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What Would Jackson Say?:

How Robert H. Jackson's Decisions Continue to Influence the Supreme Court

Introduction

Individual personalities on the contemporary Supreme Court are the focus of much attention in part because of the adversarial nature of their work. This might be a contemporary area of focus, however it is not a phenomenon that exists solely in the modern context. For generations the Supreme Court has been a place of disagreement and, at various times, discord. This is not a phenomenon unique to today, nor was it one unique to Jackson's time on the bench. To study, then, traditional theories of legal precedent, which focus primarily on majority opinions instead of such opinions in conjunction with the myriad of concurrences and dissents is to ignore a significant portion of the Court's history and legacy. Turning attention to a specific justice to explore his legacy as a whole is one step towards remedying such a gap in traditional explorations of precedent and influence. Justice Jackson presents one such example. He served on a divided court, historically one of the most divided, and his decisions - not just those he wrote for the majority - continue to be cited as precedent more than fifty years after his death. Certainly traditional theories of Supreme Court precedent are not rigid. There are numerous moments in which the Court turns away from majority decisions, either as a means of overturning previous decisions or as a means of clarifying their decisions. However, such turns

towards non-majority decisions are rarely explored in depth or accepted as law. The continued use of Justice Jackson's opinions can be attributed to Jackson's ability to capture complex legal concepts whose relevance do not expire upon the passing of the historical moment within which he is writing, thus allowing him to be effective beyond traditional conceptions of legal precedent.

Literature Review

Studies regarding the influences on Supreme Court decisions focus primarily on legislative acts and previous majority decisions that have effect on more contemporary majority decisions (Fowler and Jeon 17). Precedent is found to be the groundwork upon which newer cases are built as historical support is thought to enhance legitimacy (Fowler and Jeon 16). Other studies suggest that precedent is manipulated by justices to bolster their pre-existing ideas, preferences and biases (Segal and Spaeth 981, Spriggs and Hansford 141). Regardless of intention, these studies all focus on what majority opinions allow for and provide.

What these findings do not take into account is that the influence of past decisions is not limited to majority decisions. Concurrences and dissents can exert influence over contemporary iterations of the court, though their effects are less frequently explored in academic literature. Most studies of precedent intentionally disregard such aspects of decisions (Kosma 341, Spriggs and Hansford 146) in part due to the fact that such aspects of decisions are rarely considered precedential or backed by the full force of law (Aldisert 608). As analyses of contemporary uses of Jackson demonstrate, though, previous majority opinions alone are not sufficient when Supreme Court justices construct later decisions.

Even analyses of the effects of concurrences are sure to note that such effects are hampered by the fact that such decisions are not openly supported by the majority, especially if

the concurrences are in judgment alone (Kirman 2085, 2089). However, this is not to say that concurring opinions can be blatantly ignored or dismissed as might have been the practice in earlier iterations of legal theory. For instance, legal theorist Kirman opens a study of concurring opinions with the recognition that “[w]ith the dramatic rise in the number of fragmented Supreme Court decisions over the past fifty years, the idea that a decision’s precedential value is found only in the majority opinion warrants more analysis than it has received” (Kirman 2083). This emphasizes the importance of opinions beyond those delivered by the majority. Concurrences can be used to interpret majority opinions that are vague, or to present alternate theories of law that lead, in the given case, to the same opinion. Jackson’s concurrences provide examples of both.

Studies that dismiss these aspects can and do still recognize the potential influence such parts of a decision might exert, though such potential is beyond the scope of their studies. For instance, in a statistical analysis of precedential influence over time, Kosma writes, “a justice’s influence may ebb and flow over time as the composition of the Court changes. Because citations to dissenting opinions are not counted, the influence of a justice found often in dissent may be understated” (Kosma 341). By using former Supreme Court Justice Robert H. Jackson as a preliminary model, a broader understanding of influence can be explored. Of the cases explored, only his *Wickard v. Filburn* (1942) decision was penned on behalf of the Court. His *Edwards v. California* (1941) and *Youngstown Sheet & Tube, Co. v. Sawyer* (1952) concurrences are used to show that Jackson’s influence exists beyond his majority decisions.

By exploring one majority decision and two concurring opinions, the study of Jackson's dissents remains for another day. The principle remains that dissents, like concurrences, can impact later decisions. Such impact is simply reserved for exploration at a later date.

Methods

The cases reviewed are done so in order of the extent to which the contemporary case relies upon Jackson's decision. For example, Jackson's *Edwards* (1941) concurrence is cited only in the Court's majority opinion in *Saenz* (1999), and is thus the first of the cases to be explored, while the *Wickard* (1942) influence on the *National Federation* (2012) case reaches each part of the decision, thus making the exploration of these coupled cases the final part of the analysis. In this way, Jackson's decisions are explored in relation to the extent of their influence, when the contemporary cases are considered holistically.

For each case, Jackson's decision will be analyzed first, followed by the contemporary case for which Jackson's case acts as an integral part. Following this dual analysis, attention will return to the Jackson decision to determine what of that case insured its place in the contemporary legal canon. When necessary, traditional theories of legal precedence will be explored in conjunction with the cases themselves, to discover how such cases compare or contrast to them. Doing so allows for exploring the ways in which Jackson continues to influence the court beyond traditional conceptions of legal precedent. The final part of each section offers a hypothesis as to the way in which Jackson's ability to look to the future was reflected in each of these decisions, thus enabling them to act as precedent.

Analysis

“Humanization” of the Right to Travel: The Legacy of Jackson’s *Edwards v. California* (1941) Concurrence as Seen in *Saenz v. Roe* (1999)

Edwards v. California (1941) was one of the first cases Jackson participated in while on the Supreme Court. His concurrence was one of the first decisions he penned. The facts of the case centered around a law in California that prohibited citizens of California from bringing indigent persons from out of state into California. The majority decision deemed that, because of the Commerce Clause in the Constitution, such a law could not be upheld. Jackson agreed that the law should be struck, but suggested that the case hinged on the privileges and immunities outlined in the Fourteenth Amendment instead. In the introduction to his concurrence, he writes:

But the migrations of a human being, of whom it is charged that he possesses nothing that can be sold and has no wherewithal to buy, do not fit easily into my notions as to what is commerce. To hold that the measure of his rights is the commerce clause is likely to result eventually either in distorting the commercial law or in denaturing human rights. I turn, therefore, away from principles by which commerce is regulated to that clause of the Constitution by virtue of which Duncan is a citizen of the United States and which forbids any State to abridge his privileges or immunities as such. (314 U.S. 160)

Demonstrating that Jackson’s concurrence has contemporary implications requires only finding a contemporary case that uses the concurrence with positive treatment, which means its use affirms Jackson’s decision and bolsters the decision in which it is cited. This is found in *Saenz v. Roe* (1999).

Notable here, as will prove true in *Youngstown* (1952), is that Jackson did not pen the Edwards decision. His concurrence, however, has been discussed in *Saenz v. Roe* (1999). In this decision, a question of welfare benefits available to new state residents triggered a decision reminiscent to that of Jackson's concurrence in *Edwards v. California* (1942) in that it ends with an evocation of Jackson's opinion: "Citizens of the United States, whether rich or poor, have the right to choose to be citizens 'of the State wherein they reside.' U. S. Const., Amdt. 14, § 1. The States, however, do not have any right to select their citizens" (526 U.S. 489). The footnote indicated in this excerpt cites Jackson's decision with the argumentation:

[I]t is a privilege of citizenship of the United States, protected from state abridgment, to enter any State of the Union, either for temporary sojourn or for the establishment of permanent residence therein and for gaining resultant citizenship there of. If national citizenship means less than this, it means nothing. (526 U.S. 489)

This language is taken directly from Jackson's concurrence and is cited in *Saenz* (1999) as a frame of reference for what eventually becomes primary issue in the case: the rights of citizenship. In this way, the decision does not necessarily hinge on Jackson, but it does mark his interpretation of *Edwards* (1941) as being important beyond the confines of the majority decision. The majority in *Edwards* (1941) is used in justifying the first of three issues in *Saenz* (1999), which simply articulates the ability of citizens to cross borders, while the Privileges and Immunities Clause is used in the second of three issues in *Saenz* (1999), which explicitly explores the rights assured to citizens inconsequential of movement across state borders.

The third question regarding the rights of new state citizens - the issue the Court spends the bulk of the decision deliberating - falls to the “privileges or immunities” portion of the Fourteenth Amendment. In this amendment, Jackson found the most compelling argument for the issues in *Edwards* (1941), and 58 years later, the majority on the Court found in it the most compelling argument for *Saenz* (1999). For Jackson, the right to travel was too sacred a component of citizenship, both with regard to national and state citizenship, to be found in the Commerce Clause, the implications of which potentially reduce citizens to “commerce.” Clear to Jackson in his concurrence is:

The language of the Fourteenth Amendment declaring two kinds of citizenship is discriminating. It is: ‘All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.’ While it thus establishes national citizenship from the mere circumstance of birth within the territory and jurisdiction of the United States, birth within a state does not establish citizenship thereof. State citizenship is ephemeral. It results only from residence and is gained or lost therewith. That choice of residence was subject to local approval is contrary to the inescapable implications of the westward movement of our civilization. (314 U.S. 160)

At the time, the distinction articulated by Jackson between the Fourteenth Amendment assurance of citizenship and their own Commerce Clause argument remained unclear to the Court as a whole, but by *Saenz*, the Court declares:

What is at issue in this case, then, is this third aspect of the right to travel—the right of the newly arrived citizen to the same privileges and immunities enjoyed

by other citizens of the same State. That right is protected not only by the new arrival's status as a state citizen, but also by her status as a citizen of the United States. That additional source of protection is plainly identified in the opening words of the Fourteenth Amendment. (526 U.S. 489)

Thus, what was at once unclear to the majority in *Edwards* (1941), though advocated for by Jackson, is clear to the Court, and officially made precedent, by the *Saenz* (1999) decision.

Also notable about Jackson's concurrence is that it is neither the only concurrence in *Edwards* (1941), nor is it the only one to make an appeal to the Fourteenth Amendment. Thus it is not this legal argument alone that makes Jackson's concurrence noteworthy, nor is it sufficient to warrant citation in later majority opinions, for the other concurrence in *Edwards* (1941) does this just as Jackson does. What sets Jackson's concurrence apart from Justice William Douglas' is that Jackson examines the issue of indigence, the source of dispute in both *Edwards* (1941) and *Saenz* (1999) as an integral part of the decision process. Douglas stops at the right to travel being found in the Fourteenth Amendment. Jackson goes on to argue that:

Any measure which would divide our citizenry on the basis of property into one class free to move from state to state and another class that is poverty-bound to the place where it has suffered misfortune is not only at war with the habit and custom by which our country has expanded, but is also a short-sighted blow at the security of property itself. (314 U.S. 160)

In extending this aspect of his argument, Jackson is able to put implications of the decision in context. He "humanizes" it in an a way that neither the majority decision nor Douglas' concurrence does in *Edwards* (1941). As is made obvious by the entirety of Jackson's

concurrence, citizenship in the United States is a status he holds sacrosanct. To delineate based on wealth is an affront to what Jackson considers freedom, and it is this humanization alongside his legal argumentation that puts his concurrence in the position of legal canon, despite the fact that traditional theories of such would not necessarily categorize it immediately as law.

A return to the traditional approach occurs in the dissent to *Saenz* (1999). Unlike the majority in *Saenz* (1999) that does not struggle to find the answer to the case clearly in the Fourteenth Amendment, the dissent begins by disputing such clarity. The dissent begins:

The Court today breathes new life into the previously dormant Privileges or Immunities Clause of the Fourteenth Amendment...Because I do not think any provision of the Constitution—and surely not a provision relied upon for only the second time since its enactment 130 years ago—requires this result, I dissent.

(526 U.S. 489)

By beginning the dissent in this way, Rehnquist, former clerk to Jackson, is evoking the traditionally accepted legal canon as being comprised of majority decisions. Jackson clearly relied on this provision for the purposes of his concurrence, as did Douglas for the same case, and yet neither are recognized as having previously “breathe[d] new life” into the Fourteenth Amendment-line of reasoning. This conforms to the idea that legal precedent, at least that which is found in previous Supreme Court decisions, is believed to be firmly rooted in majority opinions. In an analysis of concurring opinions, Kirman argues that if a concurrence does not agree on the legal arguments used to justify the majority, “[T]he simple concurrence should be regarded as a concurrence in judgment, and should merit little authoritative effect” (Kirman 2105). Because of Jackson’s alternate legal reasoning, his concurrence in *Edwards* (1941) would

fall under such a category, and yet the majority in *Saenz* (1999) was convinced enough by the authority of Jackson's concurrence to legitimate its use in the *Saenz* (1999) majority opinion.

That Jackson's concurrence is used to justify *Saenz* (1999) proves that his concurrence has contemporary implications. It does not prove, however, that Jackson's foresight is the reason for its continued relevance, instead of the fact that its fact pattern matches that of the modern case. Such a reason must be found in his awareness in *Edwards* (1941) that the case might not exist in a vacuum of time and situation. This can first be found in the opening paragraph of his concurrence in which he advocates for the Fourteenth Amendment as the basis for this right, instead of the Commerce Clause. He writes, "To hold that the measure of his rights is the commerce clause is likely to result eventually either in distorting the commercial law or in denaturing human rights" (314 U.S. 160). The phrase "likely to result" suggests that the implications of ruling the case in the way that the Court does will have unforeseen consequences, at least by the Court. Skillful foresight makes his justifications in this case hinge on citizenship, people as people, instead of commerce, people as property. In *Saenz* (1999), the rights of citizenship come to the forefront and the Fourteenth Amendment justification becomes critical. The rights of the "newly arrived citizen" are at issue in *Saenz*, and in Jackson's concurrence those rights are protected.

Limits to Executive Power: The Legacy of Jackson's *Youngstown Sheet & Tube, Co. v. Sawyer* (1952) as Seen in *Hamdan v. Rumsfeld* (2006)

Even more consequential than Jackson's *Edwards* (1941) concurrence is his concurrence in the *Youngstown Sheet & Tube* (1952) case. Considered one of the most influential issuances of the Supreme Court during this era (Urofsky 229), Jackson's concurrence in this case laid the

foundation for most, if not all, decisions regarding the contested use of presidential power since its genesis. Kidman, for instance, argues:

Although it lacks direct decisional force, even the concurrence in judgment has many times influenced subsequent decisions. See Ray, *supra* note 7, at 780. One well known example of this phenomenon occurred in the Steel Seizure Case, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Justice Jackson's concurring opinion, offering a tripartite classification of presidential action, has been the most widely relied upon of the opinions in that decision (Kirman 2105).

At issue in the case was Truman's seizure of steel mills that had closed when workers went on strike. The Court found that Truman had exceeded the power allotted him by Congress and was thus at fault. Jackson established a framework for evaluating the use of presidential power based off the extent to which it is explicitly allowed or disallowed by Congress. In doing so, he delineated how presidential power would be evaluated. According to Jackson, presidential power is at its greatest when in line with the dictates of Congress, at its least when in defiance and within a "zone of twilight" when the power is neither expressly granted nor prohibited. They are as follows:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum [...] If his act is held unconstitutional under these circumstances, it usually means that the Federal Government, as an undivided whole, lacks power [...]
2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone

of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain [...]

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system. (343 U.S. 579)

By establishing this framework, and then going through the steps to demonstrate how the *Youngstown* (1952) case was to be sorted, Jackson lays the foundation for subsequent evaluations of executive power.

The framework that Jackson develops in his concurrence is partially responsible for its being one of the most important decisions in recent history. But Jackson does not stop with simply defining the framework. Instead, he also uses the *Youngstown* case to demonstrate how later iterations of the Court could use his concurrence in deciding cases. The level of personal experience Jackson brings to the Court is one that no other justice from Jackson's time, and no justice today, could contribute. He writes of executive power during wartime. He writes of countries whose leaders have forced the cessation of individuals' civil liberties during wartime. He writes of the negative impacts that outweigh the potential for good...and he does so not just as a Supreme Court justice, but also as the lead prosecuting attorney at the first Nuremberg Trial.

Although he does not explicitly state that it is this experience from which he is writing, he is drawing on his experiences as the lead prosecuting attorney to discuss the implications of executive overstep. After outlining various examples of such, including the Nazi rise to power, Jackson writes, “Nothing in my experience convinces me that such risks are warranted by any real necessity, although such powers would, of course, be an executive convenience” (343 U.S. 579). The majority decision simply finds that absent Congressional approval or Constitutional provision the executive’s power does not include that of seizing steel mills during a strike despite the argument that the Korean War imbued the president with such wartime power. Jackson’s concurrence goes further as it establishes the way in which later cases can be decided on the grounds of *Youngstown* and does so both through legal justification and through the insights provided by his time as the chief prosecuting attorney of those war criminals whose actions resulted from the removal of citizens’ civil rights and liberties.

Because of the depth and clarity with which Jackson writes about the issue of executive power in *Youngstown*, his concurrence has become the basis for deciding the limits of that power. Though many cases have come up through the Court, only to be decided on the grounds of *Youngstown*, the case *Hamdan v. Rumsfeld* (2006) has come to exemplify the modern relevance of Jackson’s concurrence. At issue in this case was the treatment of a Guantanamo Bay detainee who alleged unconstitutional treatment while being held. The military commission that presided over Hamdan’s trial was found to be a violation of the Geneva Convention and the Uniform Code of Military Justice. In this determination, the Court had to make rulings on the powers of the executive and of Congress. As such, *Youngstown* (1952) was evoked throughout. In the majority, during a discussion on the influence *Ex Parte Quirin* (1942), Justice Stevens is

sure to include the footnote, “Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers” (548 U.S. 557), which he attributes to Jackson’s concurrence. Both the Geneva Conventions and the Unified Code of Military Justice are accepted into law in the United States via Congress. The Court finds the President’s actions to be in violation of both and that he has exhibited “disregard [for] limitations that Congress has, in proper exercise of its own war powers, placed on his powers” (548 U.S. 557). The finding of the Court is thus: “[...] in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction” (548 U.S. 557). Such a finding is in line with the conclusion of Jackson’s *Youngstown* (1952) concurrence, in which he writes, “With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations” (343 U.S. 579). Just like in both cases, in which the Executive performs an action outside the laws established by Congress, the Court finds that the Executive must stay true to those laws that dictate his position in the government. In both, Congress established the law, the Executive violated it and the Court, under the influence of Jackson, made a judgement on it.

Furthermore, unlike in *Saenz* (1999), which only turns to Jackson explicitly in the majority opinion, both the concurrence and the dissent in *Hamdan* (2006) also use Jackson when justifying the arguments being made in each. Both accept the legitimacy of Jackson’s concurrence, treating it as positive law, but does not necessarily agree on the arguments in the majority decision that hinge upon Jackson’s framework. For instance, in a part-concurrence

penned by Justice Kennedy he writes, “The proper framework for assessing whether Executive actions are authorized is the three-part scheme used by Justice Jackson in his opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579 (1952)” (548 U.S. 557). This is direct affirmation that Jackson’s concurrence, instead of the more traditional use of majority opinions in the legal canon, is the method by which the case should be decided. He then writes, “In this case, as the Court observes, the President has acted in a field with a history of congressional participation and regulation” (548 U.S. 557) and:

As explained below, the statute further recognizes that special military commissions may be convened to try war crimes... While these laws provide authority for certain forms of military courts, they also impose limitations, at least two of which control this case. If the President has exceeded these limits, this becomes a case of conflict between Presidential and congressional action—a case within Justice Jackson’s third category, not the second or first. (548 U.S. 557)

In his analysis of the creation of the military tribunal used to try the defendant, Kennedy ultimately finds:

In sum, as presently structured, Hamdan’s military commission exceeds the bounds Congress has placed on the President’s authority in §§836 and 821 of the UCMJ. Because Congress has prescribed these limits, Congress can change them, requiring a new analysis consistent with the Constitution and other governing laws. At this time, however, we must apply the standards Congress has provided. By those standards the military commission is deficient. (548 U.S. 557)

This conclusion is possible in part because of Jackson's concurrence. It argues that due to Congress's history of legislation on the issue, the case falls under Jackson's third category and then decides it as such.

The dissent, too, looks to Jackson as the basis for resolving the issue at hand. What separates the dissent from the majority opinion and the part-concurrence, however, is the way in which the dissent argues the case should be sorted via Jackson's framework. Justice Thomas writes:

When 'the President acts pursuant to an express or implied authorization from Congress,' his actions are 'supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion ... rest[s] heavily upon any who might attack it.' *Id.*, at 668 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 637 (1952) (Jackson, J., concurring))...Under this framework, the President's decision to try Hamdan before a military commission for his involvement with al Qaeda is entitled to a heavy measure of deference. In the present conflict, Congress has authorized the President 'to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.' (548 U.S. 557)

Thus, what remains at issue here is not Jackson's framework, but the way in which the issue in the case is defined by that framework. Thomas, like his colleagues, accepts the writings of

Jackson but he disagrees on the way in which Jackson's concurrence is used. This suggests that deference to Jackson does not necessarily mean that all relevant contemporary problems can be immediately made clear and solved by Jackson's input in the form of his decisions. What Jackson's words provide, however, are the foundation upon which contemporary debates can be built. Jackson's contributions to the contemporary legal canon, whether it be through majority decisions, concurrences or dissents, is made by his ability to form decisions that continue to be relevant even after the issue he is writing on is resolved.

The multi-purpose use of Jackson's concurrence demonstrates its relevance to contemporary decisions. However, as in *Edwards* (1941), this contemporaneous relevance does not solely hinge on the prerogative of newer iterations of the Court to use this decision, so much as it hinges on Jackson's ability to write decisions that transcend the singular issue the specific case decides. In *Youngstown* (1952), this ability to look beyond the moment of the case is twofold: he both suggests that historical examples of executive overstep can have contemporary and future implications and he establishes guidelines for evaluating if such overstep has occurred. He does the first when he writes:

Germany, after the First World War, framed the Weimar Constitution, designed to secure her liberties in the Western tradition. However, the President of the Republic, without concurrence of the Reichstag, was empowered temporarily to suspend any or all individual rights if public safety and order were seriously disturbed or endangered. This proved a temptation to every government, whatever its shade of opinion, and, in 13 years, suspension of rights was invoked on more

than 250 occasions. Finally, Hitler persuaded President Von Hindenberg to suspend all such rights, and they were never restored. (343 U.S. 579)

Here, Jackson shows that the implications of executive overstep do not end with the historical moment. Thirteen years separated the temporary suspension of individual rights and the start of Hitler's reign of terror, according to Jackson.

He demonstrates the second expression of foresight when he establishes the three-part framework outlined above. In both of these ways, Jackson demonstrates the awareness that the threat of executive overstep is one that is as timeless as the promises of freedom he holds so dear, as seen in both this case and in *Edwards* (1941). Further, in his conclusion he makes sure to include the warning:

No one, perhaps not even the President, knows the limits of the power he may seek to exert in this instance, and the parties affected cannot learn the limit of their rights. We do not know today what powers over labor or property would be claimed to flow from Government possession if we should legalize it, what rights to compensation would be claimed or recognized, or on what contingency it would end. (343 U.S. 579)

The language here, such as "may seek" and "would be claimed" exemplify his ability to turn to the future. This is not a case that exists solely in the historical moment in which Jackson is writing. This is instead a case that, should it have been ruled in favor of the Executive, would have made the future limits of executive power unclear. And if anyone on Jackson's court understood the risks of unclear limitations on executive power, it was him, the chief prosecuting attorney at the first Nuremberg Trial.

The Commerce Clause as an Expression of Congressional Power: The Legacy of Jackson's *Wickard v. Filburn* (1942) Decision as Seen in *National Federation of Independent Business v. Sebelius* (2012)

The office of the President is not the only branch of government to come under review during Jackson's time on the Court. Congress, too, faced the inquiry of the Court following the approval of Agricultural Adjustment Act of 1938 that effectively rationed the amount of wheat farmers were allowed to produce. *Wickard v. Filburn* (1942) came to the court when Wickard refused to pay a fine imposed upon him after he produced more wheat than was allotted to him. What was at issue in the case was the fact that the excess wheat never left his farm. Wickard never profited from the excess production, electing instead to use it in feed for his animals. The question, then, and the one that Jackson decides in his majority opinion, is whether private consumption of a good, the production of which is controlled by Congress, falls under the regulatory jurisdiction of the Commerce Clause. Jackson's affirmative to this question lays the foundation for the issues that arise in *National Federation of Independent Business v. Sebelius* (2012). Jackson concludes his decision with, "That appellee is the worse off for the aggregate of this legislation does not appear; it only appears that, if he could get all that the Government gives and do nothing that the Government asks, he would be better off than this law allows. To deny him this is not to deny him due process of law" (317 U.S. 111). Thus he is affirming Congress' ability to regulate actions of citizens beyond that which the citizens would necessarily approve. As in *Hamdan* (2006), the *National Federation* (2012) case makes use of Jackson's decision in every aspect of the case, from the majority opinion, to the part concurrence part dissent, to the

dissent. Again, all three parts treat *Wickard* (1942), positively, but use its precedent to make three separate legal arguments.

Many cases since *Wickard* (1942) have used the reasoning in *Wickard* (1942) to determine the legitimacy of Commerce Clause justifications of legislation passed by Congress. The *National Federation* (2012) case is one such example. The highly publicized and largely politicized debate regarding the Affordable Healthcare Act (known by some as ObamaCare), has resulted in a number of challenges rising to the level of the Supreme Court. The *National Federation* (2012) case challenges two parts of the act: the legality of the individual mandate and the legality of the “threat” to funding for states that refuse to adopt provisions of the act. The first of these is the issue that brings *Wickard* (1942) into the discussion. The majority in *National Federation* (2012) finds:

The farmer in *Wickard* was at least actively engaged in the production of wheat, and the Government could regulate that activity because of its effect on commerce. The Government’s theory here would effectively override that limitation...The individual mandate forces individuals into commerce precisely because they elected to refrain from commercial activity. Such a law cannot be sustained under a clause authorizing Congress to “regulate Commerce.”

(576 U.S. ___)

Thus, while the majority shows deference to Jackson, it does not believe that the facts of *Wickard* (1942) suitably align with the case at hand to justify a decision in the same vein. The Court later finds, however, in favor of the contested individual mandate by virtue of the Taxing and Spending Clause.

Much like Jackson's concurrence in *Edwards* (1941), however, is Ginsberg's opinion in the *National Federation* (2012) she, like Jackson in *Edwards* (1941), agrees with the majority's decision in so far as it affirms the legitimacy of the individual mandate, but does not agree on the grounds upon which it was found. She favors the use of *Wickard*, in what is considered one of the most influential (and perhaps stinging) partial concurrence/partial dissents in recent history. One scholar, in fact, writes "I decided to ask my colleagues in the field of constitutional history what dissents they thought would have staying power, opinions that might one day be part of the canon and, if not justified, at least enshrined in constitutional law casebooks..." (Urofsky 416), and Ginsberg in the *National Federation* (2012) case made the list. On the issue of *Wickard* (1942), she writes:

Our decisions thus acknowledge Congress' authority, under the Commerce Clause, to direct the conduct of an individual today (the farmer in *Wickard*, stopped from growing excess wheat; the plaintiff in *Raich*, ordered to cease cultivating marijuana) because of a prophesied future transaction (the eventual sale of that wheat or marijuana in the interstate market). Congress' actions are even more rational in this case, where the future activity (the consumption of medical care) is certain to occur, the sole uncertainty being the time the activity will take place...In concluding that the Commerce Clause does not permit Congress to regulate commercial "inactivity," and therefore does not allow Congress to adopt the practical solution it devised for the healthcare problem, THE CHIEF JUSTICE views the Clause as a "technical legal conception," precisely what our case law tells us not to do. *Wickard*, 317 U. S., at 122 (internal

quotation marks omitted)... These linedrawing exercises were untenable, and the Court long ago abandoned them. “[Q]uestions of the power of Congress [under the Commerce Clause],” we held in *Wickard*, “are not to be decided by reference to any formula which would give controlling force to nomenclature such as ‘production’ and ‘indirect’ and foreclose consideration of the actual effects of the activity in question upon inter state commerce.” 317 U. S., at 120. See also *Morrison*, 529 U. S., at 641–644 (Souter, J., dissenting) (recounting the Court’s “nearly disastrous experiment” with formalistic limits on Congress’ commerce power). Failing to learn from this history, THE CHIEF JUSTICE plows ahead with his formalistic distinction between those who are “active in commerce,” *ante*, at 20, and those who are not. (576 U.S. ___)

Ginsberg thus looks to Jackson’s *Wickard* opinion, not only as a ruling by the Supreme Court, but *the* ruling to turn to in deciding the individual mandate question. Interesting about Urofsky’s suggestion that this will come to be one of the most influential concurrence/dissents is that Jackson too is amongst the list of justice’s whose decisions mark historical landmarks for the Court. That he is later the single most influential factor in a later influential case should be of note. His seeming ability to look to the future here too makes him influential beyond his time on the Court.

The dissent in the *National Federation* (2012) case also looks to *Wickard* (1942) for guidance. Justices Scalia, Kennedy, Thomas and Alito had to say on the matter:

That clear principle carries the day here. The striking case of *Wickard v. Filburn*, 317 U. S. 111 (1942), which held that the economic activity of growing wheat,

even for one's own consumption, affected commerce sufficiently that it could be regulated, always has been regarded as the *ne plus ultra* of expansive Commerce Clause jurisprudence. To go beyond that, and to say the failure to grow wheat (which is not an economic activity, or any activity at all) nonetheless affects commerce and therefore can be federally regulated, is to make mere breathing in and out the basis for federal prescription and to extend federal power to virtually all human activity. (576 U.S. ___)

The dissenters thus find similarly to the majority, with regard to the *Wickard* (1942) standard, that activity and lack thereof warrant different levels of intervention from Congress. What separates the dissent from the majority is that the dissenters do not find, as the majority does, that the Taxing and Spending Clause finds justification where the Commerce Clause (via the *Wickard* [1942] case) does not.

That *Wickard* (1942) plays an integral role in the *National Federation* (2012) case is without dispute. As in the other cases, however, Jackson's ability to affect contemporary iterations of the Court as a function of his writing instead of the contemporary make-up of the Court rests in Jackson's ability to capture the issue at hand holistically. A part of a case's ability to be cited is its continued relevance. If Jackson could not pen a decision with continued relevance, then it would not be viable for later decisions to build upon. *Wickard* (1942) has the added layer of legitimacy formed by the fact that it is a majority decision, and as such carries the full force of the law as traditionally conceptualized in theory. Like the others, however, it also carry with it Jackson's ability to capture future moments and historical ones alike. For instance, Jackson's suggestion that:

Even if appellee's activity be local, and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect," (317 U.S. 111)

can easily be ascribed to health care, as Ginsberg seems to do, as much as it can be ascribed to wheat production. Jackson, too, in this case, looks to past historical events and court decisions that demonstrate a clear foundation upon which he has built his decision. One acts as a nod to the future while the other acts as a nod to the past, thus solidifying his place in an ever-growing canon of legal literature.

Conclusion

Traditional legal theory suggests that majority opinions are the only important issuances from the Supreme Court, as they, unlike their concurring and dissenting counterparts, carry the full force of the law. A brief study of three of Justice Jackson's opinions has demonstrated a more complex picture. His foresight allowed him to pen decisions that would continue to be used long after his death and long beyond their initial places as concurrences. A study that includes his dissents would likely yield the same results.

That Jackson would continue to influence the current Court comes as no surprise because he sat on a Court that issued many decisions that are still influential today. The root of this continued importance has come to light, not as a consequence of the current Court, but instead can be found in Jackson's work itself. His ability to look to the past, present and future has made his decisions relevant because of the effectiveness with which he captures contemporary issues.

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