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# SURPRISINGLY (UN)INSPIRING JUDICIAL DECISIONS

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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 among commentators and pollsters was that *Dobbs*<sup>1</sup> would galvanize voters toward the ballot box in November 2022,<sup>2</sup> and indeed there were signs that overturning *Roe* had invigorated voters in some places.<sup>3</sup> But even though Democrats did better than predicted in the midterms, the post-*Dobbs* effect ultimately aligned with a familiar pattern to other landmark SCOTUS decisions: that of decreasing post-decision voter turnout. The 2018 elections produced the strongest midterm voter turnout in over a century (50%), but the 2022 returns show that voter turnout fell to 46.8%, down over three points from 2018.<sup>4</sup> Scouring years of voter turnout data, this piece finds that landmark court decisions—in the US and elsewhere—do not often result in increased voter turnout. Many landmark cases have been surprisingly followed by decreased voter turnout or by very marginal voter turnout increases, suggesting that they often placate rather than energize the electorate.

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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 (Sept. 3, 2022), <https://www.nytimes.com/2022/09/03/opinion/women-voters-roe-abortion-midterms.html> [<https://perma.cc/W7VM-HRDD>]; See also Catherine Lucey, *Support for Legalized Abortion Grows Since Dobbs Ruling, WSJ Poll Shows*, WALL ST. J. (Sept. 3, 2022, 9:00 AM), <https://www.wsj.com/articles/support-for-legalized-abortion-grows-since-dobbs-ruling-wsj-poll-shows-11662210020> [<https://perma.cc/TBF2-JAAP>].
3. Gabriella Borter, *Kansas Votes to Preserve Abortion Rights in First Post-Roe v. Wade Election Test*, REUTERS (Aug. 4, 2022, 3:50 AM), <https://www.reuters.com/world/us/abortion-rights-face-voter-test-kansas-after-roe-v-wade-reversal-2022-08-02/> [<https://perma.cc/T5W3-PCCW>].
4. *National General Election VEP Turnout Rates, 1789-Present*, U.S. Election Project, <https://www.electproject.org/2022g>, (last visited Jan. 6, 2022) [<https://perma.cc/88DL-B2MH>]. However, note that the 2022 voter turnout was still quite high in comparative perspective, and was the highest midterm turnout since 1970 (473%).

The interaction between court decisions and elections lies at the heart of the relationship between law and politics. But 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,<sup>5</sup> 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.<sup>6</sup> This brief essay attempts to remedy this by shedding light on the connection between landmark court decisions and voter turnout. It ultimately finds that landmark judicial decisions may at times help to galvanize voters but are more likely to lead to decreased turnout at the ballot box or to not affect voting levels at all.

### I. THE COURT, ELECTIONS, AND VOTER TURNOUT

For the copious amount of discussion about the counter-majoritarian difficulty, theories of constitutional interpretation, and 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 are 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.<sup>7</sup> Although most election campaigns "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."<sup>8</sup> And while he does an excellent job of detailing instances of Court-focused campaigns, Stephenson does not address how these interactions affect voter turnout.<sup>9</sup>

William Ross has also thoroughly documented how the Court comes into focus during presidential campaigns.<sup>10</sup> Although he determines that assessing the precise impact of judicial decisions on particular campaigns is "not possible,"

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

6. Brian Christopher Jones, *The Legal Contribution to Democratic Disaffection*, 75 ARK. L. REV. (forthcoming 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.

7. STEPHENSON, *supra* note 4.

8. *Id.* at x, 218.

9. *Id.* at 238. However, he does go onto say,

"[d]enationalization 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." *Id.*

10. See generally Ross 2002, *supra* note 4; Ross 2012, *supra* note 4.

Ross does provide compelling evidence regarding when and how the Court has been used on the campaign trail.<sup>11</sup> He ultimately concludes that referencing the Court on the campaign trail is tricky for politicians and may be “politically perilous,” as attacks on the Court may make candidates look extreme.<sup>12</sup> Noting how candidates have moved away from a focus on individual decisions and toward appointments to the Court, Ross writes 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.”<sup>13</sup> While Ross’s work helps explain how the Court and its decisions have impacted elections, it shies away from doing so in a quantitative manner. A couple authors, however, have studied these interactions from an empirical perspective.

In a fascinating study published in 1993, Philip Klinker analyzed judicial activism and voter turnout from the founding to the present and concluded that an inverse relationship exists between the number of laws SCOTUS strikes down and voter turnout.<sup>14</sup> In particular, periods where SCOTUS struck down a higher number 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. Instead, he put forward another explanation: groups which mobilize voters—such as political parties, NGOs and others—choose to put their efforts elsewhere during times of court activism.<sup>15</sup> This seems to be a more likely explanation of how mechanisms like judicial review impact voter turnout.

Andrew Busch also empirically assessed how SCOTUS and its decisions interact with the campaign trail, finding that the focus on constitutional rhetoric in elections has generally declined in presidential elections over the past two centuries.<sup>16</sup> Supreme Court decision references are most common in party platforms and presidential debates but are less common in candidate messages and television advertising.<sup>17</sup> It remains a complex picture, however, as commentary on Supreme Court decisions has increased in absolute terms in party platforms, something which began shortly after *Roe* was decided.<sup>18</sup> Additionally, references to individual Supreme Court decisions can still spark wide national debate, as Bush’s reference to *Dred Scott* did in the 2004 debate.<sup>19</sup> Indeed, as Ross and others have demonstrated, even though explicit references to Supreme

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11. Ross 2012, *supra* note 4, at 326.

12. *Id.* at 332.

13. Ross 2002, *supra* note 4, at 479.

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

15. *Id.* at 640–45.

16. BUSCH, *supra* note 4, at 56–57, 198–200.

17. *Id.* at 49–51, 91–92, 114–15, 136–37.

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

19. *Id.* at 137.

Court decisions may be lacking in candidate messages, this does not mean that particular court cases are not impacting the campaign trail.<sup>20</sup>

Below I examine the effect of 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 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. 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.<sup>21</sup>

## II. THE USUAL SUSPECTS: *LOCHNER*, *BROWN*, AND *ROE*

Whether landmark Supreme Court decisions galvanize voters to the ballot box is a significant question. Some SCOTUS decisions undoubtedly have staying power and continue to be discussed at major debates and in party platforms. However, three landmark decisions that are still debated today, *Lochner*, *Brown* and *Roe*, did not seem 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,<sup>22</sup> 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 by more than four points, from 55.6% (1902) to 51.3% (1906).<sup>23</sup>

TABLE 1: MIDTERM ELECTIONS PRE -AND POST- *LOCHNER*

Year	Voter Turnout (VEP)
1886	63.9%
1890	64.6%
1894	67.4%

20. See Ross 2012, *supra* note 4, at 324 (“While the Republican platform did not actually mention Dred Scott by name, its disapproval of that decision was unmistakable.”).

21. *National General Election VEP Turnout Rates, 1789-Present*, U.S. ELECTION PROJECT, <http://www.electproject.org/national-1789-present> (last visited Nov. 11, 2022) [https://perma.cc/8VAX-8H98].

22. *Lochner v. New York*, 198 U.S. 45 (1905). However, some argue that *Lochner* was not especially controversial when it was decided (See, e.g., DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* (2011)).

23. Presidential elections post-*Locher* show a slight uptick in voter turnout from 65.5% (1904) to 65.7% (1908).

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,<sup>24</sup> 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 discussed decisions in U.S. history. *Brown* was decided in May 1954, just a few months before the 1954 midterm elections in November.<sup>25</sup> 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.<sup>26</sup> Yet in the 1956 election, the first presidential election following both *Brown I* and *Brown II*, turnout was 60.2%. This figure was lower than the turnout in the presidential elections just preceding the *Brown* decisions (1952 - 62.3%) and 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*

Year	Voter Turnout (VEP)
1952	62.3%
1956	60.2%
1960	63.8%

24. 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* 149 (2019).

25. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)

26. *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

It is difficult to know if the turnout figures were due to “simple shock”<sup>27</sup> or perhaps something else, such as a feeling of contentment or complacency. Regardless, 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.<sup>28</sup> 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 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%
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%

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

28. *Roe v. Wade*, 410 U.S. 113 (1973). Similar to the *Lochner* decision, scholars have argued that *Roe* was not particularly controversial when it was handed down (See, e.g., Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 *YALE L. J.* 2028 (2011)).

There is little doubt that *Roe* has remained an extremely controversial judgment since it was delivered.<sup>29</sup> But 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

The Supreme Court rulings on flag burning “sparked intense media interest” and even “public outcry.”<sup>30</sup> Indeed, according to the Pew Research Center, the issue was the most followed by citizens out of the decade of SCOTUS cases under study.<sup>31</sup> Flag burning came before the Court twice just before the 1990 midterm elections. In June 1989, the Court decided *Texas v. Johnson*,<sup>32</sup> holding that burning an American flag is a form of protected speech. The decision was deeply unpopular with both parties and with citizens more generally.<sup>33</sup> Congress responded by passing the Flag Protection Act of 1989, which was subsequently struck down in *U.S. v. Eichman*,<sup>34</sup> just before the 1990 midterm elections.

TABLE 6: MIDTERM ELECTIONS PRE-AND POST-*JOHNSON/EICHMAN*

Year	Voter Turnout (VEP)
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 did occur, it was marginal (0.3%).

29. 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.

30. PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 185 (Nathaniel Persily, Jack Citrin & Patrick J. Egan eds., 2008). They further note that the issue was a “politically potent weapon in political campaigns” *Id.* at 185–86.

31. *Id.* at 185.

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

33. PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY, *supra* note 30, at 184–206.

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

*Citizens United* caused shockwaves when it was decided in 2010.<sup>35</sup> Barack Obama famously chastised the Supreme Court in his annual State of the Union speech,<sup>36</sup> and the ruling was prominently debated by all sides before the 2010 midterms.<sup>37</sup> 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.<sup>38</sup>

TABLE 7: MIDTERM ELECTIONS PRE-AND POST-*CITIZENS 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.<sup>39</sup> The ACA was the Democrats’ signature piece of legislation during the Obama administration and the most significant change to healthcare in decades. The *Sebelius* decision was handed down on June 28, 2012, and healthcare continued to be a major issue going into the November 2012 presidential election. Yet voter turnout in 2012 decreased to 58.6%, three points lower than in 2008.

TABLE 8: PRESIDENTIAL ELECTIONS PRE-AND POST-*SEBELIUS*

Year	Voter Turnout (VEP)
2004	60.1%

35. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

36. Barack Obama, *Remarks by the President in State of the Union Address*, WHITE HOUSE ARCHIVES (Jan. 27, 2010, 9:11 PM), <https://obamawhitehouse.archives.gov/the-press-office/remarks-president-state-union-address> [<https://perma.cc/5T96-J3XD>].

37. See, e.g., Ashby Jones, *Is ‘Citizens United’ Affecting the 2010 Midterm Races? In a Word: Yes*, WALL ST. J. (Oct. 8, 2010, 10:55 AM), <https://www.wsj.com/articles/BL-LB-34389> [<https://perma.cc/E9WS-XR5F>]; Michael Luo, *Money Talks Louder Than Ever in Midterms*, N.Y. TIMES (Oct. 7, 2010), <https://www.nytimes.com/2010/10/08/us/politics/08donate.html> [<https://perma.cc/BX5A-4TQN>].

38. Paul Harris & Ewen MacAskill, *US Midterm Election Results Herald New Political Era as Republicans Take House*, THE GUARDIAN (Nov. 3, 2010, 12:22 PM), <https://www.theguardian.com/world/2010/nov/03/us-midterm-election-results-tea-party> [<https://perma.cc/W8W9-K4HQ>].

39. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012)

2008	61.6%
2012	58.6%

Republicans were furious about the *Sebelius* decision, vowing during the 2012 election campaign to scrap the ACA.<sup>40</sup> Presidential candidate Mitt Romney led the charge,<sup>41</sup> but the issue, while relevant, was not enough to energize voters, who did not turn out as much as in 2008, and the Presidency stayed with the Democrats.

#### 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.<sup>42</sup> 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. Fewer 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. Many people thought that Johnson's prorogation was the move of a populist, authoritarian leader;<sup>43</sup> 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 UK citizens surprisingly did not respond. The 2017 election brought the UK its highest voter turnout in the 21st century (69.3%). But even with the "threat" of Johnson looming, Brexit still hanging in the balance, and the Conservative Party being in power for 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 voters.<sup>44</sup> Ultimately, it seemed to aid the Conservatives, who garnered an 80-seat parliamentary majority in the December 2019 election.<sup>45</sup>

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40. Avik Roy, *The Inside Story on How Roberts Changed His Supreme Court Vote on Obamacare*, FORBES (July 1, 2012, 1:01 PM), <https://www.forbes.com/sites/theapotheary/2012/07/01/the-supreme-courts-john-roberts-changed-his-obamacare-vote-in-may/?sh=ed628cd701d5> [https://perma.cc/SF3E-G58B]; Andy Sullivan, *Romney to Campaign as Only Hope Against "Obamacare"*, REUTERS (June 28, 2012, 11:07 AM), <https://www.reuters.com/article/us-usa-healthcare-romney/romney-to-campaign-as-only-hope-against-obamacare-idUSBRE85R12M20120628> [https://perma.cc/ZU9K-36HR].

41. *Id.*

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

43. Foreign Policy magazine called him "King Johnson," comparing him to Charles I. Garvan Walshe, *King Johnson vs. Parliament*, FOREIGN POL'Y (Aug. 28, 2019, 4:49 PM), <https://foreignpolicy.com/2019/08/28/king-johnson-vs-parliament-prorogue-boris/> [https://perma.cc/8MRU-XQQK].

44. 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.

45. Mark Katkov, *Boris Johnson and Conservative Party Win Large Majority In U.K. Parliament*, NPR (Dec. 13, 2019), <https://www.npr.org/2019/12/13/787705261/boris-johnson-and-conservative-party-win-large-majority-in-parliament> [https://perma.cc/KM6N-7ZPA].

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 captured 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 U.S. 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*.<sup>46</sup> This case was decided in March 1857 and had an impact on both the 1858 midterm elections and the 1860 presidential election. It was the first time in American history the Court was at the vortex of a political campaign.<sup>47</sup> Each election saw noticeable increases in voter turnout, and discussion of *Dred Scott* was a crucial part of both campaigns.<sup>48</sup>

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%

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

47. Ross 2012, *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.’

48. See STEPHENSON, *supra* note 4, at 81–106; Ross, *supra* note 4 (2002), at 394–95; Ross 2012, *supra* note 4, 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 U.S. history. Although it is 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 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 affect voter turnout, not only in presidential contests but also in midterm elections. Landmark SCOTUS decisions—even those that denationalize extremely contentious issues—surprisingly do not often inspire the electorate.<sup>49</sup> Indeed, it may be the case that, rather than inspiring voters to the ballot box, these decisions 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 affect.<sup>50</sup>

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. But such sparks of enhanced voter activity are exceptions to the norm. For all their sound and fury, landmark court decisions rarely inspire citizens to the ballot box.

49. STEPHENSON, *supra* note 4, at 238. See footnote 9 for Stephenson’s full quote on how denationalization could “electrify the electoral process.”

50. *Id.* at 221.