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Justice Robert Jackson's Catechisms

Mark A. Graber

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ESSAY

JUSTICE ROBERT JACKSON'S CATECHISMS

MARK A. GRABER*

The joint dissent by Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan in *Dobbs v. Jackson Women's Health Organization*[1] passionately champions Justice Robert Jackson's catechisms.[2] Part I of the joint dissent quotes Jackson's sermon in *West Virginia Board of Education v. Barnette*[3] when asserting, "[w]e do not (as the majority insists today) place everything within 'the reach of majorities and [government] officials.' We believe in a Constitution that puts some issues off limits to majority rule."[4] Part II of that dissent invokes Jackson's mantras when maintaining: "To repeat: The point of a right is to shield individual actions and decisions 'from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.'"[5]

Jackson is the patron saint of progressives committed to privacy rights and reproductive freedom. His canonization occurred in *Obergefell v. Hodges*,[6] although his quotations performed many miracles in previous liberal opinions. Justice Anthony Kennedy's majority opinion defending judicial power to declare unconstitutional bans on same-sex marriage also solemnly chanted that "[t]he idea of the Constitution 'was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.'"[7] Kennedy's devotion to judicial power

* University System of Maryland Regents Professor, University of Maryland Francis King Carey School of Law. Thanks to the editors of the Law Review, Professor Richard Boldt and Professor Maxwell Stearns for their advice and help.

1. 142 S. Ct. 2228 (2022).
2. *Id.* at 2317 (Breyer, Sotomayor, & Kagan, JJ., dissenting).
3. 319 U.S. 624 (1943).
4. *Dobbs*, 142 S. Ct. at 2320 (second alteration in original) (citation omitted) (quoting *Barnette*, 319 U.S. at 638).
5. *Id.* at 2334 (quoting *Barnette*, 319 U.S. at 638).
6. 576 U.S. 644 (2015).
7. *Id.* at 677 (quoting *Barnette*, 319 U.S. at 638).

continued: "This is why 'fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.'"[8]

Justice Jackson's catechisms may belong in Law Day speeches, but do not merit serious consideration for any activist lawyer. Protections for fundamental rights in the United States depend on elections. Justice Jackson was appointed to the Supreme Court of the United States in part because members of the Franklin Roosevelt Justice Department thought Jackson more committed to the judicial protection of civil liberties than Judge Learned Hand, the other candidate for the judicial vacancy. The Supreme Court decided *Brown v. Board of Education*[9] after Justice Department officials in the Roosevelt, Truman, and Eisenhower Administrations self-consciously packed the federal judiciary with racial liberals. A generation of political scientists have demonstrated that judicial decisions protecting rights have little impact on the ground unless elected officials either support the decision as a matter of policy or as a means of passing political responsibility for a politically divisive controversy. Listen to the loudspeaker before high school football games throughout rural America and you will realize that the Supreme Court did not abolish school prayer in *Engel v. Vitale*.[10]

Abortion is no exception to the normal politics of constitutional law. *Roe v. Wade*[11] would have been overruled had the 1986 U.S. Senatorial Election not provided more Democratic votes against Robert Bork, who was publicly committed to allowing state legislatures to ban reproductive choice.[12] Should Democrats win the next few elections and have the opportunity to fashion a progressive judiciary majority, Republicans are likely to discover how abortion rights, as well as the rights conservatives hold sacred, depend on the outcome of elections. A woman's right to terminate a pregnancy and a football coach's right to pray privately on the fifty-yard line with numerous other persons who are presumably also praying privately on the fifty-yard line were on the ballot in 2022, and similar issues will be on the ballot in future elections as well.[13]

The more accurate view was expressed by Abraham Lincoln in his fifth debate with Stephen A. Douglas. Lincoln spent much of his energy during

8. *Id.* (quoting *Barnette*, 319 U.S. at 638).

9. 347 U.S. 483 (1954).

10. 370 U.S. 421 (1962).

11. 410 U.S. 113 (1973).

12. RICHARD C. THOMAS, FED. ELECTIONS COMM'N, ELECTION RESULTS FOR THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES (May 1987), https://www.fec.gov/resources/cms-content/documents/federalelections86.pdf; *Supreme Court Nominations (1789–Present)*, U.S. SENATE, https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm (last visited Mar. 20, 2023).

13. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022).

the debates tying the *Dred Scott v. Sandford*[14] decision to the Democrats. *Dred Scott* was not an instance of Justices on the rampage. The "decision," the future sixteenth President asserted, "never would have been made in its present form if the party that made it had not been sustained previously by the elections."[15] The ballot box was the place for determining the future of slavery and race in the United States. Lincoln continued: "My own opinion is, that the new *Dred Scott* decision, deciding against the right of the people of the States to exclude slavery, will never be made, if that party is not sustained by the elections."[16] Lincoln acknowledged that the most fundamental right of a person, the right not to be enslaved, depended on elections. Elect Democrats and more persons would be enslaved. Elect Republicans and slavery would be placed on a "course of ultimate extinction."[17] "Slavery must be put down politically, or else militarily," the abolitionist Theodore Parker agreed.[18]

The Lincolnian view that constitutional law is politics by other means and the R. Jacksonian view that law is not simply politics, are both easily oversimplified, particularly in a blog post. Elections matter, even though Justices are not slaves to the whims of the political majority. Some decisions are more political than others. Compare *Dobbs* to interpretations of minor provisions in the tax code. Timing matters. The politics of the time makes courts more or less independent of other elected officials.

Reasonable elaboration, the judicial use of precedent to resolve cases, best describes judicial decision-making when a regime is stable. Most elites in a stable regime share a set of common beliefs, whether those beliefs be that disputes over slavery should not disrupt the Union (Jacksonian America) or that the national government has the power to resolve all national commercial problems (the New Deal/Great Society). The role of the Supreme Court in stable regimes is to resolve problems that arise within accepted paradigms, such as the precise rules for the rendition of fugitive slaves or the specific applications of liberal cultural norms regarding families. *Roe v. Wade* is typical of the judicial decisions that are handed down in periods of normal politics, as are *Wickard v. Fillburn*,[19] *Brown v. Board of Education*,

14. 60 U.S. (19 How.) 393 (1857).

15. *Fifth Debate: Galesburg, Illinois*, NAT'L PARK SERV.: LINCOLN HOME (Apr. 10, 2015), https://www.nps.gov/liho/learn/historyculture/debate5.htm.

16. *Id.*

17. *House Divided Speech*, NAT'L PARK SERV.: LINCOLN HOME (Apr. 10, 2015), https://www.nps.gov/liho/learn/historyculture/housedivided.htm.

18. Theodore Parker, Speech Delivered in the Hall of the State House, Before the Massachusetts Anti-Slavery Convention: The Present Aspect of Slavery in America and the Immediate Duty of the North (Jan. 29, 1858), https://tile.loc.gov/storage-services/service/rbc/rbaapc/22000/22000.pdf#page=27.

19. 317 U.S. 111 (1942).

Lochner v. New York,[20] and *Prigg v. Pennsylvania*,[21] all of which had majorities composed of appointees from both parties. Each decision tried to work out the best applications of principles on which broad agreement existed at the time. The Court in *Lochner*, for example, divided over the application of the freedom of contract (5-4), but not over the existence of a constitutional freedom of contract (8-1).

When politics becomes a contest over what were once shared norms, the role of the Supreme Court changes. Lincoln's Republican Party had no interest in the bargains that Whigs and Democrats had forged over slavery. Roosevelt's Democrats had little interest in pre-New Deal precedents on the Commerce Clause and freedom of contract. In such circumstances, if the insurgent movement captures control of the federal judiciary, Justices will start to work out the implications of that movement's constitutional vision rather than remain bound to the precedents of what they perceive to be the "ancient regime's" reign of error. The Roberts Court is no more likely to respect Warren Court precedents than the Warren Court respected the racist Fuller Court precedents. The Kagan Court will demonstrate Justice Samuel Alito's respect for precedents, perhaps even using Alito's formula for overruling when overruling *Dobbs* and related cases.

Electoral politics is the crucial forum for constitutional arguments in times of regime change. Just as the fundamental right of a person not to be a slave was settled by a series of elections that brought and sustained the Republican Party in power, the future of reproductive choice in the long run will also be settled by victorious political coalitions. Perhaps Democrats will gain enough seats in Congress to pass federal laws guaranteeing the right to terminate a pregnancy. Perhaps they will have the power necessary to either pack the Court through replacement of retiring conservative judges or by expanding the number of seats. The paths are many. All are challenging. All go through the ballot box.

20. 198 U.S. 45 (1905).

21. 41 U.S. (16 Pet.) 539 (1842).