presidential election just after *Roe*, turnout dropped again to 54.8%. A similar picture occurred in relation to the midterm turnout. Although the previous three midterm elections produced turnouts in the upper 40s (1962 - 47.7%; 1966 - 48.7%; 1970 - 47.3%), the first post-*Roe* midterm election in 1974 produced a shockingly-low turnout of 39.1%.

Table 4. Presidential Elections pre-and post-*Roe*

Year	Voter Turnout (VEP)
1960	63.8%
1964	62.8%

²⁵ ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2nd ed)(1962) at 256.

²⁶ *Roe v. Wade*, 410 U.S. 113 (1973).

1968	62.5%
1972	56.2%
1976	54.8%

Table 5. Midterm Elections pre-and post-Roe

Year	Voter Turnout (VEP)
1962	47.7%
1966	48.7%
1970	47.3%
1974	39.1%

There is little doubt that *Roe* has remained a potent and extremely controversial judgment since it was delivered.²⁷ However, in the immediate months and years after the Supreme Court decision, *Roe*—surprisingly—did not galvanize voters to the ballot box.

III. Modern Classics: Flag Burning, Campaign Finance, and Healthcare

Supreme Court rulings on flag burning “sparked intense media interest” and even “public outcry.”²⁸ Indeed, according to the Pew Research Center, the issue was the most followed by citizens within a decade of SCOTUS cases under study.²⁹ Flag burning came before the Court twice just before the 1990 midterm elections. In June 1989 the Court decided *Texas v. Johnson*,³⁰ holding that burning an American flag was a form of protected speech. The decision was deeply unpopular with both parties and with citizens more generally.³¹ Congress responded by passing the Flag Protection Act of 1989, which was subsequently struck down in *U.S. v. Eichman*,³² just before the 1990 midterm elections.

Table 6. Midterm elections pre-and post-*Johnson/Eichman*

Year	Voter Turnout (VEP)
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²⁷ Even though it was decided in 1973, *Roe* has remained a point of contention in many elections and Presidential contests. One of the most prominent examples comes from the 1992 presidential campaign, when Bill Clinton said that he would include a litmus test for any Supreme Court nomination.

²⁸ N. PERSILY, J. CITRIN, & P.J. EGAN (EDS), *PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY* (2008) at 185. They further note that the issue was a “politically potent weapon in political campaigns” (p 185-86).

²⁹ PERSILY, CITRIN, & EGAN, *supra* note 28, at 185.

³⁰ *Texas v. Johnson*, 491 U.S. 397 (1989).

³¹ PERSILY, CITRIN, & EGAN, *supra* note 28, at 184-206.

³² *United States v. Eichman*, 496 U.S. 310 (1990).

1982	42.0%
1986	38.1%
1990	38.4%

Flag burning may have been an issue that the American public held passionate views on, but there's scant evidence that it spurred citizens to the ballot box. Although an increase in voter turnout was seen, it was marginal (0.3%).

Citizens United caused shockwaves when it was decided in 2010.³³ Famously, Barack Obama chastised the Supreme Court in his annual State of the Union speech,³⁴ and the ruling was prominently debated on all sides before the 2010 midterms.³⁵ And yet, these elections only produced a small uptick in voter turnout (41.0%) over the previous 2006 midterms (40.4%). Also, the party shouting the loudest about how wrong the Supreme Court decision was, the Democrats, lost control of the House of Representatives—losing 63 seats—and also lost another 7 seats in the Senate.³⁶

Table 7. Midterm elections pre-and post-*Citizen United*

Year	Voter Turnout (VEP)
2002	39.5%
2006	40.4%
2010	41.0%

Given all that has happened over the years with the Patient Protection and Affordable Care Act (“ACA” or “Obamacare”), it is almost difficult to remember how anticipated the *NFIB v. Sebelius* decision was in 2012.³⁷ The ACA was the Democrat’s signature piece of legislation under Obama, and the most significant change to healthcare in decades. The *Sebelius* decision was handed down on June 28, 2012, and health care continued to be a major issue going into the November 2012

³³ *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

³⁴ Barack Obama, *Remarks by the President in State of the Union Address*, WHITE HOUSE ARCHIVES (January 27, 2010), <https://obamawhitehouse.archives.gov/the-press-office/remarks-president-state-union-address>.

³⁵ See, e.g., Ashby Jones, *Is 'Citizens United' Affecting the 2010 Midterm Races? In a Word: Yes*, WALL ST. J. (October 8, 2010), <https://www.wsj.com/articles/BL-LB-34389>; Michael Luo, *Money Talks Louder Than Ever in Midterms*, N.Y. TIMES (October 7, 2010), <https://www.nytimes.com/2010/10/08/us/politics/08donate.html>.

³⁶ Paul Harris & Ewen MacAskill, *US midterm election results herald new political era as Republicans take House*, THE GUARDIAN (November 3, 2010), <https://www.theguardian.com/world/2010/nov/03/us-midterm-election-results-tea-party>.

³⁷ *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012)

Presidential election. And yet, voter turnout in 2012 decreased to 58.6%, three points lower than in 2008.

Table 8. Presidential elections pre-and post-*Sebelius*

Year	<u>Voter Turnout (VEP)</u>
2004	60.1%
2008	61.6%
2012	58.6%

Republicans were furious about the *Sebelius* decision, vowing in the 2012 election to scrap the ACA.³⁸ Presidential candidate Mitt Romney led the charge, but the issue, while relevant, was not enough to energize voters, who did not turnout as much as in 2008, and the Presidency stayed Democratic.

IV. An International Perspective? The UK's 2019 Prorogation Case

The United Kingdom's 2019 blockbuster case, *Miller II/Cherry*, provided a unique interaction between a landmark court decision and a general election.³⁹ After Boris Johnson prorogued Parliament during the midst of a crucial Brexit negotiation period, the Supreme Court boldly intervened, nullifying the prorogation and recalling Parliament. Less than three months after Johnson was chastised by the UK Supreme Court, the UK general public got the chance to determine whether they should keep the PM in office. And it should be acknowledged that many people thought that Johnson's prorogation was the move of a populist, authoritarian leader.⁴⁰ Indeed, if the rhetoric on Boris was to be believed, then voters had the chance to oust a Prime Minister that had proven himself a threat to democratic norms.

But surprisingly, UK citizens did not respond. The 2017 election brought the UK its highest voter turnout in the 21st century (69.3%). However, with the "threat" of Johnson looming, Brexit still hanging in the balance, and the Conservative Party being in power for over nearly a decade, the UK public were not especially energized. The 2019 election garnered a 67.6% turnout. The Supreme Court case played a big part in the campaign, being used by both sides to motivate

³⁸ Avik Roy, *The Inside Story on How Roberts Changed His Supreme Court Vote on Obamacare*, FORBES (July 1, 2012), <https://www.forbes.com/sites/theapothecary/2012/07/01/the-supreme-courts-john-roberts-changed-his-obamacare-vote-in-may/?sh=ed628cd701d5>.

³⁹ *Miller v. Prime Minister* [2019] UKSC 41; *Cherry v. Advocate General for Scotland* [2019] UKSC 41.

⁴⁰ Foreign Policy magazine called him "King Johnson," comparing him to Charles I (Garvan Walshe, *King Johnson vs. Parliament*, FOREIGN POLICY (August 28, 2019), <https://foreignpolicy.com/2019/08/28/king-johnson-vs-parliament-prorogue-brexit-boris/>).

voters.⁴¹ Ultimately, however, it seemed to aid the Conservatives, who garnered an 80-seat parliamentary majority in the December 2019 election.

Table 9. UK general election turnout pre-and post *Miller II/Cherry*

<u>Year</u>	<u>Voter Turnout (VEP)</u>
2010	65.8%
2015	66.1%
2017	69.3%
2019	67.6%

V. All Hope Lost? Not Quite

Landmark decisions may not always galvanize voters, but they do have the potential to affect the campaign trail. Abortion has certainly captured the national attention for the past half-century, and it bears similarities with an issue that brought voting turnout to some of the highest levels in US history. The 1860 presidential election was dominated by the long-running issue of slavery, and at the center of the election was a landmark SCOTUS decision: *Dred Scott v. Sandford*.⁴² This decision was decided in March 1857, and had an impact on both the 1858 midterm elections and the 1860 presidential election, as it was the first time in American history the Court was at the vortex of a political campaign.⁴³ Each election saw noticeable increases in voter turnout, and discussion of *Dred Scott* was a crucial part of both campaigns.⁴⁴

Table 10. Midterm election turnout pre-and post *Dred Scott*

<u>Year</u>	<u>Voter Turnout (VEP)</u>
1846	60.3%
1850	60.5%
1854	66.1%

⁴¹ Boris Johnson used it as evidence that judicial elites were trying to halt Brexit, while the Labour Party used it as evidence that Boris was a democratic threat.

⁴² *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

⁴³ Ross, *supra* note 4, at 323. Ross notes,

Bitterly assailed by the nascent Republican party, *Dred Scott* provided opponents of slavery with a tangible target on which to focus. The decision was a prominent feature of the debates between Abraham Lincoln and Stephen Douglas in their 1858 contest to represent Illinois in the U.S. Senate, and fear of the extension of slavery was such a dominant force in the 1860 presidential election that the legal scholar Charles Warren concluded that ‘Chief Justice Taney elected Abraham Lincoln to the Presidency.’

⁴⁴ STEPHENSON, *supra* note 4, at 81-106; Ross, *supra* note 4 (2002), at 394-95; Ross, *supra* note 4 (2012), at 323-24.

1858	69.1%
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Table 11. Presidential election turnout pre-and post *Dred Scott*

<u>Year</u>	<u>Voter Turnout (VEP)</u>
1848	72.8%
1852	69.5%
1856	79.4%
1860	81.8%

As the confrontation over slavery came to head in America, voting levels at both midterm and presidential elections reached some of the highest peaks in US history. Although it may be impossible to single out *Dred Scott* as *the* decisive factor in reaching these levels, there is no doubt that the decision loomed large over the campaign trail in both instances.

Conclusion

Much of the research we have on how court decisions impact elections comes from qualitative evidence focused on presidential contests. This essay has attempted to expand this scope, focusing on how landmark decisions may affect voter turnout, not only in presidential contests but also in midterm elections. Surprisingly, landmark SCOTUS decisions do not often inspire the electorate. Indeed, it may be the case that, rather than landmark decisions inspiring voters to the ballot box, these decisions in complicated ways may actually be placating citizens, and potentially depressing turnout. Perhaps citizens, political parties, and other groups feel that these important decisions take things out of their hands. After all, when the Court takes certain action,

the justices place a particular public policy out of the reach of ordinary majoritarian politics. That policy is no longer ‘in play,’ no longer an option among the range of things that government or the voters may do.⁴⁵

Conversely, the 1860 election demonstrates that enhanced citizen alignment carries the potential to energize the electoral process, and also provide a strong statement on a highly controversial Supreme Court decision. Perhaps that is what we will see post-*Dobbs*. But even if so, this will be the exception to the norm. For all their sound and fury, landmark court decisions do not often inspire citizens to the ballot box.

⁴⁵ STEPHENSON, *supra* note 4, at 221.