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THE ANTICANON

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THE ANTICANON

Jamal Greene[*]

Argument from the "anticanon," the set of cases whose central propositions all legitimate decisions must refute, has become a persistent but curious feature of American constitutional law. These cases, Dred Scott v. Sandford*,* Plessy v. Ferguson*,* Lochner v. New York*, and* Korematsu v. United States*, are consistently cited in Supreme Court opinions, in constitutional law casebooks, and at confirmation hearings as prime examples of weak constitutional analysis. Upon reflection, however, anticanonical cases do not involve unusually bad reasoning, nor are they uniquely morally repugnant. Rather, these cases are held out as examples for reasons external to conventional constitutional argument. This Article substantiates that claim and explores those reasons. I argue that anticanonical cases achieve their status through historical happenstance, and that subsequent interpretive communities' use of the anticanon as a rhetorical resource reaffirms that status. That use is enabled by at least three features of anticanonical cases: their incomplete theorization, their amenability to traditional forms of legal argumentation, and their resonance with constitutive ethical propositions that have achieved consensus. I argue that it is vital for law professors in particular to be conscious of the various ways in which the anticanon is used — for example, to dispel dissensus about or sanitize the Constitution — that we may better decide if and when those uses are justified.*

INTRODUCTION

It is a curious feature of American constitutional law that the project of identifying the Supreme Court's worst decisions is not solely a normative one. There is a stock answer to the question, not adduced by anyone's reflective legal opinion but rather preselected by the broader legal and political culture. We know these cases by their petitioners: *Dred Scott*,[1] *Plessy*,[2] *Lochner*,[3] and *Korematsu*.[4] They are the American anticanon. Each case embodies a set of propositions that all legitimate constitutional decisions must be prepared to refute. Togeth-

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[1] Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

[2] Plessy v. Ferguson, 163 U.S. 537 (1896).

[3] Lochner v. New York, 198 U.S. 45 (1905).

[4] Korematsu v. United States, 323 U.S. 214 (1944).

er, they map out the land mines of the American constitutional order, and thereby help to constitute that order: we are what we are not.

The anticanon poses a distinct problem for teachers and students of constitutional law. Professional competence in law is established by one's ability to distinguish strong from weak legal arguments and to predict how judges or other relevant legal actors might decide cases or resolve controversies. Most constitutional law courses identify a set of materials that students may draw from to perform these tasks with respect to constitutional cases: constitutional text, structure, and history; judicial and political precedent; and prudential or policy considerations.[5] It is tempting to say that the anticanon constitutes those decisions in which the Court did an especially poor job of navigating and synthesizing these traditional materials, and anticanon Courts are frequently accused of just this error.[6] As I will show, however, the status of a decision as anticanonical does not depend on the magnitude, or even the presence, of contemporaneous analytic errors by the deciding Court. Rather, it depends on the attitude the constitutional interpretive community takes toward the ethical propositions that the decision has come to represent, and the susceptibility of the decision to *use* as an antiprecedent. These factors might not relate to the decision's internal logic. A professor could explain anticanonical decisions through the lens of historicism, but she would not then be indoctrinating her students in the norms of professional legal practice; she would not be "doing" constitutional law.

A parallel problem exists with respect to the constitutional canon, the set of decisions whose correctness participants in constitutional argument must always assume. *Brown v. Board of Education*[7] is the classic example of such a case: all legitimate constitutional decisions must be consistent with *Brown*'s rightness, and all credible theories of constitutional interpretation must accommodate the decision.[8] And yet *Brown* was inconsistent with longstanding precedent,[9] was in tension with the original expected application of the Fourteenth Amendment,[10] was not compelled by the text of the Equal Protection Clause,[11] and

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[5] *See* PHILIP BOBBITT, CONSTITUTIONAL FATE 3–119 (1982); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1189–90, 1194–1209 (1987).

[6] *See* sources cited *infra* note 145.

[7] 347 U.S. 483 (1954).

[8] *See* Louis Michael Seidman, Brown *and* Miranda, 80 CALIF. L. REV. 673, 675 (1992).

[9] *See* Gong Lum v. Rice, 275 U.S. 78 (1927); Plessy v. Ferguson, 163 U.S. 537 (1896).

[10] Michael J. Klarman, Brown*, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1884–1914 (1995).

[11] *See Brown*, 347 U.S. at 492 (referring to "findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors").

has required a Herculean effort — one well beyond the Court's competence — to implement comprehensively.[12] Justifying *Brown* in the face of all that bad news requires reaching somewhat beyond the traditional tools of constitutional argument. Still, constitutional law professors persevere, and few these days find *Brown* a hard sell.

I will argue, though, that the presence of *anti*canonical decisions in textbooks, in syllabi, and as decisional precedents poses a more acute problem for constitutional lawyers. All but the stingiest formalist accept that constitutional law is not simply constructed from a series of doctrinal algorithms, that some decisions reflect the triumph of a particular community's ethical values, or *nomos*; or a judge's perception of moral imperative; or whimsy; or mistake. And we accept that many such decisions, though not produced by the conventional tools of constitutional analysis, may yet become part of the legal fabric and worthy of our respect as precedent, whether because of significant reliance interests,[13] out of a Burkean prudence that counsels deference to past decisions of long standing,[14] or indeed because the legal culture's acceptance of a case works a kind of informal constitutional amendment that acquires democratic purchase.[15] It is therefore important to teach these cases, commensurate with their doctrinal and political significance, and to seek to accommodate them within accepted modes of constitutional reasoning — they are, after all, the law.

But anticanonical cases are not the law; they are its opposite. Their holdings cannot reasonably be relied upon, and it is not obvious how the law would be any different were they never cited, taught, or thought about again. Yet we cite them, we teach them, and we think about them, and it would border on professional malpractice for us not to. This practice is in need of explanation. Several important articles about the constitutional canon also refer to the anticanon as a species of canon.[16] This Article takes a different approach. I argue that the presence of the anticanon within our constitutional discourse, and its particular use in briefs, in cases, and in classrooms, is a distinct phenomenon requiring distinct theoretical treatment.

For one, as Part I explains, the anticanon differs from the canon in that it is both narrower and less contested. The content of the consti-

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[12] *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 803–22 (2007) (Breyer, J., dissenting) (describing integration efforts of Seattle and Louisville).

[13] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992).

[14] *See* Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 367–69 (2006).

[15] *See* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 47–50 (1991).

[16] *See* Jack M. Balkin, *"Wrong the Day It Was Decided":* Lochner *and Constitutional Historicism*, 85 B.U. L. REV. 677, 681–82 (2005); J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1018–19 (1998); Ian Bartrum, *The Constitutional Canon as Argumentative Metonymy*, 18 WM. & MARY BILL RTS. J. 327, 329 (2009); Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 245 (1998).

tutional canon depends heavily on the purpose for which it is being used — Jack Balkin and Sanford Levinson have identified a cultural literacy canon, a pedagogical canon, and an academic theory canon, each with distinct content and each contested in itself.[17] By contrast, the anticanon likely comprises no more than the four cases I have identified, and may comprise just three — *Dred Scott*, *Plessy*, and *Lochner*. Part I substantiates that descriptive claim by canvassing the existing secondary literature on anticanonical decisions, examining Supreme Court confirmation hearings, studying constitutional law casebooks, and recording the pattern of Supreme Court citation for the four cases and for others that might be thought to fall into this category. As the citation study shows, unlike many other negative precedents, the four cases I have identified as anticanonical are frequently cited in modern opinions, and three of the four — all but *Korematsu* — are generally cited only as negative authority. (*Korematsu* presents a special case that I discuss at the end of Part I.) These four cases are also the only ones that consistently register in each of the other measures of anticanonicity.

Part II explicates the dilemma that I have so far only suggested. Namely, anticanonical cases are not distinguished by unusually poor reasoning, by special moral failings, or because these problems exist in tandem. This claim will surprise some readers, and so Part II devotes some attention to explaining why the traditional tools of constitutional analysis — text, structure, history, precedent, and prudential or policy considerations — are not sufficient to identify any of the four cases as of uniquely low quality. To assist in making out that "negative" case for anticanonicity, I also discuss four other cases — *Prigg v. Pennsylvania*,[18] *Giles v. Harris*,[19] *Gong Lum v. Rice*,[20] and *Bowers v. Hardwick*[21] — that are particularly poorly reasoned or morally challenged but are not, as a descriptive matter, anticanonical.

Part III reconstructs the anticanon. Since conventional legal logic alone is not dispositive, section III.A uses history to develop a more satisfying account of how and why the anticanon was formed. It turns out that each of these cases surged in prominence during the Warren Court era. For *Dred Scott* and *Plessy*, the evolving consensus around the evils of official racial discrimination dramatically elevated their rhetorical purchase. *Lochner*'s salience as a substantive due process precedent owes a debt to Felix Frankfurter, whose admiration for Justice Holmes led him to emphasize the case out of proportion to its doc-

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[17] Balkin & Levinson, *supra* note 16, at 970–76.
[18] 41 U.S. (16 Pet.) 539 (1842).
[19] 189 U.S. 475 (1903).
[20] 275 U.S. 78 (1927).
[21] 478 U.S. 186 (1986).

trinal significance. *Korematsu* did not, and could not, emerge as anticanonical until Chief Justice Warren, Justice Black, and Justice Douglas — each of whom played a significant role in the decision — had left the Court.

Section III.B marshals this history in support of a theory of the anticanon. I conclude that anticanonical cases share three important features. First, these cases are what I call, borrowing from Cass Sunstein, incompletely theorized.[22] There is consensus within the legal community that the cases are wrongly decided but (in part because their analytic flaws are obscure) there is disagreement, even irreconcilable disagreement, as to why. This feature of anticanon cases is indispensable, as it enables multiple sides of contemporary constitutional arguments to use the anticanon as a rhetorical trump. Second, and relatedly, the traditional modes of legal analysis arguably support the results in anticanon cases. That is, these cases are, in some formalistic sense, correct. To many who have internalized the norms of American constitutional argument, this claim will sound jarring, almost scandalous. But these cases remain alive within constitutional discourse precisely because their errors are susceptible to repetition by otherwise reasonable people. Third, each case has come to symbolize a set of generalized ethical propositions that we have collectively renounced. The persistent use of anticanonical cases as positive authority for the propositions that they reject supports the independent significance of ethos-based argument as a mode of constitutional reasoning.[23]

In their classic treatment of the constitutional canon, Balkin and Levinson write that professors of law have less control over the content of the constitutional canon than professors in other disciplines have over their own, because legal canons are "largely shaped and controlled by forces beyond their direct control — the courts and the political branches."[24] Whether or not this is true of the canon, it seems less likely to be true, or true to a lesser degree, of the anticanon. The courts and the political branches necessarily shape the contours of constitutional law by dynamically resolving constitutional cases and controversies. The precedents those resolutions birth must be accommodated within academic theory because those precedents structure the life of the nation. In contrast, cases that are not good law do not of

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[22] *See* Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735–36 (1995).

[23] *See* Balkin, *supra* note 16, at 706–11. *See generally* BOBBITT, *supra* note 5, at 93–119 (introducing the concept of ethical argument as a mode of constitutional analysis).

[24] Balkin & Levinson, *supra* note 16, at 1001. Balkin and Levinson make this observation about the academic theory canon, the set of materials legal academics must know and account for in their theories. *Id.* at 976, 1001.

themselves exercise any coercive authority. They lie dormant unless and until someone resolves to use them for some end.

Part IV devotes particular attention to the role legal academics play in devising and promoting the anticanon. I argue that law professors have more control over the content of the anticanon than over the content of the canon, and must remain self-conscious about how the anticanon is used in constitutional argument. Depending on how it is contextualized, the anticanon may serve to cleanse the Constitution of its inequities, smooth the rough edges of historical social conflict, bolster the argument for originalist modes of interpretation, or shed light on constitutional dissensus. But the anticanon is not a conceptual certainty, unlike, perhaps, the canon. Its existence reflects a contingent professional practice that must be understood and, ultimately, justified.

I. DEFINING THE ANTICANON

A canon is the set of texts so central to an academic discipline that competence in the discipline requires fluency in the texts. Harold Bloom describes a canonical literary text as "a literary work that the world would not willingly let die";[25] a canonical work's indispensability is ostensibly a measure of quality, not an opportunity to torture students, though it is easy to conflate the two. After all, most teachers believe it is important for most students to know what most teachers know — this approaches tautology — and the remainder will be scolded by parents. Teacher friends tell me that nothing would spark more outrage than to remove *To Kill a Mockingbird*[26] from the curriculum.

I suspect a like reaction would greet me — in this case from my adult students — were I to refuse to teach *Brown*. *Brown*, along with *Marbury v. Madison*[27] and *McCulloch v. Maryland*,[28] stands for a set of essential truths of American constitutional law[29]: "[T]he doctrine of 'separate but equal' has no place";[30] "[i]t is emphatically the province and duty of the judicial department to say what the law is";[31] and "we must never forget, that it is a *constitution* we are expounding."[32] These are the fixed stars in our constitutional constellation. Of course, Justice Jackson's famous phrase, from his majority opinion in *West*

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[25] HAROLD BLOOM, THE WESTERN CANON: THE BOOKS AND SCHOOL OF THE AGES 19 (1994).

[26] HARPER LEE, TO KILL A MOCKINGBIRD (1960).

[27] 5 U.S. (1 Cranch) 137 (1803).

[28] 17 U.S. (4 Wheat.) 316 (1819).

[29] *See* Primus, *supra* note 16, at 252.

[30] Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

[31] *Marbury*, 5 U.S. at 177.

[32] *McCulloch*, 17 U.S. at 407.

Virginia State Board of Education v. Barnette,[33] does not describe any of *those* truths, but rather the truth that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[34] To this we should add that judges should specially train on "prejudice against discrete and insular minorities" in the political process.[35] And who can forget that an individual subject to custodial interrogation must be informed of his "right to remain silent?"[36]

I could go on. A well-turned phrase stating a principle that stands the test of time may easily nominate a decision for the constitutional canon. Likewise, broader developments within the society — in *Miranda*'s case, the migration of its language into popular culture — may contribute to a case's canonization. The problem in identifying a consensus constitutional canon is that canonical cases generally remain good law. Not all cases that count as good law are included — we must remember, it is a *canon* we are expounding — but, as in literature, what is included is inevitably subject to contest. Who is to say, after all, which among a set of true judicial statements of the American ethos is the *most* true, the *most* central?

Balkin and Levinson recognize this uncertainty. They argue that there are at least three different legal canons based on "the audience for whom and the purposes for which the canon is constructed."[37] Thus, the pedagogical canon is the set of materials that are "important for educating law students"; the academic theory canon constitutes those texts that "serve as benchmarks for testing academic theories about the law"; and the cultural literacy canon "ensure[s] a necessary cultural literacy for citizens in a democracy."[38] *Brown* comfortably fits within all three canons, but a case like *McCulloch* — always taught but rarely written about or discussed in policy circles — may be better suited for the pedagogical than for the academic theory or cultural literacy canon.[39]

The anticanon is different. In parallel to the canon, it is the set of legal materials so wrongly decided that their errors, to paraphrase Bloom, we would not willingly let die. It remains important for us to teach, to cite, and to discuss these decisions, ostensibly as examples of how not to adjudicate constitutional cases. Balkin and Levinson have described anticanonical cases as those that "any theory worth its salt

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[33] 319 U.S. 624 (1943).
[34] *Id.* at 642.
[35] United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938).
[36] Miranda v. Arizona, 384 U.S. 436, 467–68 (1966).
[37] Balkin & Levinson, *supra* note 16, at 970.
[38] *Id.*
[39] *See id.* at 974–75.

must show are wrongly decided"[40] and as "wrongly decided cases that help frame what the proper principles of constitutional interpretation should be."[41] Others describe the anticanon, or what Mary Anne Case has called "anti-precedents," in similar terms.[42] Gerard Magliocca calls such cases "examples of a judicial system gone wrong" and "the haunted houses of constitutional law — abandoned yet frightening."[43] Akhil Amar writes that *Dred Scott*, *Plessy*, and *Lochner* "occupy the lowest circle of constitutional Hell."[44]

There is plenty of disagreement over the normative question of which cases are the most incorrectly decided, but unlike with the canon, there is remarkable consensus around the descriptive question of which decisions the legal community regards as the worst of the worst. The pedagogical, academic theory, and cultural literacy canons tend to converge on the four decisions I have identified: *Dred Scott*, *Plessy*, *Lochner*, and *Korematsu*. No other case so consistently acknowledged as important to legal education, professional theory and practice, and elite cultural literacy is so uniformly acknowledged to have been wrongly decided. This agreement suggests either consensus as to how poorly reasoned these cases actually are or consensus as to the *status* of these cases as especially poorly reasoned. The former is implausible, as Part II shows. The latter is obvious to many who have been exposed to modern legal education, and suggests that much more is afoot than traditional legal argumentation.

As of August 2011, the LexisNexis database contained fifty-four U.S. law review articles that referred to an anticanon or to anticanoni-

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[40] *Id.* at 1018.

[41] J.M. Balkin & Sanford Levinson, *Interpreting Law and Music: Performance Notes on "The Banjo Serenader" and "The Lying Crowd of Jews,"* 20 CARDOZO L. REV. 1513, 1553 (1999); *accord* Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 586 (2009). Balkin also has suggested as an important feature of an anticanonical case that legal scholars are willing to say the case was "wrong the day it was decided." Balkin, *supra* note 16, at 684–90.

[42] *See* Mary Anne Case, *"The Very Stereotype the Law Condemns": Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1469 n.112 (2000); Michael R. Dimino, *The Futile Quest for a System of Judicial "Merit" Selection*, 67 ALB. L. REV. 803, 803 n.3 (2004); Stephen I. Vladeck, *The Problem of Jurisdictional Non-Precedent*, 44 TULSA L. REV. 587, 590 n.27 (2009).

[43] Gerard N. Magliocca, *Preemptive Opinions: The Secret History of* Worcester v. Georgia *and* Dred Scott, 63 U. PITT. L. REV. 487, 487 (2002).

[44] AKHIL REED AMAR, AMERICA'S *UNWRITTEN* CONSTITUTION: BETWEEN THE LINES AND BEYOND THE TEXT (forthcoming 2012) (manuscript at 464) (on file with the Harvard Law School Library). Richard Primus offers another definition of the anticanon, as the set of texts representing arguments that were rejected by canonical judicial opinions. Primus, *supra* note 16, at 254. This definition is idiosyncratic, and reflects little more than a difference in nomenclature. Primus acknowledges that the term "anti-canon" may also describe "the set of the most important constitutional texts that we, the retrospective constructors of constitutional history, regard as normatively repulsive," which approximates my usage. *Id.* at 254 n.41.

cal legal texts,[45] and an additional seventeen that referred to "antiprecedent" or to antiprecedential decisions. Table A lists, by frequency of citation, the fifteen decisions described by the authors of any of these seventy-one articles as anticanon or antiprecedent cases: *Dred Scott*,[46] *Plessy*,[47] *Lochner*,[48] *Korematsu*,[49] *Bradwell v. Illinois*,[50] *Dennis v.*

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[45] This number excludes articles referring to an anticanon strictly in literature as opposed to law, or referring to an anticanon as the opposite of a canon of statutory interpretation.

[46] *See* Austin Allen, *Rethinking* Dred Scott*: New Context for an Old Case*, 82 CHI.-KENT L. REV. 141, 174–75 (2007); Jack M. Balkin, Essay, Bush v. Gore *and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1449 (2001) [hereinafter Balkin, Bush]; Balkin, *supra* note 41, at 586; Jack M. Balkin, *The Use that the Future Makes of the Past: John Marshall's Greatness and Its Lessons for Today's Supreme Court Justices*, 43 WM. & MARY L. REV. 1321, 1326–27 (2002) [hereinafter Balkin, *Marshall*]; Balkin, *supra* note 16, at 681–82; Balkin & Levinson, *supra* note 41, at 1553; Balkin & Levinson, *supra* note 16, at 976, 1018–19; Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at* Dred Scott, 82 CHI.-KENT L. REV. 49, 76 (2007) [hereinafter Balkin & Levinson, Dred Scott]; David E. Bernstein, Lochner v. New York*: A Centennial Retrospective*, 83 WASH. U. L.Q. 1469, 1473 (2005); Devon W. Carbado & Rachel F. Moran, *The Story of Law and American Racial Consciousness: Building a Canon One Case at a Time*, 76 UMKC L. REV. 851, 856 (2008); Case, *supra* note 42, at 1469 n.112; Jennifer M. Chacón, *Citizenship and Family: Revisiting* Dred Scott, 27 WASH. U. J.L. & POL'Y 45, 59 n.87 (2008); Daniel A. Crane, *Lochnerian Antitrust*, 1 NYU J.L. & LIBERTY 496, 496 (2005); Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627, 693–94 (2006); Vicki C. Jackson, *Multi-Valenced Constitutional Interpretation and Constitutional Comparisons: An Essay in Honor of Mark Tushnet*, 26 QUINNIPIAC L. REV. 599, 632 n.111 (2008); Paul Kens, Lochner v. New York*: Tradition or Change in Constitutional Law?*, 1 N.Y.U J.L. & LIBERTY 404, 405 (2005); Sanford Levinson, *The David C. Baum Memorial Lecture: Was the Emancipation Proclamation Constitutional? Do We / Should We Care What the Answer Is?*, 2001 U. ILL. L. REV. 1135, 1157; Magliocca, *supra* note 43, at 487; Gerard N. Magliocca, *The Cherokee Removal and the Fourteenth Amendment*, 53 DUKE L.J. 875, 928 (2003); Primus, *supra* note 16, at 281–82; Sharon E. Rush, *The Anticanonical Lesson of* Huckleberry Finn, 11 CORNELL J.L. & PUB. POL'Y 577, 580 (2002) [hereinafter Rush, *Anticanonical*]; Sharon E. Rush, *Identity Matters*, 54 RUTGERS L. REV. 909, 928 (2002) [hereinafter Rush, *Identity*].

[47] *See* Allen, *supra* note 46, at 174–75; Balkin, Bush, *supra* note 46, at 1449; Balkin, *Marshall*, *supra* note 46, at 1326–27; Balkin, *supra* note 16, at 682; Balkin & Levinson, *supra* note 16, at 1018; Balkin & Levinson, *supra* note 41, at 1553; Randy E. Barnett, *Clauses not Cases*, 115 YALE L.J. POCKET PART 65, 67 (2006), http://www.thepocketpart.org/2006/01/barnett.html; Bernstein, *supra* note 46, at 1473; Carbado & Moran, *supra* note 46, at 864; Josh Chafetz, *The Unconstitutionality of the Filibuster*, 43 CONN. L. REV. 1003, 1028 (2011); Crane, *supra* note 46, at 496; Justin Driver, *The Consensus Constitution*, 89 TEX. L. REV. 755, 788–90 (2011); Fletcher, *supra* note 46, at 693–94; Scott Grinsell, *"The Prejudice of Caste": The Misreading of Justice Harlan and the Ascendency of Anticlassification*, 15 MICH. J. RACE & L. 317, 336 (2010); Jackson, *supra* note 46, at 632 n.111; Levinson, *supra* note 46, at 1157; Magliocca, *supra* note 46, at 927; Primus, *supra* note 16, at 245–46; Rush, *Anticanonical*, *supra* note 46, at 580; Sharon E. Rush, *Emotional Segregation:* Huckleberry Finn *in the Modern Classroom*, 36 U. MICH. J.L. REFORM 305, 308 n.11 (2003); Rush, *Identity*, *supra* note 46, at 928;; David J. Seipp, *Introduction to Symposium: Lochner Centennial Conference*, 85 B.U. L. REV. 671, 673 (2005); Adrienne Stone, *Defamation of Public Figures: North American Contrasts*, 50 N.Y.L. SCH. L. REV. 9, 31 n.109 (2005); Robert L. Tsai, *Sacred Visions of Law*, 90 IOWA L. REV. 1095, 1146 (2005); Vladeck, *supra* note 42, at 590 n.27.

[48] *See* Bruce Ackerman, *Constitutional Politics / Constitutional Law*, 99 YALE L.J. 453, 514 (1989); Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1742 (2007) [hereinafter Ackerman, *Living Constitution*]; Allen, *supra* note 46, at 174–75; Balkin, *supra* note 16, at 682–84; Balkin, Bush, *supra* note 46, at 1449; Balkin, *supra* note 41, at 587; Balkin & Levinson, *supra* note 16, at 1018; Bartrum, *supra* note 16, at 346–47; David E. Bernstein, Lochner *Era Revi-*

United States,[51] *Johnson v. M'Intosh*,[52] *Buck v. Bell*,[53] *Chisholm v. Georgia*,[54] *Goesaert v. Cleary*,[55] *Hoyt v. Florida*,[56] *Minor v. Happersett*,[57] *Muller v. Oregon*,[58] *Pollock v. Farmers' Loan & Trust Co.*,[59] and

sionism, Revised: Lochner *and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 58 (2003) [hereinafter Bernstein, *Revisionism, Revised*]; Bernstein, *supra* note 46, at 1473; David E. Bernstein, Lochner*'s Legacy's Legacy*, 82 TEX. L. REV. 1, 63 (2003) [hereinafter Bernstein, *Legacy*]; Case, *supra* note 42, at 1469 n.112; Crane, *supra* note 46, at 496; Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1293 n.150 (2007); Fletcher, *supra* note 46, at 693–94; Kens, *supra* note 46, at 405; Michael Anthony Lawrence, *Government as Liberty's Servant: The "Reasonable Time, Place, and Manner" Standard of Review for All Government Restrictions on Liberty Interests*, 68 LA. L. REV. 1, 9–10 (2007); Levinson, *supra* note 46, at 1157; Thomas B. McAffee, *Overcoming* Lochner *in the Twenty-First Century: Taking Both Rights and Popular Sovereignty Seriously as We Seek to Secure Equal Citizenship and Promote the Public Good*, 42 U. RICH. L. REV. 597, 599 n.8 (2008); Joseph F. Morrissey, Lochner*,* Lawrence*, and Liberty*, 27 GA. ST. U. L. REV. 609, 643 (2011); Primus, *supra* note 16, at 245; Jedediah Purdy, *People as Resources: Recruitment and Reciprocity in the Freedom-Promoting Approach to Property*, 56 DUKE L.J. 1047, 1069 n.64 (2007); Miguel Schor, *The Strange Cases of* Marbury *and* Lochner *in the Constitutional Imagination*, 87 TEX. L. REV. 1463, 1464 (2009); Seipp, *supra* note 47, at 673; Stone, *supra* note 47, at 31 n.109; David A. Strauss, *Why Was* Lochner *Wrong?*, 70 U. CHI. L. REV. 373, 373 (2003); Vladeck, *supra* note 42, at 590 n.27; Howard M. Wasserman, Bartnicki *as* Lochner*: Some Thoughts on First Amendment Lochnerism*, 33 N. KY. L. REV. 421, 421 (2006).

[49] *See* Allen, *supra* note 46, at 174–75; Balkin, Bush, *supra* note 46, at 1449; Balkin & Levinson, *supra* note 16, at 1018; Crane, *supra* note 46, at 496; Donald A. Dripps, *Terror and Tolerance: Criminal Justice for the New Age of Anxiety*, 1 OHIO ST. J. CRIM. L. 9, 22 (2003); Driver, *supra* note 47, at 788–89; John Ip, *Responses to the Ten Questions*, 36 WM. MITCHELL L. REV. 5023, 5038 (2010); John Ip, *The Supreme Court and the House of Lords in the War on Terror:* Inter Arma Silent Leges*?*, 19 MICH. ST. J. INT'L L. 1, 34 (2010); Jackson, *supra* note 46, at 632 n.111; Jerry Kang, *Watching the Watchers: Enemy Combatants in the Internment's Shadow*, LAW & CONTEMP. PROBS., Spring 2005, at 255, 275; Seth F. Kreimer, *Rays of Sunlight in a Shadow "War": FOIA, the Abuses of Anti-Terrorism, and the Strategy of Transparency*, 11 LEWIS & CLARK L. REV. 1141, 1215 n.314 (2007); Strauss, *supra* note 48, at 373; Vladeck, *supra* note 42, at 590 n.27.

[50] 83 U.S. (16 Wall.) 130 (1873) (holding that barring women from obtaining law licenses does not violate the Fourteenth Amendment's Privileges or Immunities Clause); *see* Case, *supra* note 42, at 1469 n.112; Brian Johnson, *Admitting that Women's Only Public Education Is Unconstitutional and Advancing the Equality of the Sexes*, 25 T. JEFFERSON L. REV. 53, 61 (2002).

[51] 341 U.S. 494 (1951) (upholding, against a First Amendment challenge, a federal conviction for advocating the overthrow of the government); *see* Primus, *supra* note 16, at 251 n.33; Stone, *supra* note 47, at 31 n.109.

[52] 21 U.S. (8 Wheat.) 543 (1823) (refusing to recognize title to land conveyed by an Indian tribe to a private citizen); *see* Fletcher, *supra* note 46, at 693–94; Rachel Godsil, Book Review, 27 LAW & HIST. REV. 462, 464 (2009).

[53] 274 U.S. 200 (1927) (rejecting a Fourteenth Amendment challenge to Virginia's practice of sterilizing the mentally retarded); *see* Allen, *supra* note 46, at 174–75.

[54] 2 U.S. (2 Dall.) 419 (1793) (holding that Article III's grant of diversity jurisdiction permits a citizen of one state to sue another state in federal court); *see* Primus, *supra* note 16, at 282.

[55] 335 U.S. 464 (1948) (upholding a general prohibition on women's serving as bartenders); *see* Johnson, *supra* note 50, at 61.

[56] 368 U.S. 57 (1961) (upholding Florida's presumptive exclusion of women from jury lists); *see* Johnson, *supra* note 50, at 61.

[57] 88 U.S. (21 Wall.) 162 (1874) (holding that the Fourteenth Amendment does not grant women the right to vote); *see* Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 IND. L.J. 1289, 1344 (2011).

Prigg v. Pennsylvania.[60] Of these fifteen decisions, only seven are called anticanon or antiprecedent by more than one author: *Dred Scott*, *Plessy*, *Lochner*, *Korematsu*, *Bradwell*, *Dennis*, and *M'Intosh*. Only the first four are called anticanon or antiprecedent by more than two authors, and each of those four is so labeled by at least twelve distinct authors. Balkin and Levinson, who have done the most work in elaborating the anticanon, appear to limit it to these four cases.[61] In ten articles in which either Balkin or Levinson or both have referenced the anticanon or its equivalent, and in multiple editions of the constitutional law casebook they coedit, they have never placed any other case in that category.[62] It is fair to say that the four cases I have identified are a class apart.

Those seeking to be confirmed as federal judges (and presumably their professional handlers) also appear to regard these four cases as unusually *non gratus*. Responses given at confirmation hearings are among the most reliable measures of anticanonicity. They reflect not only the considered view of an accomplished lawyer sufficiently receptive to the norms of American legal practice to have been selected as a federal court nominee, but also the collective judgment of an advisory legal team comprising both political appointees and career lawyers in the White House and the Department of Justice. Any decision a nominee is willing to repudiate is likely to be one that a large number of well-informed and politically attuned lawyers believe it safe to repu-

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[58] 208 U.S. 412 (1908) (upholding a maximum hours law for women on the ground that women require special legislative protection); *see* Johnson, *supra* note 50, at 61.

[59] 158 U.S. 601 (1895) (invalidating an unapportioned direct tax on income); *see* Primus, *supra* note 16, at 282.

[60] 41 U.S. (16 Pet.) 539 (1842) (holding, among other things, that the Fugitive Slave Clause is self-executing and preempts conflicting state procedural laws); *see* Barnett, *supra* note 47, at 67.

[61] Balkin and Levinson do not, however, believe that the anticanon is limited to cases. *See* Balkin & Levinson, *supra* note 16, at 1003.

[62] *See* PAUL BREST, SANFORD LEVINSON, JACK M. BALKIN, AKHIL REED AMAR & REVA B. SIEGEL, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 253 (5th ed. 2006); Balkin, *supra* note 16, at 681–85, 688–89, 700–11; Balkin, Bush, *supra* note 46, at 1449; Balkin, *supra* note 41, at 586; Balkin, *Marshall*, *supra* note 46, at 1326–27; Balkin & Levinson, *supra* note 41, at 1553; Balkin & Levinson, *supra* note 16, at 976, 1018; Balkin & Levinson, Dred Scott, *supra* note 46, at 76; Levinson, *supra* note 46, at 1157. In one of those ten articles, Levinson characterizes the *Insular Cases*, including, most prominently, *Downes v. Bidwell*, 182 U.S. 244 (1901), as "exemplifying the anti-canon." Sanford Levinson, *Why the Canon Should Be Expanded to Include the* Insular Cases *and the Saga of American Expansionism*, 17 CONST. COMMENT. 241, 244 (2000). Levinson's usage is whimsical, and differs conceptually from the subject of the present discussion (as well as his own usage elsewhere), and so I omit it from my tally. In another article, Balkin, while not using the term "anticanon," argues that constitutional scholars use *Prigg*, along with *Dred Scott*, as "litmus tests for the worth of their theories and as means of attacking competing theories." J.M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 FORDHAM L. REV. 1703, 1710 (1997).

TABLE A: LAW REVIEW ARTICLES
IDENTIFYING CASES AS ANTICANONICAL

Case	Articles	Distinct Authors
Lochner v. New York	28	22
Plessy v. Ferguson	25	19
Dred Scott v. Sandford	22	15
Korematsu v. United States	13	12
Bradwell v. Illinois	2	2
Dennis v. United States	2	2
Johnson v. M'Intosh	2	2
Buck v. Bell	1	1
Chisholm v. Georgia	1	1
Goesaert v. Cleary	1	1
Hoyt v. Florida	1	1
Minor v. Hapersett	1	1
Muller v. Oregon	1	1
Pollock v. Farmers' Loan & Trust Co.	1	1
Prigg v. Pennsylvania	1	1

diate.[63] The confirmation process, moreover, is an opportunity for translation between legal and political forms of argumentation. It is enabled by its trade in symbols, with a nominee's willingness to affirm or deny particular propositions standing in for a wider range of substantive views. Canonical and anticanonical cases, with their outsized symbolism, are vital to this process. As Michael Dorf writes, "We hear nominees uniformly praising or accepting as settled those decisions widely regarded as canonical, while invoking anti-canonical cases as illustrations of the proposition that sometimes the Court must overrule its own precedents."[64] The hearing is a bellwether, and nominees' responses to committee questioning reliably reflects, as David Strauss puts it, "the mainstream of American constitutional law today."[65]

For that reason, a research assistant and I examined the written transcript of each of the thirty-two Supreme Court confirmation hearings in which the nominee testified openly and without restriction.

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[63] *Cf., e.g.*, *Nomination of Anthony M. Kennedy to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 220 (1987) [hereinafter *Kennedy Hearing*] (statement of then–Judge Anthony M. Kennedy) ("I have been rather cautious about going through a list of cases that I agree with and disagree with.").

[64] Michael C. Dorf, *Whose Ox Is Being Gored? When Attitudinalism Meets Federalism*, 21 ST. JOHN'S J. LEGAL COMMENT. 497, 521–22 (2007).

[65] Strauss, *supra* note 48, at 373.

This list includes every hearing since that of John Marshall Harlan II in 1955, plus the 1939 hearing of Felix Frankfurter and the 1941 hearing of Robert Jackson. We recorded every instance in which the nominee arguably asserted or affirmed that a previously decided Supreme Court case was decided wrongly. As table B indicates, through thirty-two hearings over seven decades, and despite numerous invitations,[66] there are only six cases that any successful Supreme Court nominee has asserted were wrongly decided: *Dred Scott*, *Plessy*, *Lochner*, *Korematsu*, *Adkins v. Children's Hospital*,[67] and *Bradwell.* Only the first four of these six have been repudiated in open testimony by multiple nominees, and each of those four has been disavowed by at least four nominees.[68]

In addition to explicit recognition as anticanonical in legal academic literature and implicit recognition at confirmation hearings, a decision's treatment in casebooks might reflect dominant pedagogy, and therefore provide an additional measure of anticanonicity. In 1992, and again in 2005, political scientist Jerry Goldman set out to determine whether there is a constitutional canon by studying the treatment of cases in eleven textbooks used widely in undergraduate courses in constitutional law.[69] Goldman constructed an index comprising "prin-

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[66] For example, senators asked then-Judge John Roberts whether he agreed with the Court's decisions in *Korematsu v. United States*, 323 U.S. 214 (1944); *Brown v. Board of Education*, 347 U.S. 483 (1954); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Wickard v. Filburn*, 317 U.S. 111 (1942); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Plyler v. Doe*, 457 U.S. 202 (1982); and *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992). *See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 154, 241, 167, 188–89, 207, 223–24, 261, 301–02, 391, 414 (2005) [hereinafter *Roberts Hearing*]. Roberts testified at the hearing that he would not "agree or disagree with particular decisions," *id.* at 143, but as Table B shows, he in fact said he disagreed with *Plessy*, *Dred Scott*, *Lochner*, and *Korematsu*.

[67] 261 U.S. 525 (1923) (invalidating a minimum wage law for women and children in the District of Columbia).

[68] At his 1987 confirmation hearing, Judge Robert Bork criticized the reasoning of *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Griswold v. Connecticut*, 381 U.S. 479 (1965); and *Cohen v. California*, 403 U.S. 15 (1971). *See Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 100th Cong. 113–14, 155, 156–57, 253, 286–87, 347–49, 711–12, 749–51 (1987). These cases are not only non-anticanonical but are arguably part of the constitutional canon. Judge Bork's failure points up the risk in saying that any case is poorly reasoned at a confirmation hearing, even those cases whose intellectual underpinnings have long been criticized by both liberals and conservatives within the legal academy. Bork tried to separate questions of faulty analysis from questions of faulty results, and his fate suggests that the discourse around canonical and anticanonical cases tends to conflate the two inquiries.

[69] Goldman initially reviewed twelve casebooks, but he chose to bracket one of them because it focused exclusively on individual rights rather than structure. *See* Jerry Goldman, *Is There a Canon of Constitutional Law?*, 2 LAW & POL. BOOK REV. 134, 134–35 (1992).

TABLE B: DISAVOWALS IN CONFIRMATION HEARING TESTIMONY

Case	Hearing(s)
Plessy	Alito (2006); Roberts (2005); Thomas (1991); Souter (1990); Kennedy (1987); Rehnquist (1986)[70]
Dred Scott	Roberts (2005); Ginsburg (1993); Thomas (1991); Kennedy (1987)[71]
Lochner	Roberts (2005); Ginsburg (1993); Thomas (1991); Rehnquist (1971)[72]
Korematsu	Sotomayor (2009); Alito (2006); Roberts (2005); Ginsburg (1993)[73]
Adkins	Rehnquist (1971)[74]
Bradwell	Thomas (1991)[75]

cipal" cases, defined as any whose excerpt was not paraphrased and that was typographically identified in the same way as other key cases in the book. "Operationally," Goldman writes, "I searched for text entries that began: 'Justice X delivered the Opinion of the Court' or language to that effect."[76] As Richard Primus has noted, of the ten cases included in every one of the eleven casebooks Goldman reviewed in 1992, only one — *Lochner* — is never cited for its positive legal au-

[70] *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 379, 440, 462, 530, 601 (2006) [hereinafter *Alito Hearing*]; *Roberts Hearing*, *supra* note 66, at 204; *Nomination of Judge Clarence Thomas to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 102d Cong. 469 (1991) [hereinafter *Thomas Hearing*]; *Nomination of David H. Souter to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm on the Judiciary*, 101st Cong. 303 (1990); *Kennedy Hearing*, *supra* note 63, at 149; *Nomination of Justice William Hubbs Rehnquist to Be Chief Justice of the United States: Hearings Before the S. Comm. on the Judiciary*, 99th Cong. 136–38 (1986) [hereinafter *Rehnquist Hearing*].

[71] *Roberts Hearing*, *supra* note 66, at 180; *Nomination of Ruth Bader Ginsburg, to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 126, 270 (1993) [hereinafter *Ginsburg Hearing*]; *Thomas Hearing*, *supra* note 70, at 464; *Kennedy Hearing*, *supra* note 63, at 175.

[72] *Roberts Hearing*, *supra* note 66, at 162, 408; *Ginsburg Hearing*, *supra* note 71, at 271; *Thomas Hearing*, *supra* note 70, at 115, 241; *Nominations of William H. Rehnquist, of Arizona, and Lewis F. Powell, Jr., of Virginia, to Be Associate Justices of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 92d Cong. 159 (1971) [hereinafter *Rehnquist and Powell Hearings*].

[73] *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 117 (2009) [hereinafter *Sotomayor Hearing*]; *Alito Hearing*, *supra* note 70, at 418; *Roberts Hearing*, *supra* note 66, at 241; *Ginsburg Hearing*, *supra* note 71, at 210, 247.

[74] *Rehnquist and Powell Hearings*, *supra* note 72, at 159.

[75] *Thomas Hearing*, *supra* note 70, at 202.

[76] *Id.*

thority.[77] In a follow-up study that relaxed some of the standards for inclusion, Goldman added twelve cases to this list.[78] Only two of these additional cases, *Dred Scott* and *Plessy*, are even arguably anticanonical.

With the help of a research assistant, I conducted a comparable experiment using casebooks commonly assigned in law school constitutional law courses. Like Goldman, I was interested only in those cases that received substantive treatment in each casebook, not with every case that appeared in whatever context.[79] Of the twenty-two principal cases that appeared in all ten casebooks, the only two the modern legal culture generally treats as error are *Lochner* and *Plessy*.[80] Of the sixty principal cases that appeared in nine of the ten casebooks, only two additional cases are treated as error: *Korematsu* and *Hammer v. Dagenhart*.[81] *Dred Scott* appears as a principal case in six of the ten casebooks.

Table C indicates the ten books selected and indicates whether each book treats each of eight potential anticanonical cases — *Dred Scott*, *Plessy*, *Lochner*, *Korematsu*, *Bradwell*, *Dennis*, *Adkins*, and *Buck* — as a principal case. As the table shows, *Bradwell* is a principal case in only four casebooks, and *Buck* is a principal case in only three. In contrast, *Dennis* and *Adkins* each receives significant coverage, with

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[77] Primus, *supra* note 16, at 243–44.

[78] Jerry Goldman, *The Canon of Constitutional Law Revisited*, 15 LAW & POL. BOOK REV. 648, 650 (2005).

[79] My definition of a principal case was somewhat broader than Goldman's. Although I did require that some part of the opinion be verbatim rather than paraphrased or that the case be typographically similar to other principal cases in the book, I did not require that the casebook's treatment of a case begin with language so indicating.

[80] The other twenty cases are *United States v. Morrison*, 529 U.S. 598 (2000); *Washington v. Glucksberg*, 521 U.S. 702 (1997); *United States v. Virginia*, 518 U.S. 515 (1996); *Romer v. Evans*, 517 U.S. 620 (1996); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Morrison v. Olson*, 487 U.S. 654 (1988); *South Dakota v. Dole*, 483 U.S. 203 (1987); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985); *Washington v. Davis*, 426 U.S. 229 (1976); *Miller v. California*, 413 U.S. 15 (1973); *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Katzenbach v. McClung*, 379 U.S 294 (1964); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Brown v. Board of Education*, 347 U.S. 483 (1954); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *United States v. Darby*, 312 U.S. 100 (1941); *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); and *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Of these cases, the decision in the *Slaughterhouse Cases* comes in for the most criticism: many constitutional scholars believe that the Court improperly failed to interpret the Privileges or Immunities Clause of the Fourteenth Amendment as applying the Bill of Rights to state and local action. *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3029–30 (2010). This is not a universal view within the academy, however. *See, e.g.*, Philip Hamburger, *Privileges or Immunities*, 105 NW. U. L. REV. 61 (2011) (arguing that the purpose of the clause was to extend Comity Clause rights to free blacks). And as the Court recently affirmed in *McDonald*, the decision in the *Slaughterhouse Cases* remains good law. 131 S. Ct. at 3030–31.

[81] 247 U.S. 251 (1918) (holding that the Commerce Clause did not authorize a federal ban on interstate commerce in the products of child labor).

the former case listed in eight of the ten books and the latter listed in seven. Section II.B discusses a "shadow" anticanon of four cases — *Prigg v. Pennsylvania*, *Giles v. Harris*, *Gong Lum v. Rice*, and *Bowers v. Hardwick* — that are poorly reasoned and morally disturbing but are not part of the anticanon. The first two of these cases — *Prigg* and *Giles* — each appears as a principal case in two of the ten casebooks. *Gong Lum* is a principal case in none of the ten books, and *Bowers* is a principal case in eight of the ten. Given that *Bowers* was decided just twenty-five years ago, this makes some sense, but as I discuss in section III.B, it is a surer indication that *Bowers* is not yet fully disavowed than that it is part of the anticanon.

TABLE C: PRINCIPAL CASES IN SELECTED TEXTBOOKS

	Scott	*Plessy*	*Lochner*	*Korematsu*
SSSTK[82]	✓	✓	✓	✓
C[83]	✓	✓	✓	✓
SG[84]		✓	✓	✓
BLBAS[85]	✓	✓	✓	✓
VCA[86]		✓	✓	✓
CFKS[87]	✓	✓	✓	✓
M[88]		✓	✓	✓
B[89]	✓	✓	✓	✓
FEF[90]	✓	✓	✓	✓
R[91]		✓	✓	

[82] GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW (6th ed. 2009).
[83] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW (3d ed. 2009).
[84] KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW (17th ed. 2010).
[85] BREST ET AL, *supra* note 62.
[86] JONATHAN D. VARAT ET AL., CONSTITUTIONAL LAW (13th ed. 2009).
[87] JESSE H. CHOPER ET AL., CONSTITUTIONAL LAW: CASES, COMMENTS, QUESTIONS (9th ed. 2001).
[88] CALVIN MASSEY, AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES (3d ed. 2009).
[89] RANDY E. BARNETT, CONSTITUTIONAL LAW: CASES IN CONTEXT (2008).
[90] DANIEL A. FARBER ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW (4th ed. 2009).
[91] RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW (9th ed. 2009).

TABLE C (*CONTINUED*)

	Bradwell	*Dennis*	*Adkins*	*Buck*
SSSTK		✓		
C		✓	✓	✓
SG	✓	✓	✓	
BLBAS	✓		✓	
VCA		✓	✓	
CFKS		✓	✓	
M		✓		
B	✓		✓	
FEF	✓	✓		✓
R		✓	✓	✓

We can now say that *Dred Scott*, *Plessy*, *Lochner*, and *Korematsu* each presents a compelling case for placement within the anticanon. Each decision has been rejected by our legal culture, but all are sufficiently significant that legal academics confer special status upon them within the literature on antiprecedents; Supreme Court nominees believe they will curry favor with senators and the public by declaring them to be reliably bad law; and casebook authors assume that law professors should assign them to students. A handful of additional cases are candidates for similar status, though none are "successful" on all of our criteria. *Adkins v. Children's Hospital* was specifically disavowed by one Supreme Court nominee[92] and appears frequently as a principal case in constitutional law textbooks but seems never to have been recognized as an antiprecedent in other academic writings. *Dennis v. United States* is mentioned more than once in discussions of antiprecedent within the law reviews[93] and is considered significant by casebook authors, but it has escaped negative discussion at confirmation hearings. *Bradwell v. Illinois* also has received attention from law review authors, but it does not appear to be part of the "pedagogical" anticanon.[94]

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[92] *See supra* p. 393.

[93] *See supra* pp. 388–89.

[94] *Bradwell* presents an example of a decision that is anticanonical within certain subcommunities but is not universally deprecated within the larger constitutional culture. *See infra* p. 470. Women's rights advocates who speak in the language of legal precedent are inti-

Having narrowed the possibilities, we can attempt an additional, and quite significant, test of anticanonicity: citation in Supreme Court cases. We should not expect anticanonical cases to be cited in Supreme Court opinions except negatively, that is, in order to point out flaws in an argument the opinion seeks to reject. We should also expect that those cases that are in fact frequently cited negatively are strong candidates for the anticanon.[95] This feature of the anticanon knows no parallel in the canon. Cases that the Court frequently cites positively are necessarily important to its work, but the fact of extensive positive citation may tell us no more than that the case contains the first, last, or most cogent statement of some legal proposition either foundational to or decisive within a large number of cases. *Craig v. Boren*,[96] the first case to apply intermediate scrutiny to sex discrimination, was cited in an average of 2.4 decisions per Term between the 1976 and 2010 Terms of the Supreme Court, but to say it is therefore part of the canon would make the canon unworthy of any special interest or attention. By contrast, Court citation, because so often gratuitous, is the feature of anticanonical cases that makes them most interesting.[97]

Figures A and B graphically demonstrate the pattern of citation in the Supreme Court, by decade, for ten majority opinions.[98] Figure A contains citation statistics for the four cases that I argue are in the anticanon. Figure B contains statistics for *Adkins*, *Dennis*, *Bradwell*, and three of the four cases in the "shadow" anticanon discussed in section II.B — *Prigg*, *Giles*, and *Bowers*.[99] The figures separate "negative" from "positive" citations. A negative citation indicates that the opinion is cited to support a proposition that the citing judge believes is inconsistent with the cited decision. A positive citation indicates that the opinion is cited to support a proposition that is consistent with

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mately familiar with *Bradwell*, just as legally attuned gay rights advocates have long considered the wrongness of *Bowers v. Hardwick* to be self-evident.

95 Certainty as to the completeness of my list of anticanonical cases might therefore require an analysis of the general pattern of citation of every case the Court has ever cited. I leave this research to (very) interested readers. As discussed, I believe the identity of the anticanon to be nearly axiomatic, and so incomplete proof is no discomfort.

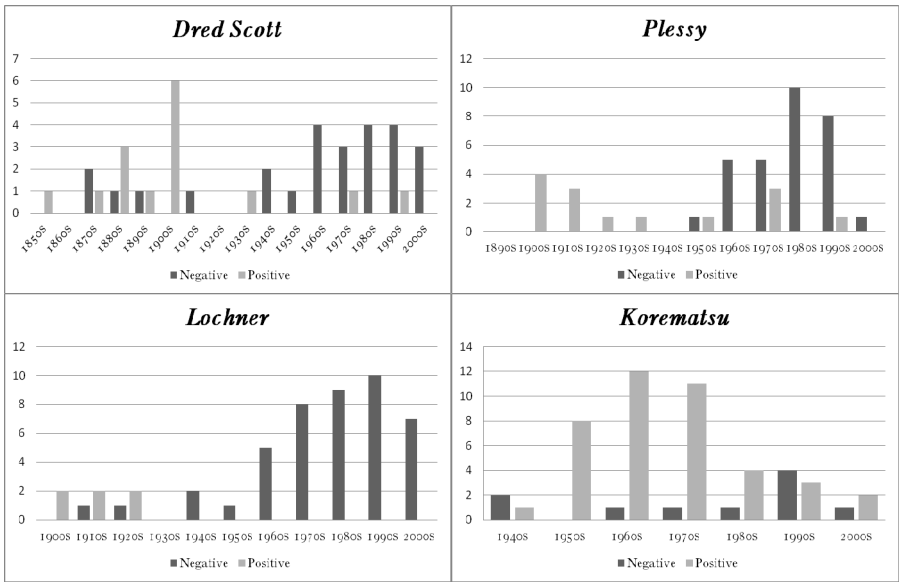
96 429 U.S. 190 (1976).

97 It is for this reason that judicial citation does not make out a fourth "canon" to accompany the pedagogical, academic, and cultural literacy canons. Citation is not an interesting feature of the canon, but without citation, a case cannot be part of the anticanon. (Alternatively, if citation is not a feature of the anticanon, then the anticanon is no longer interesting.) *See infra* pp. 403-04.

98 The citation count excludes citations to dissenting or concurring opinions but includes dissents and concurrences as citing sources.

99 I omit a figure for *Gong Lum*, which is cited only neutrally in subsequent Supreme Court opinions.

FIGURE A: POSITIVE VERSUS NEGATIVE SUPREME COURT CITATIONS — STRONG CANDIDATES



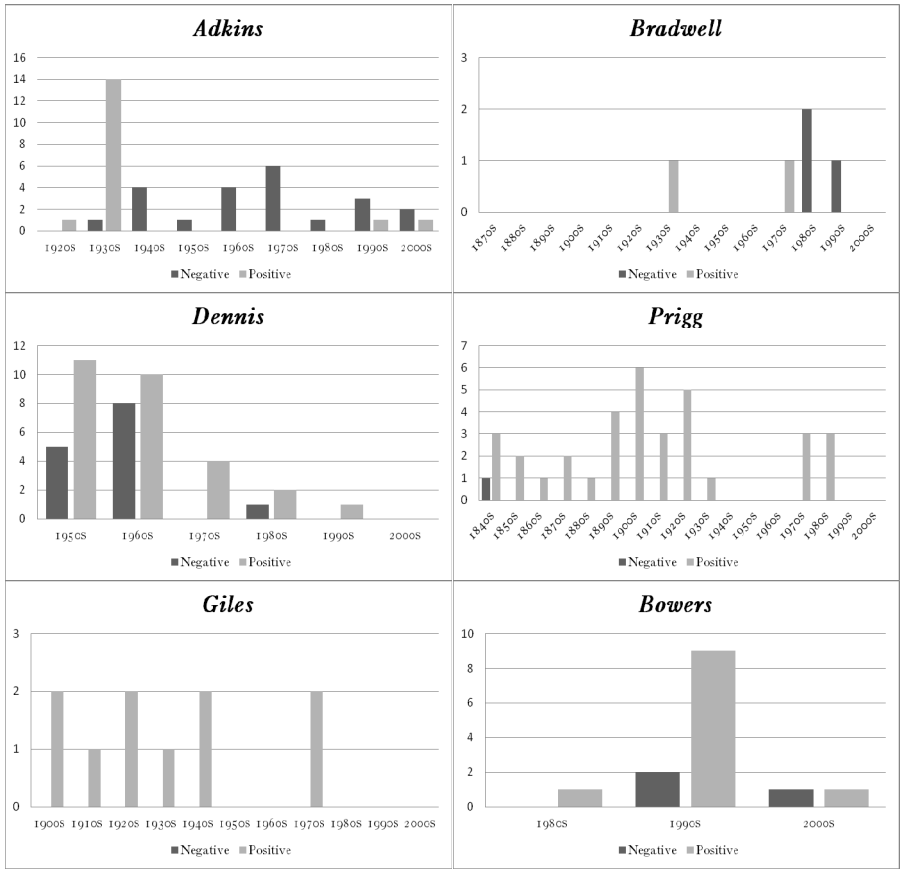
the cited decision. The figure excludes "neutral" citations, defined as those discussions of a case that are meant neither to criticize nor to support any particular claim. Typically, "neutral" citations occur in the course of historical discussion that is tangential to the normative arguments at issue in the citing case.

Figure A shows that three of the four principal candidates for the anticanon — *Dred Scott*, *Plessy*, and *Lochner* — have been cited negatively far more frequently than positively over the last half century. For reasons I explore in Part III, a strong pattern of negative citation does not begin for any of the three cases until the 1960s. The clear outlier among the four is *Korematsu*, which has been cited positively far more than negatively. Over the last several decades, the overwhelming majority of these positive citations have been in support of the proposition that governmental racial classifications receive strict scrutiny from reviewing courts.

Of the other candidate anticanon cases, only *Adkins*, *Dennis*, and *Bowers* have been cited with any frequency in recent decades. Even so, negative citation of *Adkins* is appreciably lower than for *Dred Scott*, *Plessy*, and *Lochner*. *Dennis* and *Bowers*, like *Korematsu*, have received more positive than negative citation.

The citation pattern for *Korematsu* is surprising. By the criteria already discussed, it presents a strong case for sharing the status of *Dred Scott*, *Plessy*, and *Lochner*. Notably, each of the last four nomi-

FIGURE B: POSITIVE VERSUS NEGATIVE
SUPREME COURT CITATIONS — WEAK CANDIDATES



nees to receive a Supreme Court confirmation hearing, and five of the last six, stated either in live testimony or in their written questionnaires that *Korematsu* was either wrongly decided or, according to Elena Kagan, "poorly reasoned."[100] The decision has not been overruled by the Supreme Court, but a district court vacated Fred Korematsu's conviction on a writ of *coram nobis* in litigation brought in 1983.[101] In that litigation, the government did not formally confess error, but it refused to oppose Korematsu's petition, on the ground that

100 *The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 472 (2010); *see Sotomayor Hearing*, *supra* note 72, at 117; *Alito Hearing*, *supra* note 70, at 418; *Roberts Hearing*, *supra* note 66, at 241; *Ginsburg Hearing*, *supra* note 71, at 210, 247.

101 Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984).

the statute of conviction "has been soundly repudiated."[102] The government noted that Executive Order 9066, under which Korematsu was ordered evacuated and detained, could not be issued today without prior congressional authorization due to the Non-Detention Act of 1971.[103] For his part, Korematsu relied on the findings of the 1982 Report of the Commission of Wartime Relocation and Internment of Civilians, which concluded that "a grave injustice"[104] was done to those interned and that "today the decision in *Korematsu* lies overruled in the court of history."[105] The government agreed with that assessment in its filings,[106] and Congress officially apologized for the internment[107] and allocated more than $1.6 billion in reparations in 1988.[108]

These events might well have influenced citing courts. As indicated in Figure B, citation to *Korematsu* has been fairly balanced between positive and negative since the 1970s. More dramatically, discussion of *Korematsu* has been conspicuously absent from recent detention-related litigation before federal appellate courts. Formally, *Korematsu* should be a valuable precedent for the government in its prosecution of the war on terror, given its outsized deference to executive power. Yet it appears that at no time since September 11 has any U.S. government lawyer publicly used the *Korematsu* decision as precedent in defending executive detention decisions.[109] That claim relies on a survey of every publicly available Office of Legal Counsel (OLC) opinion since September 11 and the merits briefings and published opinions in ten detention-related cases to reach the Supreme Court or the federal courts of appeals during that period: *Rasul v. Bush*;[110] *Rumsfeld v. Padilla*;[111] *Hamdi v.*

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[102] *Id.* at 1413.

[103] 18 U.S.C. § 4001(a) (2006); *see Korematsu*, 584 F. Supp. at 1413.

[104] *Korematsu*, 584 F. Supp. at 1417.

[105] *Id.* at 1420 (internal quotation marks omitted); *see also* David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 993 (2002).

[106] *Korematsu*, 584 F. Supp. at 1420.

[107] Restitution for World War II Internment of Japanese-Americans and Aleuts, 50 U.S.C. app. § 1989 (2006). More recently, then-Acting Solicitor General Neal Katyal referred to former Solicitor General Charles Fahy's defense of the relocation and internment program as a "mistake[]." Tracy Russo, *Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases*, THE JUSTICE BLOG (May 20, 2011), http://blogs.usdoj.gov/blog/archives/1346.

[108] 50 U.S.C. app. § 1989b-3 (2006).

[109] *Cf.* STEPHEN BREYER, MAKING OUR DEMOCRACY WORK 193 (2010) ("[I]t is hard to conceive of any future Court referring to [*Korematsu*] favorably or relying on it.").

[110] 542 U.S. 466 (2004) (holding that the statutory grant of authority for federal district courts to hear habeas cases extends to applications from foreign nationals held at the U.S. Naval Base at Guantánamo Bay, Cuba).

[111] 542 U.S. 426 (2004) (dismissing, on jurisdictional grounds, a case filed by a U.S. citizen challenging his military detention as an enemy combatant).

Rumsfeld;[112] *Hamdan v. Rumsfeld*;[113] *Bismullah v. Gates*;[114] *Boumediene v. Bush*;[115] *Al-Marri v. Pucciarelli*;[116] *Munaf v. Geren*;[117] *Al Maqaleh v. Gates*;[118] and *Al-Bihani v. Obama*.[119]

The majority opinion in *Korematsu* is cited just once in the merits briefs of any of these cases, when the *petitioner's* reply brief in *Al Odah v. United States*[120] (the companion case of *Rasul*) unselfconsciously cites the opinion as an example of the Court's *rejection* of claims of unreviewable executive authority.[121] Jose Padilla's merits brief before the Supreme Court avoids reference to the binding precedent in *Korematsu* but refers to the district court decision on Fred Korematsu's writ of *coram nobis* as an example of a case in which "the Government has misled the courts."[122] No publicly available OLC opinion since September 11 has made any mention of *Korematsu*. Those opinions include the memo signed by Jay Bybee asserting that any reading of the statutory prohibition on torture that interfered with the President's conduct of a military campaign would be unconstitutional.[123] Even though that memorandum argues that "it is for the President alone to decide what methods to use to best prevail

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[112] 542 U.S. 507 (2004) (upholding executive authority to detain indefinitely a U.S. citizen who was accused of being an enemy combatant and held in the United States after capture on foreign soil, but requiring that he be afforded due process).

[113] 548 U.S. 557 (2006) (invalidating the Bush Administration's system of military tribunals as in violation of the Uniform Code of Military Justice and the Geneva Conventions).

[114] 501 F.3d 178 (D.C. Cir. 2007) (entering a protective order governing court and detainee lawyer access to evidence in reviewing enemy combatant determinations of the Combatant Status Review Tribunal).

[115] 553 U.S. 723 (2008) (holding that under the Constitution the privilege of the writ of habeas corpus extends to foreign nationals held at Guantánamo Bay and that the administrative tribunals in place did not serve as an adequate substitute).

[116] 534 F.3d 213 (4th Cir. 2008) (en banc) (per curiam) (upholding executive authority to detain as an enemy combatant a lawful resident alien arrested at his home in the United States but finding that petitioner had not been provided with a sufficient opportunity to contest his designation).

[117] 553 U.S. 674 (2008) (holding that the habeas statute extends to U.S. citizens held abroad by the U.S. military operating under a U.S. chain of command but that the statute does not authorize an injunction against release to foreign authorities for prosecution under foreign law).

[118] 605 F.3d 84 (D.C. Cir. 2010) (holding that the privilege of the writ of habeas corpus does not extend to foreign nationals held by U.S. forces at Bagram Airfield in Afghanistan).

[119] 590 F.3d 866 (D.C. Cir. 2010) (upholding the extension of authority to detain Al Qaeda- or Taliban-affiliated individuals not accused of direct hostilities against U.S. forces and holding that international law does not constrain that authority).

[120] 542 U.S. 466 (2004).

[121] *See* Reply Brief for Petitioners at 11 n.27, *Al Odah*, 542 U.S. 466 (No. 03-343), 2004 WL 768555, at *12.

[122] Brief for Respondent at 44 n.33, Rumsfeld v. Padilla, 542 U.S. 426 (2004) (No. 03-1027), 2004 WL 812830, at *44.

[123] Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President 2 (Aug. 1, 2002).

against the enemy,"[124] it does not cite *Korematsu*, which is perhaps the most direct precedent for that proposition.

Of all the appellate opinions issued in any of these cases, the only published opinions to refer to *Korematsu* single it out as a case to be avoided. Thus, in dissenting from the denial of rehearing en banc in *Hamdi*, Judge Motz warned of "the lesson of *Korematsu*," a case whose holding "history has long since rejected."[125] In reply, Judge Wilkinson asserted that "[t]here is not the slightest resemblance of a foreign battlefield detention to the roundly and properly discredited mass arrest and detention of Japanese-Americans in California in *Korematsu*."[126] It is fair to say that *Korematsu* is almost uniformly recognized by serious lawyers and judges to be bad precedent, indeed so bad that its use by one's opponent is likely to prompt a vociferous and public denial.

Before we start to understand why and how *Dred Scott*, *Plessy*, *Lochner*, and *Korematsu* have come to constitute the anticanon, it is worth noting that the anticanon need not be limited to court cases. Historical statutes that have been disavowed might, for example, qualify. In *New York Times v. Sullivan*,[127] in which the Court erected constitutional barriers to libel liability, one of the most significant "precedents" discussed was the Sedition Act of 1798,[128] which Justice Brennan used to affiliate the majority's position with James Madison's arguments in the Virginia Resolutions. "Although the Sedition Act was never tested in this Court," Brennan wrote, "the attack upon its validity has carried the day in the court of history."[129] We can also imagine political documents other than statutes becoming notorious in the style of an anticanonical judicial decision. The Southern Manifesto, a resolution signed by nearly the entire Southern congressional delegation and pledging resistance to the Court's decision in *Brown*,[130] could in theory play a role not unlike the role played by *Plessy*: as a foil to the principles assumed to be universally accepted in *Brown I*,[131] *Brown II*,[132] or *Cooper v. Aaron*.[133] Courts have not used the South-

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[124] *Id.* at 38.
[125] 337 F.3d 335, 375 (4th Cir. 2003) (Motz, J., dissenting from denial of rehearing en banc).
[126] *Id.* at 344 (Wilkinson, J., concurring in denial of rehearing en banc).
[127] 376 U.S. 254 (1964).
[128] 1 Stat. 596 (expired 1801).
[129] *Sullivan*, 376 U.S. at 276; *see also id.* at 274–76.
[130] 102 CONG. REC. 4459–60 (1956).
[131] 347 U.S. 483 (1954).
[132] 349 U.S. 294 (1955).
[133] 358 U.S. 1 (1958).

ern Manifesto in this way, however, as only two published federal court decisions have referred to it.[134]

A perhaps more common use of something like an antiprecedent is what Kim Lane Scheppele calls "aversive" reference to the practices of foreign courts or institutions in the course of constitutional drafting and interpretation.[135] Reference to the ideas or values of Nazi Germany or apartheid South Africa are ready ways to signal disgust with an opponent's position and to put her on the defensive. Recall, for example, Justice Stevens's identification, in *Fullilove v. Klutznick*,[136] of government racial assignment with "precedents such as the First Regulation to the Reichs Citizenship Law of November 14, 1935."[137] David Fontana has catalogued numerous instances in which the Supreme Court has deployed what he calls "negative comparativism," often used to associate challenged domestic practices with apartheid, or to invoke totalitarian regimes in cases dealing with rights of free speech or free expression.[138]

Reference to disavowed statutes or to offensive foreign practices has much in common with use of anticanonical cases, but is less interesting than citation of the anticanon. Argument by negative example is a common feature of our political and social discourse, and we should not expect judges to disclaim the rhetorical resources used to valuable effect by others. But citation to the anticanon can be problematic in a legal system wed to stare decisis. Judges in the United States, including judges in constitutional cases, are embedded within a common law tradition of incremental policymaking through the slow accretion of a body of principles, standards, and rules that we collectively call "the law."[139] That process demands more of resort to precedent than do other discourses. Common law decisionmaking derives its sustenance from the artful and appropriate use of analogy, and we assume that judges in such systems cite cases for reasons internal to the analysis contained therein. If precedent is used in some other

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[134] *See* Condon v. Reno, 913 F. Supp. 946, 967 (D.S.C. 1995); Henderson v. Bd. of Supervisors of Richmond Cnty., 1988 U.S. Dist. LEXIS 16729, at *31 (E.D. Va. July 27, 1988).

[135] Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models*, 1 INT'L J. CONST. L. 296, 300–01 (2003).

[136] 448 U.S. 448 (1980).

[137] *Id.* at 534 n.5 (Stevens, J., dissenting).

[138] David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539, 551 n.59 (2001).

[139] *See generally* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996) (arguing that a common law approach provides the best explanation and justification for American constitutional practice).

way, we should want desperately to have a sense of its prevalence, its potential, and its limitations.[140]

II. DEFENDING THE ANTICANON

The claims a legal culture makes about past cases tend to be historicist in nature. The meaning we ascribe to legal precedents is determined not at the time of decision, but over time by subsequent normative communities.[141] This is as true of the anticanon as it is of the canon and indeed of cases outside the canon. And yet it is common practice to describe anticanonical cases not in terms of cultural evolution but in terms of analytic errors that should have been obvious at the time. As Balkin notes, we like to believe that such cases were wrong the day they were decided.[142] In criticizing Elena Kagan's defense of precedent at her confirmation hearing, Senator Tom Coburn said that if precedent could trump original intent, "then we would have never had [*Brown*], and [*Plessy*] would still be the law."[143] John Roberts suggested something similar at his confirmation hearing in 2005, arguing that *Brown* "is more consistent with the 14th Amendment and the original understanding of the 14th Amendment than [*Plessy*]."[144]

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[140] This discussion raises the question of whether other constitutional systems have their own "anticanons." That question exceeds this Article's scope, but two possible examples come to mind. The Supreme Court of Canada and Canadian commentators sometimes frame debates over constitutional interpretation through a dichotomy between the "living tree" approach symbolized by the *"Persons" Case*, Edwards v. Att'y Gen. of Can., [1930] A.C. 124 (P.C.) (appeal taken from Can.), and the "frozen concepts" approach associated with, for example, the *Labour Conventions Case*, Att'y Gen. of Can. v. Att'y Gen. of Ont., [1937] A.C. 326 (P.C.) (appeal taken from Can.). *See, e.g.*, *In re* Section 53 of the Supreme Court Act, R.S.C. 1985, c. S-26, [2004] 3 S.C.R. 698 para. 20–26 (Can.). The Labour Conventions Case is not, however, used as a negative example in Canadian discourse to nearly the same degree as a case like *Lochner* or *Dred Scott* is used in the United States. In fact, as Sujit Choudhry has documented, the *Lochner* decision itself performs similar work within Canada — and within several other foreign constitutional discourses — as it does in the United States. *See* Sujit Choudhry, *The* Lochner *Era and Comparative Constitutionalism*, 2 INT'L J. CONST. L. 1, 3–4 (2004). A second example is India. Pratap Bhanu Mehta has said of *Jabalpur v. Shukla*, A.I.R. 1976 S.C. 1207 (India), in which the Supreme Court of India upheld Prime Minister Indira Gandhi's state of emergency against a constitutional challenge, that it is "now unanimously regarded as one of the worst [decisions] in Indian judicial history." Pratap Bhanu Mehta, *The Rise of Judicial Sovereignty*, 18 J. DEMOCRACY 70, 73 (2007).

[141] *See* Balkin, *supra* note 16, at 679.

[142] *See supra* note 41.

[143] Julie Percha, *Sen. Coburn: Kagan 'Ignorant' of Constitutional Principles; 'I Wouldn't Rule Out a Filibuster,'* THE NOTE, ABC NEWS (June 30, 2010, 2:12 PM), http://blogs.abcnews.com/thenote/2010/06/sen-coburn-kagan-ignorant-of-constitutional-principles-i-wouldnt-rule-out-a-filibuster.html.

[144] *Roberts Hearing*, *supra* note 66, at 204; *cf. The Nomination of Judge Sandra Day O'Connor of Arizona to Serve as an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 97th Cong. 66, 84 (1981) (stating that the *Brown* Court had determined that *Plessy* violated the original intent of the Equal Protection Clause).

They are not alone. Commentators frequently accuse the Courts that decided *Dred Scott*, *Plessy*, *Lochner*, and *Korematsu* of defective reasoning, often in harsh terms.[145] This practice is more common among politicians and judges than among academics, who often tend toward dissent, but as this Part will show, legal scholars are hardly immune from associating anticanonicity with their preferred analytic defect. The burden for these commentators is not simply to show that the deciding Courts committed analytic errors, but also to show that those errors were so monumental, indeed historic, that the cases must be burned in effigy for all to bear witness. This Part shows that they cannot meet this burden. Section A argues that none of the four anticanon cases is unusually wrong, either by contemporaneous legal standards or by the conventional forms of legal argument that remain popular today. Moreover, although all of the anticanonical cases can be accused of moral failings of varying magnitudes, section B shows that those failings are inadequate to justify their modern-day treatment.

A. The Anticanon's Errors

There are errors and there are damned errors. We can imagine, in principle, how to construct each category as it relates to judicial review. Ordinary errors are good faith mistakes of judgment, with

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[145] *See, e.g.*, *Thomas Hearing*, *supra* note 70, at 464 ("I think [Chief Justice Taney in *Dred Scott*] should have . . . read the Constitution and attempted to discern what the Founders meant in drafting the Constitution."); ROBERT J. HARRIS, THE QUEST FOR EQUALITY: THE CONSTITUTION, CONGRESS, AND THE SUPREME COURT 101 (1960) (calling *Plessy* "a compound of bad logic, bad history, bad sociology, and bad constitutional law"); CHARLES A. LOFGREN, THE *PLESSY* CASE: A LEGAL-HISTORICAL INTERPRETATION 4 (1987) (noting one scholar's characterization of *Plessy* as "one of the most irrational opinions ever announced" (quoting Ralph T. Jans, Negro Civil Rights and the Supreme Court, 1865–1949, at 199 (1951) (unpublished Ph.D. dissertation, University of Chicago) (on file with the University of Chicago)) (internal quotation marks omitted)); MICHAEL STOKES PAULSEN ET AL., THE CONSTITUTION OF THE UNITED STATES 869–70 (2010) (calling the *Dred Scott* Court's citizenship holding "incredible" and "monstrous," calling its Fifth Amendment holding a "wild claim" and "utterly implausibl[e] as a matter of the actual meaning of the text of the Constitution," and calling the case generally an "atrocious misinterpretation of the Constitution"); Akhil Reed Amar, *The Supreme Court 1999 Term — Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 62 (2000) (calling Chief Justice Taney's view that free blacks could not be citizens "an outlandish reading of the [Constitution]"); Robert H. Bork, *The Judge's Role in Law and Culture*, 1 AVE MARIA L. REV. 19, 21 (2003) (calling *Lochner* "an abomination" that was not "based on a reasonable interpretation of the Constitution"); Steven G. Calabresi, *The Tradition of the Written Constitution: A Comment on Professor Lessig's Theory of Translation*, 65 FORDHAM L. REV. 1435, 1437 (1997) ("I think the general consensus of our tradition has been that in cases like *Dred Scott* and *Plessy* the Supreme Court gave too much weight to the background social practices of the time and not enough weight to text, to founding commitments, and to things that have been constitutionalized."); *see also* Paul Finkelman, Scott v. Sandford*: The Court's Most Dreadful Case and How It Changed History*, 82 CHI.-KENT L. REV. 3, 6–7 (2007) (discussing the ways in which diverse constituencies have used *Dred Scott* as "a symbol of mistakes made by the Court").

manageable consequences, the commission of which forms a central attribute of the human condition. A judge who respects the conventional tools of legal analysis and remains in role but simply arrives at the legally incorrect result deserves, on sober reflection, our sympathy more than our anger. He is not, after all, the judge who recklessly or intentionally disregards an important input into the process of judicial decisionmaking, or harbors delusions of political grandeur, or is unforgivably narrow-minded or incompetent. Conceptually, it seems as if the errors committed by this second type, often identifiable at the time of decision, should be the ones for which we reserve our deepest and most consistent condemnation. This section seeks to demonstrate that, with respect to *Dred Scott*, *Plessy*, *Lochner*, and *Korematsu*, this is not so. The degree to which we collectively renounce these decisions is not nearly in proportion to the outrageousness of their errors. Part of the reason for that is fundamental: the conceptual dichotomy described above, between judicial errors and damned judicial errors, is contingent and unstable in practice. What is surprising is that it is no less so with respect to the few cases that we all agree are wrong.

1. Dred Scott v. Sandford. — The *Dred Scott* case involved a slave, Dred Scott, who sued his nominal master, John Sanford, for his freedom.[146] Scott claimed that because a former master had taken him first to the free state of Illinois and then to Fort Snelling in the Wisconsin Territory, where slavery was prohibited by federal statute, he could not legally be re-enslaved in the slave state of Missouri, where he resided.[147] It was vital to the case and to its controversial outcome that Sanford was a resident of New York, for the sole jurisdictional hook claimed by Scott was based on the diversity of citizenship between the litigants.[148] In a convoluted opinion, Chief Justice Taney ruled that the Court did not have jurisdiction to hear the case because neither Scott nor any black American could be a citizen of the United States within the meaning of Article III's grant of diversity jurisdiction.[149] The Court also ruled, in a holding sometimes described as dicta and at other times called in-the-alternative, that Scott's argument failed on the merits: Congress could not constitutionally forbid slavery in U.S. territories, as doing so would deprive traveling slaveholders of their property without due process of law.[150]

The decision is, to say the least, troubling. Taney reached his conclusion that blacks could not be United States citizens through flawed

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146 Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 400 (1857). Sanford's name is misspelled in the official court caption. *See* DON E. FEHRENBACHER, THE DRED SCOTT CASE ix (1978).

147 *Dred Scott*, 60 U.S. (19 How.) at 431.

148 *Id.* at 400.

149 *Id.* at 406.

150 *Id.* at 452.

analysis. His major premise was that blacks could be citizens now only if they could have been citizens at the time of the Constitution's drafting.[151] His minor premise was that they could not have been citizens at the Founding for any number of reasons, chief among them that the Privileges and Immunities Clause of Article IV[152] would entail their equal treatment with whites, which was a nonstarter.[153] Both of these premises are routinely challenged in the literature, and with good reason. Taney's self-conscious embrace of originalism even when it leads to moral depravity is often cited as Exhibit A in the case against originalism as a viable method of constitutional interpretation.[154] His originalism, moreover, was bad originalism.[155] The notion that even free blacks could not be citizens at the Founding is embarrassed by the fact that many free blacks were in fact citizens at that time.[156] And Taney's privileges-and-immunities argument was a non sequitur: the fact that, under Article IV, citizens in one state are entitled to the privileges and immunities available to citizens in another state does not mean that they may not be subjected to racial discrimination.[157] These errors raise a suspicion that Taney's aggressive positivism was but a façade for his abject racism.[158]

That is not all. Taney's further holding that Congress could not ban slavery in the territories adds injury to insult. For one thing, it was premised on the notion that slaves are not people but property, and as such have no Fifth Amendment rights to liberty competitive with their masters' Fifth Amendment rights to own them. For another, those who reject the idea of "substantive" due process will wonder what *process* was found wanting in the decision of Congress to ban slavery in the territories.[159] Most importantly, perhaps, the *Dred Scott* decision rendered unconstitutional the political positions both of the nascent Republican Party and of Stephen Douglas and other northern Democrats on the question of slavery in the territories. The Republicans maintained that the territories should remain free, and southern Democrats insisted that they should not. Douglas and other northern

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151 *Id.* at 404.

152 U.S. CONST. art. IV, § 2.

153 *Dred Scott*, 60 U.S. (19 How.) at 405–06.

154 *See* Christopher L. Eisgruber, *The Story of Dred Scott: Originalism's Forgotten Past*, *in* CONSTITUTIONAL LAW STORIES 151, 165–69 (Michael C. Dorf ed., 2004); Paul Finkelman, *Teaching Slavery in American Constitutional Law*, 34 AKRON L. REV. 261, 270 (2000).

155 *See* Balkin & Levinson, Dred Scott, *supra* note 46, at 70–71.

156 *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 252 (2005).

157 *See* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888, at 265 (1985).

158 *See* BEN W. PALMER, MARSHALL AND TANEY: STATESMEN OF THE LAW 218–20 (1939) (noting and ultimately rejecting the view that Taney's opinions reflected his underlying racism).

159 *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 31 (1990).

Democrats adopted the compromise position that residents of the territories should be able to determine for themselves whether to permit slavery.[160] Taney's decision made only the pro-slavery position constitutionally viable, causing a deep rift in the Democratic Party and preventing a compromise that could have averted the bloodiest war in American history. And as if that were not enough, he did so in dicta!

Can such errata be defended? Mark Graber has tried, somewhat, to do so (post-tenure, I hasten to add). Graber argues that because the original Constitution rested on a set of political accommodations for slavery — and therefore abided "constitutional evil" — the *Dred Scott* majority was armed with a set of interpretive resources that made its claims just as plausible as the dissent's.[161] He notes that the argument typically criticized by modern commentators as the most odious — that black Americans could not be U.S. citizens — "reflected beliefs held by the overwhelming majority of antebellum jurists in both the North and the South"[162] and was consistent with the views of large segments of the American public.[163] Taney's historical case against black citizenship was flawed but, on Graber's view, the case would have come out no differently if it were flawless.[164] Graber may or may not be persuasive on these points, some of which I explore further below, but remember the burden we are concerned with — not whether *Dred Scott* was wrong but whether it deserves to serve as a prime example of how to be wrong.

I'm not so sure. In Taney's defense — not words one reads every day — some of *Dred Scott*'s critics miss the big picture. Let us bracket for the moment Taney's actual opinion and reconsider the case with fresh eyes. First, it is easy to defend the result in the case — a loss for Scott — under then-existing precedents and legal norms.[165] In *Strader v. Graham*,[166] decided six years before *Dred Scott*, Taney had written (in dicta) that the laws of the domiciliary state — not those of a state or territory of prior residence or inhabitation — conclusively determined whether someone was slave or free.[167] While Missouri precedents were arguably on Scott's side,[168] the Missouri Supreme Court held otherwise in Scott's state court suit for emancipation.[169] If the

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160 *See* FEHRENBACHER, *supra* note 146, at 165–66.

161 MARK A. GRABER, *DRED SCOTT* AND THE PROBLEM OF CONSTITUTIONAL EVIL 4 (2006).

162 *Id.* at 28–29.

163 *Id.* at 28–33.

164 *See id.* at 46.

165 *See* Magliocca, *supra* note 43, at 576.

166 51 U.S. (10 How.) 82 (1851).

167 *Id.* at 93–94.

168 *See* FEHRENBACHER, *supra* note 146, at 262.

169 Scott v. Emerson, 15 Mo. 576 (1852).

startlingly pro-slavery majority opinion in *Strader* was right, then Scott could not win on the merits at the Supreme Court and, moreover, was not a citizen of the state of Missouri for jurisdictional purposes.[170] All Taney had to do was affirm *Strader*'s dicta as a holding and the case could have been dismissed without any discussion of black inferiority or the constitutionality *vel non* of prohibiting slavery in the territories.[171]

More broadly, the basic question in *Dred Scott* was whether free blacks were entitled to the constitutionally conferred benefits of state citizenship. The Court had never before been so directly called upon to define the central features of citizenship, and it is difficult to dispute the conception Taney settled on: citizens have rights. In 1857, as in 1787, it offended no constitutional prohibition for states to protect the right to keep blacks as chattel slaves, and, a fortiori, for a state to deny, even to free blacks, the right to marry, to sue, to enter into contracts, or to own property, much less to deny them political rights such as voting and jury service. Blacks were subjected to all manner of discriminatory treatment that no government would dare visit upon its white population. As Taney infamously wrote, blacks were "regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect."[172]

Let us also keep in mind a doctrinal point to which I return later in this Part. Under the Court's holding in *Prigg v. Pennsylvania*, which remained good law at the time of *Dred Scott*, a free state was constitutionally *forbidden* from providing a free black with due process of law if that person were kidnapped by a slave catcher.[173] To hold in the face of such precedent that the same Constitution recognizes the citizenship of free blacks feels like the rankest sophistry.[174] No nation worth its salt could abide the treatment of its citizens in this way. Either the treatment of blacks or their designation as citizens had to go. Only the designation was before the Court, and the war came.

Dred Scott's other "holding" — that prohibiting slavery in federal territories offended the due process clause of the Fifth Amendment — is also flawed, but not for the reasons often given. First, it was not at all clear at the time of *Dred Scott* that the Constitution applied to the

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170 *See* FEHRENBACHER, *supra* note 146, at 278–80.

171 Justice Nelson's initial draft decided the case on approximately those grounds, but, for reasons that are a matter of historical dispute, the majority scrapped that draft and decided to reach broader issues. *Id.* at 307–09.

172 *Dred Scott*, 60 U.S. (19 How.) at 407; *see* Eisgruber, *supra* note 154, at 168.

173 Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 613–14, 625–26 (1842).

174 One might object that *Prigg* is also profoundly wrong, but if this is the objection, then it would argue for placing *Prigg* firmly in the anticanon. As we have seen, it is not.

actions of Congress in federal territories.[175] Second, we do not ordinarily perceive substantive due process difficulties when regulations in one state reduce the value of chattels transported across state lines.[176] If one state permits the carrying of marijuana and another prohibits it, it does not violate the Fourteenth Amendment Due Process Clause for the regulating state to confiscate a visitor's hash, much less simply to define it as contraband. Perhaps most significantly, the argument that Congress could not prohibit slavery in the territories not only rendered the Missouri Compromise not a compromise at all, but also would have invalidated the Northwest Ordinance, which was passed by the same Continental Congress that authorized the Philadelphia Convention, and which was unanimously reaffirmed by the First Congress. The First Congress not only comprised many delegates to the federal and state constitutional conventions, but it was also the same Congress that referred the Bill of Rights, whose Fifth Amendment Taney claimed made the Northwest Ordinance unconstitutional. This was a curious originalism indeed, one that prompted Abraham Lincoln in 1858 to call Taney's misdirection "an astonisher in legal history" and "a new wonder of the world."[177]

These points do not, however, form the usual case against *Dred Scott*'s substantive due process holding. It is not uncommon, particularly in popular discourse, to see assertions that *Dred Scott*'s chief failing is its assumption that the Constitution countenanced the treatment of blacks as personal property.[178] That assumption, though, was unas-

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175 *See* Magliocca, *supra* note 43, at 582.

176 *See Dred Scott*, 60 U.S. (19 How.) at 625–26 (Curtis, J., dissenting).

177 Abraham Lincoln, *Lincoln at Chicago, July 10, 1858*, *in* THE COMPLETE LINCOLN-DOUGLAS DEBATES OF 1858, at 26, 37 (Paul M. Angle ed., 1958). Taney argued in *Dred Scott* that the Northwest Ordinance followed from Congress's Article IV, § 3 power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States," and that this language did not apply to the later-acquired territory at issue in the case. *Dred Scott*, 60 U.S. (19 How.) at 432. Even if we accept this contention, it is barely relevant — if at all — to the argument that the Territories Clause would not have insulated Congress from a challenge to the Northwest Ordinance based on independent limitations imposed by the Due Process Clause. *Cf.* Matthew J. Hegreness, Note, *An Organic Law Theory of the Fourteenth Amendment: The Northwest Ordinance as the Source of Rights, Privileges, and Immunities*, 120 YALE L.J. 1820, 1871 (2011) ("Despite Taney's insistence that the free-soil principles violated due process of law, the Ordinance is a testament to the consistency of the prohibition of slavery with due process of law in America's organic law.").

178 *See, e.g.*, Adam Liptak, *Path to Court: Speak Capably but Say Little*, N.Y. TIMES, July 12, 2009, at A1; *Glenn Beck* (Fox News television broadcast Apr. 30, 2010) (interview with David Barton) (rush, unofficial transcript), *available at* http://www.foxnews.com/story/0,2933,591966,00.html; *see also* LAURENCE H. TRIBE, GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY 98 (1985) (writing that *Dred Scott* "sanctified the status of blacks as property and made the Civil War all but inevitable").

sailable.[179] A slightly more nuanced criticism faults Taney for resorting to substantive due process at all. Robert Bork writes: "[O]nce it is conceded that a judge may give the due process clause substantive content, *Dred Scott*, *Lochner*, and *Roe* are equally valid examples of constitutional law."[180] Here is not the place to rehearse the arguments for and against substantive due process, but suffice to say that any federal constitutional claim to freedom that Scott had also would have been grounded in substantive due process. Had Taney adopted the Republican argument that the Fifth Amendment actually *forbids* slavery in federal territories — likely a correct claim today[181] — surely *Dred Scott* would not be regarded as anticanonical, or even wrong.[182]

There is a broader point that extends beyond doctrinal minutiae. *Dred Scott* does not gnaw at us because it misused syllogism or invented constitutional rights; we hate it because it abided constitutional evil.[183] The conclusions Taney reached were morally insufferable, and so should have counted as dispositive evidence that his position was incorrect. But if this is what makes *Dred Scott* anticanonical, then there is incongruity in the conservative critique of the Warren Court, many of whose members envisioned their role precisely as we wish Taney had envisioned his.[184]

In his time, Taney could not easily have held other than he did. His commentary on the status of slavery in the territories, though unnecessary to his holding, was at the invitation of prominent members of Congress, President Buchanan, and even Abraham Lincoln.[185] The

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[179] Which is not to say that it was not assailed. The 1856 and 1860 Republican Party platforms, for example, both argued that *allowing* slavery in the federal territories violated the Due Process Clause of the Fifth Amendment. FEHRENBACHER, *supra* note 146, at 141.

[180] BORK, *supra* note 159, at 32; *accord* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 998 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

[181] The structure of the claim would be that neither federal courts nor federal agents could be used to enforce a master-slave relationship. Doing so would violate both the Fifth Amendment and, after 1865, the Thirteenth. *Cf.* Shelley v. Kraemer, 334 U.S. 1 (1948) (prohibiting state court enforcement of a racially restrictive covenant).

[182] The claim would have been in tension with the original understanding of the Fifth Amendment. *See generally* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408 (2010). *But see* Hegreness, *supra* note 177, at 1871.

[183] *See* GRABER, *supra* note 161, at 1–10; Balkin, *supra* note 62, at 1704–20; Levinson, *supra* note 46, at 1151–52.

[184] *Cf.* CARL BRENT SWISHER, ROGER B. TANEY 505 (1935) ("It is inconsistent to denounce Taney for deciding questions broadly in the hope of benefiting the country, while praising others, Marshall for instance, for doing the same thing.").

[185] For extended discussion of the pleadings of members of Congress, see Wallace Mendelson, *Dred Scott's Case — Reconsidered*, 38 MINN. L. REV. 16, 18–24 (1954). Buchanan said in his 1857 inaugural address that the issue of slavery in the territories "is a judicial question, which legitimately belongs to the Supreme Court of the United States before whom it is now pending, and will, it is understood, be speedily and finally settled." *Id.* at 24. On Lincoln, see Abraham Lincoln, Speech at Galena, Ill. (July 26, 1856), *reprinted in* 2 COLLECTED WORKS OF ABRAHAM LINCOLN 355 (Roy P. Basler ed., 1953) ("The Supreme Court of the United States is the tribunal

more obvious route to war would have been a holding that Scott was made free based on his residence at Fort Snelling or, better still, in Illinois. Had Taney instead remained silent on the Missouri Compromise, the standard account of *Dred Scott* tells us that he might have enabled Stephen Douglas to win the Presidency in 1860 and might therefore have put off the War.[186] If this is the fate Taney denied us, then we should celebrate the decision. If *Dred Scott*'s legacy is existential military conflict, then it is also emancipation for millions of enslaved Americans, the new birth of freedom that the Fourteenth Amendment promised, and confrontation with the moral inadequacy of our original commitments.[187] *Dred Scott* told us we had to take or leave a Constitution that enshrined white supremacy. We left it, and we are better for it.[188]

2. Plessy v. Ferguson. — In 1883, the Supreme Court upheld an Alabama statute that punished adultery more severely when committed between a white person and a black person than when committed between two people of the same race.[189] Without dissent, the Court held that the statute did not offend the Equal Protection Clause because it did not discriminate between races: "The punishment of each offending person, whether white or black, is the same."[190] That decision, *Pace v. Alabama*, was good law in 1896, and it was not an unreasonable interpretation of the text of the Equal Protection Clause to assume its indifference to a law that, on its face, treated members of all races analogously. That, too, was the structure of the 1890 Louisiana Separate Car Act[191] challenged in *Plessy*.[192] It required railway coaches operating in the state to provide "separate" accommodations for white and "colored" passengers, but it also required that those accommodations be "equal."[193]

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to decide [the extension of slavery to the territories], and [Republicans] will submit to its decisions.").

186 *See* FEHRENBACHER, *supra* note 146, at 455 (calling the standard account "one of the most familiar stories in American political history"); PALMER, *supra* note 158, at 223; Louise Weinberg, *Overcoming Dred: A Counterfactual Analysis*, 24 CONST. COMMENT. 733, 735–40 (2007). *But see* Mark A. Graber, *Desperately Ducking Slavery:* Dred Scott *and Contemporary Constitutional Theory*, 14 CONST. COMMENT. 271, 285–93 (1997) (arguing that the decision more likely strengthened than weakened the Democratic Party).

187 *See* Eisgruber, *supra* note 154, at 181.

188 *See* 1 ACKERMAN, *supra* note 15, at 64 ("Perhaps Americans really did have to fight a Civil War before blacks could become citizens of the United States?").

189 Pace v. Alabama, 106 U.S. 583 (1883).

190 *Id.* at 585.

191 1890 La. Acts 152.

192 *See* Plessy v. Ferguson, 163 U.S. 537, 540 (1896).

193 1890 La. Acts 153. By the time of Plessy's challenge to the law, it had been interpreted as applying only to intrastate railway cars. State *ex rel.* Abbott v. Hicks, 11 So. 74 (La. 1892).

So why is *Plessy* wrong? And why have most lawyers never heard of *Pace*?[194] There are several views on the first question, and they stand in some tension. As noted in Part I, Chief Justice Roberts has offered that *Plessy* was inconsistent with the original understanding of the Fourteenth Amendment.[195] This is an unorthodox, though not unheard of,[196] view of the Fourteenth Amendment. The Congress that debated the Fourteenth Amendment did so in front of segregated galleries that remained so into the 1960s.[197] The debate over whether that same Congress understood the Equal Protection Clause to mandate public school integration continues, though most scholars believe it did not.[198] The Reconstruction Republicans were concerned above all with eliminating discrimination in "civil" rights such as the rights to contract, to sue, and to own and dispose of property, not with what many would have then called "social" rights such as the right to associate freely, even in public or quasi-public institutions.[199]

A second, more common critique of *Plessy* echoes the language of Justice Harlan's canonical dissent: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."[200] On this view, the overriding command of the Equal Protection Clause is that government is not to recognize racial distinctions and distribute social benefits and burdens on that basis. As Justice Scalia has written, "In the eyes of government, we are just one race here. It is American."[201] A noble goal, perhaps, but colorblindness is an even less obvious imperative of the Fourteenth Amendment than is racial integration. Certainly it would be difficult for the federal government to ensure equality for the freed slaves and for their descendants if it could not make itself aware of their race.[202] And given that colorblindness is foreign

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194 For scholars recognizing the doctrinal significance of *Pace*, see DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888–1986, at 40 (1990); Balkin, *supra* note 16, at 707.

195 *See supra* p. 404.

196 *See, e.g.*, Michael W. McConnell, *Originalism and the Segregation Decisions*, 81 VA. L. REV. 947, 980–82, 1120–31 (1995).

197 *See* Email from Laura O'Hara, Historical Publ'ns Specialist, Office of History and Pres., U.S. House of Representatives, to Melissa Lerner (Oct. 13, 2010, 17:36 EDT) (on file with the Harvard Law School Library); Email from Katherine Scott, Assistant Historian, U.S. Senate Historical Office, to Melissa Lerner (Oct. 12, 2010, 09:38 EDT) (on file with the Harvard Law School Library).

198 *Compare* Klarman, *supra* note 10, at 1882–84, 1903–14, *with* McConnell, *supra* note 196, at 1131–40.

199 RICHARD A. PRIMUS, THE AMERICAN LANGUAGE OF RIGHTS 154–55 (1999).

200 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

201 Adarand Constructors v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment).

202 *See* Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 430–32 (1997). An originalist could, in principle, object that the Fourteenth Amendment does not bind the federal government, but I am personally unaware of any originalist (including Justice Scalia in *Adarand*) who claims

to both the text and the original understanding of the Fourteenth Amendment, not to mention its application in cases like *Pace*, it is hard to divine the source of this reading, apart from Justice Harlan's dissent itself.

Read in context — or even in paragraph — that dissent's invocation of colorblindness suggests a rather different principle. Justice Harlan's famous phrase has an infamous preamble:

> The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty.[203]

That the paean to white supremacy in *Plessy* comes in the dissent feels ironic, and it is frequently taught as such. But Justice Harlan's words can be read more charitably as supplying the necessary social meaning that is absent from the majority opinion. A law providing for separate public accommodations may be race neutral in a formal sense but emerges from a barely disguised effort to formalize and thereby perpetuate white dominance through Jim Crow legal institutions. Justice Harlan continues: "[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens."[204] The third common critique of *Plessy*, then, follows Justice Harlan's lead: the majority's error was willfully remaining blind to the social meaning of segregation, that blacks are and should remain a permanent underclass.

The criticism is fair. We want judges to take notice of obvious social facts, and the meaning of segregation could hardly have been more obvious. As Charles Black so memorably wrote of segregation in Austin, where he was raised, "I am sure it never occurred to anyone, white or colored, to question its meaning."[205] It was problematic enough for the *Plessy* Court to maintain that it lacked the competence to ascribe a white supremacist social meaning to segregation.[206] But the Court's absurd suggestion that blacks were inventing such a meaning[207] compounded the error manyfold. I am comfortable in my agreement with

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that the command of colorblindness applies, but only to state and local governments. *Cf.* Stephen A. Siegel, *The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477, 482 (1998) (making without endorsing the argument that "from an originalist perspective there are strong arguments that the national government may enact racially discriminatory laws and there are compelling arguments that it may enact affirmative action legislation").

[203] *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

[204] *Id.*

[205] Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424 (1960).

[206] *Plessy*, 163 U.S. at 551.

[207] *Id.*

Black that, on this point, "[t]he curves of callousness and stupidity intersect at their respective maxima."[208]

I am less comfortable that *Plessy* can fairly be called a model of bad legal reasoning. We have already seen that judicial precedent was firmly on the side of the majority. We have also noted the strong argument, accepted by many experts, that the decision is consistent with the original understanding of the Fourteenth Amendment.[209] There is plenty of evidence that the provision's drafters sought to end the common practice of barring blacks altogether from public accommodations, but little evidence that anyone of influence thought that its passage would require integration.[210] Segregation of rail cars in particular was a common feature of civil society in nineteenth-century America.[211] "[I]n the states of the former Confederacy, from the end of the war into the late 1880s and early 1890s," Charles Lofgren writes, "segregation or discrimination [in public conveyances] existed almost everywhere to an identifiable degree; and in perhaps half the states these practices flourished to the extent that their absence was the exception."[212] We should think it relevant, moreover, that segregated public accommodations were considered by many, including seven of the eight *Plessy* Justices, to be a feature of the *social* order. If we assume that we can distinguish between social rights and civil rights, then where should the Court have placed the right to sit next to whomever one pleases?

Of course, the division of rights in this way has fallen out of favor. It was never applied with rigorous exactitude and too often was used to justify the refusal to disturb discriminatory practices.[213] We might instead look to the touchstone of modern equal protection analysis: discriminatory legislative intent. A reasonable judge could infer odious intent in *Plessy*, but the Separate Car Act required equality on its face and conferred no discretion on train conductors.[214] A judge would not have been unreasonable in ascribing to the Louisiana legislature a concern for "the promotion of [passenger] comfort, and the

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[208] Black, *supra* note 205, at 422 n.8.

[209] *See* Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1247 (1993). *But see* Klarman, *supra* note 10, at 1882–83, 1882 n.7 (suggesting that neither *Brown* nor *Plessy* may have been consistent with the original understanding of the Fourteenth Amendment).

[210] Herbert Hovenkamp, *The Cultural Crises of the Fuller Court*, 104 YALE L.J. 2309, 2339–40 (1995) (reviewing OWEN M. FISS, TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910 (1993)).

[211] *See* Cheryl I. Harris, *The Story of* Plessy v. Ferguson*: The Death and Resurrection of Racial Formalism*, *in* CONSTITUTIONAL LAW STORIES, *supra* note 154, at 181, 194–96.

[212] LOFGREN, *supra* note 145, at 17.

[213] *See* JACK M. BALKIN, CONSTITUTIONAL REDEMPTION 144–54 (2011).

[214] Plessy v. Ferguson, 163 U.S. 537, 549 (1896).

preservation of the public peace and good order."[215] Maintenance of white supremacy might have simply been a happy accident.

It may be time, you are thinking, to invoke the sovereign prerogative of laughter.[216] We must remember, though, that to strike down a law based on hidden illicit motives would squarely confront a powerful tradition of refusing to look beyond the face of statutory text. In *Ex parte McCardle*,[217] in which the Court upheld a jurisdiction strip that was clearly designed to remove a specific case from the Supreme Court's docket, Chief Justice Chase wrote for a unanimous Court that "[w]e are not at liberty to inquire into the motives of the legislature."[218] A century later, Justice Black, in upholding the city of Jackson's decision to close rather than integrate all public swimming pools, wrote that "no case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it."[219] There has always been some play in the joints here. We must carefully distinguish, as Justice Black sought to do,[220] between subjective indicia of legislative motivation, which have long been deemed nondiscoverable, and objective indicia of motive that may appear on the face of a statute.[221] But that distinction is little help in an attack on *Plessy*, as the Separate Car Act required "equal" accommodations across race.

We might reasonably imagine an imperative for judges to look beyond the formalism of the Separate Car Act and to consider equality as a substantive guarantee, but that imperative, if it once existed, has been disavowed by the modern Court. One cannot establish an equal protection violation solely by demonstrating that a statute has the effect of entrenching racial inequality,[222] and a statute that formally recognizes race but does so in the spirit of *dismantling* a racial caste system is presumptively unconstitutional.[223] *Parents Involved in Community Schools v. Seattle School District No. 1*[224] is perhaps the

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[215] *Id.* at 550.

[216] *Cf.* Black, *supra* note 205, at 424.

[217] 74 U.S. (7 Wall.) 506 (1868).

[218] *Id.* at 514; *accord* Soon Hing v. Crowley, 113 U.S. 703, 710 (1885) ("[T]he rule is general with reference to the enactments of all legislative bodies that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferrible from their operation, considered with reference to the condition of the country and existing legislation.").

[219] Palmer v. Thompson, 403 U.S. 217, 224 (1971).

[220] *Id.* at 225.

[221] Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784, 1787–88 (2008).

[222] Washington v. Davis, 426 U.S. 229, 239–40 (1976).

[223] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226–27 (1995) (holding that strict scrutiny attends all governmental racial classifications).

[224] 127 S. Ct. 2738 (2007).

best example of the modern Court's racial formalism at work. There, the Court invalidated a voluntary public school desegregation plan on the grounds that it violated the command of *Brown* not to assign students to schools on the basis of race.[225] The notion that *Plessy* is anticanonical because it is too formalistic rings hollow these days.[226]

Plessy was consistent with Court precedent, with the most defensible original understanding of the Fourteenth Amendment, and with the text of the Equal Protection Clause. What about consequences? The Separate Car Act was part of a wave of Jim Crow statutes passed in Southern legislatures newly purged of significant black representation in the wake of the Compromise of 1877, in which the Republican Party agreed to relinquish military control of Southern states in exchange for Democratic support for Rutherford B. Hayes in the disputed presidential election. A contrary result in *Plessy* would have undermined that compromise. Would violence have followed? According to Eric Foner, before the compromise, thousands of Democrat Samuel Tilden's supporters proclaimed themselves ready to take up arms and march on Washington to ensure that he was seated in the White House.[227] We cannot say how history would have unfolded, but recall that invalidating a political compromise between the North and the South over volatile issues of race is precisely the error many attribute to the *Dred Scott* decision. *Plessy* might well have kept the peace.[228]

3. Lochner v. New York. — *Lochner v. New York* was once famously indefensible. Bruce Ackerman wrote in 1991 that, even more so than *Dred Scott*, judges "resist the very suggestion that *Lochner* might have been a legally plausible decision" when it was decided.[229] Matters are different today. *Lochner* revisionism has become something of a cottage industry as libertarians have become more prominent at think tanks, in politics, and in the legal academy. But *Lochner* remains firmly within the anticanon, and its defenders must always remain self-conscious about their iconoclasm. David Bernstein, for example, though a *Lochner* revisionist, has called the case "the touch-

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[225] *Id.* at 2767–68 (plurality opinion).

[226] On formalism, note that Justice Harlan wrote the unanimous opinion in *Cumming v. Richmond County Board of Education*, 175 U.S. 528 (1899), which held that it did not violate the Constitution for a county to tax black residents to pay for an all-white secondary school. Justice Harlan refused to consider whether maintenance of racially segregated public schools violated the Constitution because "[n]o such issue was made in the pleadings." *Id.* at 543.

[227] ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 576 (1988).

[228] *Cf.* Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 26–27 (1996) (situating *Plessy* within a set of "[b]ackground social, political, economic, and ideological forces" that would have made a contrary decision "virtually unthinkable").

[229] 1 ACKERMAN, *supra* note 15, at 64.

stone of judicial error."[230] David Strauss says, with only mild hyperbole, "You have to reject *Lochner* if you want to be in the mainstream of American constitutional law today."[231]

Which is why the title of the essay in which that statement appears, "Why Was *Lochner* Wrong?," is curious. One would think that by the time a case earns the scorn of every lawyer on the reservation, there would be some agreement as to why. The simplest answer, and likely the most accurate, is that it is inconceivable in the twenty-first century, as it was in the second half of the twentieth, to restore the *Lochner* era. Many a Tea Party activist would hesitate before putting every state's wage and hour and employment discrimination laws in jeopardy of judicial override. As Ackerman writes, "For the overwhelming majority of today's Americans, *Lochner*'s constitutional denunciation of a maximum-hours law, limiting bakers to a sixty (!) hour workweek, speaks in an alien voice."[232] The attack on *Lochner*, however, rarely rests solely, or even primarily, on alarm at the results, and so Strauss's title question remains interesting.

We can place the standard critique of *Lochner* into two separate categories. The first category is of a piece with Justice Holmes's dissenting opinion, in which he famously wrote that "[t]he 14th Amendment does not enact Mr. Herbert Spencer's Social Statics."[233] It is error, on this view, for judges to invalidate democratically enacted statutes based on their subjective moral or political preferences rather than on the values authoritatively codified in the Constitution.[234] Holmes's tradition is a minimalist one. For him, the question of the degree to which a maximum-hours law, versus an unrestrained labor market, contributes to the general welfare is exclusively within the legislature's competence.[235] Justice Harlan's less colorful *Lochner* dissent is, by degrees, less deferential to legislatures, but he nonetheless believed that the *Lochner* majority erred in dismissing as unreasonable views as to the dangers of bakers' work that were eminently reasonable.[236]

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230 Bernstein, *Legacy*, *supra* note 48, at 2.

231 Strauss, *supra* note 48, at 373.

232 1 ACKERMAN, *supra* note 15, at 64.

233 Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

234 *See Roberts Hearing*, *supra* note 66, at 162 (statement of John G. Roberts, Jr.) (criticizing the *Lochner* majority on the ground that "it's quite clear that they're not interpreting the law, they're making the law"); *Rehnquist and Powell Hearings*, *supra* note 72, at 159 (statement of William Rehnquist) ("[T]he series of freedom of contract cases, . . . by the objective judgment of historians, represented an intrusion of personal political philosophy into constitutional doctrine which the framers had never intended . . . .").

235 *Lochner*, 198 U.S. at 75–76 (Holmes, J., dissenting).

236 *Id.* at 69–73 (Harlan, J., dissenting).

The second category of *Lochner* critique has more of a positivist than a minimalist flavor. Here, the concern is not that the Court improperly second-guessed legislative judgments, but that it did so in the name of invented rights. As with the first category of criticism, there are different degrees of error we can assign. At one extreme, it is always improper for the Court to invalidate legislation on the basis of "unenumerated" rights such as liberty of contract.[237] A more moderate version of the criticism would suggest that rights need not be spelled out in the text of the Constitution but that the right to contract is either not as robust as the *Lochner* Court took it to be — a view that perhaps dovetails with Justice Harlan's — or is not a constitutional right at all. On this view, unenumerated rights that satisfy some other rule of recognition, such as the right to privacy, might be affirmed, but the right to contract fails to meet the test.[238] We might particularly have it in for a Court that exalts weak or nonexistent rights such as the right to contract but refuses to grant constitutional protection, for example, to speech by political dissidents.[239]

Someone wishing to defend the *Lochner* Court has any number of plausible strategies at her disposal. First, it is far from clear that the right to contract recognized in *Lochner* was either invented by the Justices of that era or inconsistent with the original understanding of the Fourteenth Amendment. The right had been recognized in prior cases, including unanimously in *Allgeyer v. Louisiana*.[240] More generally, Howard Gillman has argued forcefully that the right to contract grew out of Jackson-era hostility to class legislation,[241] and William Nelson and others have traced the doctrine to the free labor ideology of the antislavery movement.[242] It is no stretch to argue that among the rights the Fourteenth Amendment granted to former slaves was the right to bargain freely over the terms of their employment relationships. It may be that regulations of that sort lay within the traditional police powers of a state government, but as with any laws that threaten important rights, judges must carefully scrutinize the ends pursued and the means chosen. It is noteworthy, in this regard, that the *Loch-*

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[237] BORK, *supra* note 159, at 44.

[238] *See* Strauss, *supra* note 48, at 381.

[239] *See id.* at 376.

[240] 165 U.S. 578, 589–91 (1897).

[241] HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF *LOCHNER* ERA POLICE POWERS JURISPRUDENCE 10–12 (1993).

[242] *See, e.g.*, William E. Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513, 532 (1974). Others have also argued that liberty of contract has deep roots in natural rights ideology. *See* Bernstein, *Revisionism, Revised*, *supra* note 48, at 31–42; James W. Ely, Jr., *The Protection of Contractual Rights: A Tale of Two Constitutional Provisions*, 1 N.Y.U. J.L. & LIBERTY 370, 383–86 (2005).

ner-era Court upheld vastly more challenged state laws than it invalidated.[243]

Indeed, its historical provenance gives the right to contract at least as much to commend it — on originalist terms — as the right to privacy recognized in *Griswold v. Connecticut*,[244] a case that falls comfortably within the constitutional canon. *Griswold* makes clear that *Lochner*'s anticanonicity cannot be rooted in its reliance on substantive due process or in its recognition of rights that are absent from the constitutional text.[245] A case that is right about the existence of unenumerated rights but wrong about just what substantive due process guarantees seems a poor candidate for the anticanon. When the set of rights that fall under the umbrella of substantive due process remains deeply contested, it seems unfair to label a case the worst of the worst on the ground that it *over*protected civil rights. Owen Fiss makes a related point: "*Lochner* sought to say clearly and unequivocally that the legislative power was indeed limited, and to do so during a time when those limits were being called dramatically into question."[246] From a post-*Brown* perspective, this is not a judicial impulse we should wish to discourage.

Finally, consider the broader problem the *Lochner*-era Court tried to address: class legislation.[247] Class legislation is passed for the benefit of a particular interest group rather than for the people more generally. We have become accustomed to thinking of interest group rent-seeking as the fulcrum of representative democracy. But across the arc of American history, that is a relatively recent view, emerging as a pluralist conception of democracy became dominant in the last century. Nelson has argued that the Fourteenth Amendment's command that government treat classes of citizens equally was not limited to considerations of race, but proceeded from a general assumption that legislation should be for the benefit of all.[248] Thus, Justice Peckham's condemnation of a maximum-hours law that applied only to bakers was, according to Nelson, "entirely consistent with the basic doctrine of American constitutionalism extracted in the preceding three decades of adjudication from the Fourteenth Amendment: that a statute which,

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[243] Victoria Nourse has argued that judicial scrutiny was far more likely at the time of *Lochner* to favor state interests. Victoria F. Nourse, *A Tale of Two* Lochner*s: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CALIF. L. REV. 751, 752–53 (2009).

[244] 381 U.S. 479 (1965).

[245] Strauss, *supra* note 48, at 379–80.

[246] FISS, *supra* note 210, at 165.

[247] *See generally* GILLMAN, *supra* note 241.

[248] WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 77–80 (1988).

without reason, distinguishes between two groups of similarly situated citizens is unreasonable, arbitrary, and therefore void."[249]

Even under a pluralist conception, the law at issue in *Lochner* might raise our constitutional antennae. Commentators continue to treat footnote four of *United States v. Carolene Products*,[250] particularly as elaborated by John Hart Ely, as a lodestar for how the Court should adjudicate rights within a post-New Deal, pluralist constitutional order.[251] On this conception, the repudiation of *Lochner* entails deference to legislatures except where laws infringe upon rights enumerated within the Bill of Rights, impede the channels of political change, or curtail the rights of "discrete and insular minorities."[252] Ely argued that discreteness and insularity tend to exacerbate the social distance that marks a group for irrational prejudice in the course of political bargaining.[253] Whether or not that is correct as a matter of positive political science,[254] most can agree that judges should give special solicitude to politically powerless groups whose members are the victims of extraordinary legislation benefiting political majorities.[255]

The Bakeshop Act passed unanimously in both houses of the New York legislature. But the legislative consensus around the measure might not necessarily have reflected approval of the maximum-hours provision,[256] as the bill also contained consumer-friendly regulations focused on maintaining sanitary conditions in bakeries.[257] Moreover, unanimity may not always be occasion for legislative deference. Justice Scalia is fond of referring to the Talmudic rule that the Sanhedrin could not pronounce a death sentence unanimously.[258] The idea, in part, was that a unanimous verdict suggested that the accused had no defender to articulate the case in his favor. The chief promoter of the Bakeshop Act was Henry Weismann, who led the Bakery and Confec-

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[249] *Id.* at 199.

[250] 304 U.S. 144, 152 n.4 (1938).

[251] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 75–88 (1980).

[252] *Carolene Products*, 304 U.S. at 153 n.4; *see also id.* at 152–53.

[253] ELY, *supra* note 251, at 160–61.

[254] *Cf.* Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713 (1985).

[255] *See* Klarman, *supra* note 228, at 1 ("It is common wisdom that a fundamental purpose of judicial review is to protect minority rights from majoritarian overreaching.").

[256] PAUL KENS, LOCHNER V. NEW YORK: ECONOMIC REGULATION ON TRIAL 65 (1998).

[257] The bakers' union referred to the Act in its journal as "a sanitary measure solely." Bernstein, *supra* note 46, at 1481.

[258] *See, e.g.*, Transcript of Oral Argument at 51, Nw. Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504 (2009) (No. 08-322); *cf.* Barry Leff, *The Rabbi and the Supreme Court Justice*, THE NESHAMAH CENTER (Mar. 14, 2007), http://www.neshamah.net/reb_barrys_blog_neshamahn/2007/03/the_rabbi_and_t.html#more (suggesting that Justice Scalia might not agree with these kinds of procedural obstacles).

tionary Workers' International, which had successfully organized many of the larger upstate New York bakeries.[259] Many of the smaller bakeries in New York City remained non-unionized and, significantly, staffed by Italian, French, and Jewish immigrants.[260] The union had already made considerable gains in limiting bakers' work hours but wished to codify those gains, particularly with increasing competition from these immigrant shops whose bakers were willing to work much longer hours.[261] Thus, the union newspaper the *Baker's Journal* warned of "the cheap labor of the green hand . . . from foreign shores,"[262] and an 1898 New York State factory inspector's report complained that "it is almost impossible to secure or keep in proper cleanly condition the Jewish and Italian bakeshops. Cleanliness and tidiness are entirely foreign to these people, and their bakeshops are like their sweatshops, for like causes produce like effects."[263]

These references underscore that recent immigrants are often as discrete and insular as any minority, and that at least some aspects of the Bakeshop Act were undeniably "special interest" legislation. That was one of the reasons for the *Nation*'s opposition to the Act, which it called "union tyranny" in an editorial approving of *Lochner*[264]: "the main effect of the decision . . . will be to stop the subterfuge by which, under the pretext of conserving the public health, the unionists have sought to delimit the competition of non-unionists, and so to establish a quasi-monopoly of many important kinds of labor."[265] Whether immigrant bakers were "victims" of legislation that forcibly limited the hours they could work depends on whether we believe the potential benefits to their health, leisure, and dignity outweighed the (potentially catastrophic) losses to their pocketbooks, but a footnote four sensibility gives us reason to wonder whether the Act's proponents cared about the answer to that question.

4. Korematsu v. United States. — *Korematsu* presents the weakest case for anticanonicity of the four principal cases discussed, but it is the hardest of the four to defend using conventional constitutional ar-

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[259] DAVID E. BERNSTEIN, REHABILITATING LOCHNER 24–25 (2011); KENS, *supra* note 256, at 58–59. Ironically, Weismann successfully represented Joseph Lochner in the Supreme Court, having left the union in disgrace and become a bakery owner and an attorney. Bernstein, *supra* note 46, at 1484, 1491–92.

[260] David E. Bernstein, *The Story of* Lochner v. New York*: Impediment to the Growth of the Regulatory State*, *in* CONSTITUTIONAL LAW STORIES, *supra* note 154, at 325, 329.

[261] *Id.* at 328–29.

[262] Bernstein, *supra* note 46, at 1477 (quoting *Now for the Ten-Hour Day*, BAKER'S J., Apr. 20, 1895, at 1).

[263] *Id.* at 1481 (quoting *Bakeshop Inspection*, BAKER'S J., Aug. 1, 1898, at 19, 20 (quoting TWELFTH ANNUAL REPORT OF THE CHIEF FACTORY INSPECTOR OF THE STATE OF NEW YORK)).

[264] Editorial, *A Check to Union Tyranny*, THE NATION, May 4, 1905, at 346.

[265] *Id.* at 347.

guments. These features of the case are directly related, as I show in section III.B.[266] It is nonetheless important to understand why even this case is not indefensible and, indeed, is consistent with arguments made by prominent constitutional thinkers, including at least one sitting Supreme Court Justice, in the constitutional debates over post–September 11 national security policy.

The three categories of error that one may attribute to *Korematsu* can be summed up as follows: the Court approved bad racial profiling, the Court approved racial profiling *simpliciter*, and the Court approved racial profiling superfluously. General John DeWitt's orders establishing a curfew for all individuals of Japanese ancestry residing on the West Coast and subsequently requiring that they report to residential assembly centers for a determination of loyalty constituted bad racial profiling because they were based on little more than naked racism and associated hokum. As Justice Murphy detailed in his dissenting opinion, DeWitt's Final Report on the evacuation contained a litany of overwrought group stereotypes, referring to the Japanese as "subversive" and as an "enemy race" whose "racial strains are undiluted."[267] In testimony before a House subcommittee taken in April 1943, General DeWitt explained his view that "we must worry about the Japanese all the time until he is wiped off the map."[268] In a Recommendation to the Secretary of War dated February 14, 1942, which was also reproduced in his Final Report, DeWitt wrote that "[t]he very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken."[269] The absence of evidence may or may not be evidence of absence, but reasonable people can agree that it isn't evidence of *presence*. As Eugene Rostow wrote in the wake of the Court's ruling, "[t]he dominant factor in the development of this policy was not a military estimate of a military problem, but familiar West Coast attitudes of race prejudice."[270]

There is a more and a less critical version of this charge against *Korematsu*. The difference rests on the answer to whether the military's, and the Court's, actions would have been justified if there were in fact significant evidence of a Japanese fifth column operating within

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[266] *See infra* note 554 and accompanying text.

[267] Korematsu v. United States, 323 U.S. 214, 236 (1944) (Murphy, J., dissenting) (quoting J.L. DEWITT, U.S. ARMY, FINAL REPORT: JAPANESE EVACUATION FROM THE WEST COAST, 1942, at 33, 34 (1943) [hereinafter FINAL REPORT]) (internal quotation marks omitted).

[268] *Id.* at 236 n.2 (quoting *Investigation of Congested Areas: Hearings Before a Subcomm. Of the Comm. on Naval Aff., H.R.*, 78th Cong. 740 (1943) (statement of Lt. Gen. John L. DeWitt, Commanding Gen. of W. Def. Command)).

[269] *Id.* at 241 n.15 (quoting FINAL REPORT, *supra* note 267, at 34) (internal quotation marks omitted).

[270] Eugene V. Rostow, *The Japanese American Cases — A Disaster*, 54 YALE L.J. 489, 496 (1945).

the United States. If *Korematsu* would then have been either correct or not egregiously wrong, then we can say that its error was its approval of ineffectual racial profiling. We might alternatively believe that the sin of *Korematsu* is not simply its refusal to find dispositive (or even compelling) the lack of evidence supporting the exclusion order but, more broadly, the Court's acquiescence in a policy in which race constituted *any* evidence of subversion.[271] This distinction graphs onto competing views of racial profiling in general as either disfavored if and when ineffective or disfavored notwithstanding effectiveness. Commentators are not always clear which they mean when they discuss the wrongs of *Korematsu*.

A third problem with *Korematsu* is that the Court could have ruled against the government or ducked the case without any adverse consequences for the U.S. military effort. The majority in effect treated the military's authority to evacuate U.S. citizens on racial grounds as a political question. But as Alexander Bickel has most forcefully explained, a merits decision has different institutional consequences than invocation of an avoidance strategy.[272] Even in circumstances in which the Court's decision to uphold legislative or executive action has no real-world effect, "the Court's prestige, the spell it casts as a symbol, enable it to entrench and solidify measures that may have been tentative in the conception or that are on the verge of abandonment in the execution."[273] Justice Jackson affirmed that view in his *Korematsu* dissent, in which he implied that the Court should not have authorized the military's actions: "A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution."[274]

Korematsu was argued on October 11 and 12, 1944, and came down on December 18 of the same year.[275] By then, Allied victory in the Pacific was a question of when rather than if. Three months earlier, American forces had secured the island of Saipan, which led to the resignation in disgrace of Japanese Prime Minister Hideki Tojo.[276] The day before the decision issued, the War Department announced its

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[271] *See, e.g.*, Cole, *supra* note 105, at 993 ("The error was to treat people as dangerous and to intern them not based on their individual conduct, but on the basis of their group identity.").

[272] *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 111–98 (1962).

[273] *Id.* at 129.

[274] *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting).

[275] *Id.* at 214 (majority opinion).

[276] *See* Alvin D. Coox, *The Pacific War*, *in* 6 THE CAMBRIDGE HISTORY OF JAPAN: THE TWENTIETH CENTURY 315, 362–63 (Peter Duus ed., 1988).

revocation of the evacuation orders,[277] based on the view within the Department that the continued mass exclusion from the West Coast of persons of Japanese ancestry "[was] no longer a matter of military necessity."[278] The Court therefore knew with perfect surety that a decision in Korematsu's favor would not weaken the war effort. Even if that did not render the case moot — Korematsu was appealing a criminal conviction — at the very least the Court could have vacated the conviction on the grounds that he was a citizen, reserving judgment on the treatment of aliens.[279] Instead, a majority chose to gesture at absolute civilian deference to the judgments of military commanders in a time of war, and to place the Court's valuable institutional stamp on racism.

The defense of *Korematsu* begins, though, where this criticism leaves off. The Court has long espoused deference to military judgments about the conduct of war. The question in any case is how much deference to give. Under the Court's equal protection and due process jurisprudence, race-based decisionmaking is always suspect, as Justice Black's majority opinion was the first to note.[280] But the use of Japanese ancestry as a proxy for dangerousness had already been accepted as constitutionally valid by the Court, and unanimously so, in *Hirabayashi v. United States*.[281] In *Hirabayashi* the Court upheld a West Coast curfew order issued by General DeWitt even though it discriminated against residents of Japanese descent solely on the basis of race.[282] If *Hirabayashi* is wrong, then an anticanon based on flawed reasoning or moral vacuity should include it as well as *Korematsu*. If *Hirabayashi* is correct, the argument against *Korematsu* must be either that a race-based curfew is orders of magnitude less serious than a race-based evacuation order and subsequent preventive detention, or that the evidence justifying the former was different either in kind or in degree from the evidence needed to justify the latter.[283]

At this point we must consider the lens through which the Court reviews actions of the President and his Executive Branch subordinates, whose roles are underspecified in the Constitution. Justice Jack-

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[277] *See Army Lifts Blanket Ban on Japanese-Americans; No Mass Return Expected*, S.F. CHRON., Dec. 18, 1944, at 1. This "coincidence" was planned, apparently in large part by Chief Justice Stone and Justice Frankfurter. *See, e.g.*, Patrick O. Gudridge, *Remember* Endo*?*, 116 HARV. L. REV. 1933, 1935 & n.11 (2003).

[278] PETER IRONS, JUSTICE AT WAR 277 (1983) (quoting a 1944 communication from Henry L. Stimson, U.S. Secretary of War, to President Franklin D. Roosevelt) (internal quotation marks omitted).

[279] *See* WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 206–11 (1998).

[280] *Korematsu*, 323 U.S. at 216.

[281] 320 U.S. 81 (1943).

[282] *See id.* at 88, 92.

[283] *See Korematsu*, 323 U.S. at 231–32 (Roberts, J., dissenting); IRONS, *supra* note 278, at 258.

son's opinion in *Youngstown Sheet & Tube Co. v. Sawyer*[284] has become the leading doctrinal framework for evaluating claims of executive authority.[285] The *Korematsu* decision appears, though not without qualification, to fall into *Youngstown* Category One,[286] in which executive power is at its maximum because the President is acting pursuant to an express or implied congressional authorization.[287] The qualifications are these: the evacuation order was not issued by the President, but by General DeWitt pursuant to the President's authorization in Executive Order 9066. The Executive Order authorized the military to establish exclusion zones, but it did not by its terms order any particular exclusion or specify any particular ethnic or racial group to be discriminatorily excluded.[288] We must be careful not to assume that the *Youngstown* analysis is indifferent to whether the claim of authority under review is asserted by the President directly or by a subordinate exercising delegated discretionary authority. Likewise, the congressional statute approving Executive Order 9066 and criminalizing Korematsu's violation of the exclusion order predated the exclusion order itself.[289] Again, whether to place the order in *Youngstown* Category One may depend on the extent to which we can impute to Congress the discriminatory features of the order, which are not specifically approved in the statute.

Justice Jackson himself amplified those qualifications into a disposition in his *Korematsu* dissent. "[T]he 'law' which this prisoner is convicted of disregarding is not found in an act of Congress, but in a military order," he wrote.[290] This reasoning, though, is unduly formalistic. President Roosevelt of course supported the policy, his Justice Department vigorously defended the Administration's position in Court, and Congress was aware of precisely how its statutory authority was being used and chose not to address it.[291] Under Justice Jackson's *Youngstown* opinion, then, the exclusion should have been "supported by the strongest of presumptions and the widest latitude of judicial interpretation."[292]

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[284] 343 U.S. 579 (1952).

[285] *See id.* at 634–55 (Jackson, J., concurring).

[286] *Id.* at 635–37.

[287] *Id.* at 635.

[288] Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).

[289] Act of Mar. 21, 1942, Pub. L. No. 77-503, 56 Stat. 173, *repealed by* Nat'l Emergencies Act, Pub. L. No. 94-412, § 501(e), 90 Stat. 1255, 1258 (1976).

[290] Korematsu v. United States, 323 U.S. 214, 244 (1944) (Jackson, J., dissenting).

[291] *See* Russo, *supra* note 107.

[292] *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring); *see also* Korematsu v. United States, 140 F.2d 289, 290 n.2 (9th Cir. 1943) (noting that "Congress authorized and implemented" General DeWitt's curfew order).

An objection remains: *Youngstown* might not be relevant authority because (apart from its postdating *Korematsu*) *Youngstown* is concerned centrally with the existence *vel non* of executive power, not with the validity of rights claims that challenge that power. The objection seems to me well founded, but Justice Thomas seems not to agree. He argued in *Hamdi v. Rumsfeld* that courts were incompetent to second-guess the military judgments of the President, that decisions such as whom to detain, for how long, and under what conditions "are simply not amenable to judicial determination because '[t]hey are delicate, complex, and involve large elements of prophecy.'"[293] Citing favorably both Justice Jackson's *Youngstown* opinion and *Hirabayashi*,[294] Thomas argued that the high degree of deference owed the President for military decisions made in his role as Commander in Chief "extends to the President's determination of all the factual predicates necessary to conclude that a given action is appropriate."[295] As Justice Thomas has been a member of the Supreme Court for two decades, a view that he holds is not lightly made the basis for placing a precedent within the anticanon.

B. A Shadow Anticanon

The set of accounts I have attempted to debunk will strike some readers as an easy target. Each of these four decisions commanded a majority of the Supreme Court, so most of the members of the highest court in the land found their arguments persuasive at one time. The architecture of sound legal argument has not changed so much over the years that we should expect once-persuasive opinions later to earn universal rebuke solely because of conventional legal errors.[296] What does have the capacity to change over the course of just a couple of generations is conventional morality. Given that possibility, the problem with these cases may not be just that they were poorly reasoned but that they were poorly reasoned in the service of ends that society has come to recognize as immoral: the perpetuation of slavery, of Jim Crow, of labor exploitation, and of race-based detention.

There is something to this claim, and I do not mean to suggest that it is entirely mistaken. But there are also important ways in which it is incomplete. Part III makes the affirmative case that anticanonical cases must be susceptible to *use* as antiprecedents, a practice that de-

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[293] 542 U.S. 507, 583 (2004) (Thomas, J., dissenting) (quoting Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948)).

[294] *See id.* at 583–84.

[295] *Id.* at 584.

[296] *Cf.* Philip Bobbitt, *Reflections Inspired by My Critics*, 72 TEX. L. REV. 1869, 1916–17, 1919 (1994) (acknowledging and describing gradual evolution of what Bobbitt calls the "modalities" of constitutional argument).

mands more of a decision than simply poor reasoning and bad morals. It is helpful, though, to devote a few additional words to the negative case. The long history of the Supreme Court includes many decisions with both poor legal reasoning and moral bankruptcy of a surpassingly high order. I highlight four here: the cases used in Part I as "control" cases to help demonstrate the anticanon's special pattern of citation. Considerations of brevity prevent comprehensive discussion of these cases. What follows shows, however, that many of the criticisms of the anticanon may be lodged, both in style and in substance, against other decisions that have received more measured treatment from courts and commentators.

Prigg v. Pennsylvania could easily be called the worst Supreme Court decision ever issued. The human tragedy of the decision is breathtaking. In an opinion by Justice Story, the Court reversed the criminal prosecution of a slave catcher who had kidnapped and sold into slavery a woman, Margaret Morgan, who likely was not a fugitive slave, and her two children, who assuredly were not.[297] The Court's holding was that the Fugitive Slave Clause[298] prohibited states from subjecting slave catchers to a state-sanctioned civil process, except to prevent "breach of the peace, or any illegal violence."[299] Under the logic of the opinion, however, the kidnapping could not itself be outlawed as "illegal violence." Put otherwise, violence against blacks was "legal" violence; "illegal" violence was violence against whites. The decision abided the constant threat of enslavement experienced by free brown-skinned Americans in both the North and the South.[300] By constitutionally forbidding states from preventing private violence against blacks, *Prigg* worked a simultaneous assault on due process and on equal protection, the twin pillars of the modern Fourteenth Amendment. As mentioned above, *Prigg* virtually made *Dred Scott* a fait accompli.[301]

Justice Story's reading of the Fugitive Slave Clause is not defensible. His opinion omits any consideration either of Pennsylvania's obligations toward its black residents, or of Morgan's or her children's factual defenses; its understanding of the Fugitive Slave Clause as both essential to the constitutional bargain and completely preemptive of state law[302] is strained. It would, for example, divorce the interpreta-

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297 Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 626 (1842).

298 U.S. CONST. art. IV, § 2, cl. 3, *superseded by constitutional amendment*, U.S. CONST. amend. XIII.

299 *Prigg*, 41 U.S. (16 Pet.) at 613, 625.

300 Barbara Holden-Smith, *Lords of Lash, Loom, and Law: Justice Story, Slavery, and* Prigg v. Pennsylvania, 78 CORNELL L. REV. 1086, 1087 (1993).

301 *See supra* p. 409.

302 *See Prigg*, 41 U.S. (16 Pet.) at 622–25.

tion of that provision from the parallel language of the Extradition Clause,[303] which the Court later found not to be enforceable in federal court.[304] The *Prigg* Court's additional holding that Congress could not force state officials to comply with administration of the Fugitive Slave Act[305] formed a significant link in the chain of events that led to the establishment of the Republican Party and the outbreak of Civil War.[306] In his 1860 State of the Union Address, delivered seventeen days before South Carolina voted to secede, President Buchanan suggested as much: "Let us trust that the State legislatures will repeal their unconstitutional and obnoxious enactments [against the fugitive slave law]. Unless this shall be done without unnecessary delay, it is impossible for any human power to save the Union."[307] Even if Justice Story were right that the Constitution prevents states from interfering with slave catchers engaged in self-help, then it follows that the Constitution is fundamentally pro-slavery. That conclusion contributed to a rupture in the abolitionist community, many of whose members had pushed a strategy of seeking jury trials in slave-recapture cases.[308] It is also the central error attributed to *Dred Scott*. To paraphrase Bork, who says *Dred Scott* must say *Prigg*.[309]

If *Prigg* is the great stain on the legacy of Justice Story, *Giles v. Harris* is — or should be — the most prominent stain on the name of Oliver Wendell Holmes. Jackson Giles was a black Alabama citizen who wanted to vote in the November 1902 elections.[310] Unfortunately for him, the newly enacted state constitution required registered voters to have paid poll taxes, to be literate, to have been employed for a year, and to own at least forty acres of land; the registrar was invested, moreover, with extensive discretion to deny new registrants. Those, like Giles, who were registered prior to the new law[311] were grandfathered for life, but only if directly descended from (or themselves) a war veteran (including on the Confederate side of the Civil War) or if they "[were] of good character and . . . underst[oo]d the duties and ob-

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303 U.S. CONST. art. IV, § 2, cl. 2.

304 Kentucky v. Dennison, 65 U.S. (24 How.) 66, 107–10 (1861).

305 *See Prigg*, 41 U.S. (16 Pet.) at 615–16.

306 *See* Earl M. Maltz, *Slavery, Federalism, and the Constitution:* Ableman v. Booth *and the Struggle over Fugitive Slaves*, 56 CLEV. ST. L. REV. 83, 86–89 (2008).

307 James Buchanan, *Fourth Annual Message, December 3, 1860*, *in* AMERICAN PRESIDENTS: FAREWELL MESSAGES TO THE NATION, 1796–2001, at 174, 177 (Gleaves Whitney ed., 2003).

308 *See* ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 164–68 (1975).

309 *See* BORK, *supra* note 159, at 32 ("Who says *Roe* must say *Lochner* and *Scott.*").

310 Giles v. Harris, 189 U.S. 475, 482 (1903).

311 *See* Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295, 299 (2000).

ligations of citizenship under a republican form of government."[312] It is difficult to concoct a more transparent attempt to evade the Fifteenth Amendment. Participants at the all-white constitutional convention did not attempt to hide their work. In his opening address to delegates, convention president John B. Knox said: "And what is it that we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State."[313]

They succeeded. Writing for the majority, Justice Holmes recognized what Alabama was doing to its black citizens and did nothing about it; indeed, the severity of the state's disenfranchisement was the very reason for the Court's quiescence:

> The bill imports that the great mass of the white population intends to keep the blacks from voting. . . . If the conspiracy and the intent exist, a name on a piece of paper will not defeat them. Unless we are prepared to supervise the voting in that State by officers of the court, it seems to us that all that the plaintiff could get from equity would be an empty form. Apart from damages to the individual, relief from a great political wrong, if done, as alleged, by the people of a State and the State itself, must be given by them or by the legislative and political department of the government of the United States.[314]

Being legally disenfranchised in a massive state-sanctioned conspiracy against your race? Call your senator.

Giles is the anti–*Cooper v. Aaron*.[315] In *Cooper*, the Court held that the Little Rock school board was not permitted to delay its integration plan, in deference to the Court's role as "supreme in the exposition of the law of the Constitution."[316] *Giles*, rather, stands for the proposition that the Court is anything but "supreme." So far as racial discrimination was concerned, the Court was self-consciously impotent.

The Court reinforced that view in *Gong Lum v. Rice*.[317] Gong Lum, a Chinese man, wanted his nine-year-old daughter, Martha, a U.S. citizen, to attend the only public school in her district, the Rosedale Consolidated High School.[318] Rosedale was maintained for white students, and the Mississippi Constitution provided at the time that "[s]eparate schools shall be maintained for children of the white and

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[312] ALA. CONST. of 1901 art. VIII, §§ 177–84 (1901); *see also Giles*, 189 U.S. at 483–84 (describing sections 177–84 of the 1901 Alabama Constitution).

[313] Hunter v. Underwood, 471 U.S. 222, 229 (1985) (quoting John B. Knox, President Ala. Constitutional Convention of 1901, Address Before the Alabama Constitutional Convention of 1901 (May 21, 1901)).

[314] *Giles*, 189 U.S. at 488. Richard Pildes calls this reasoning "the most legally disingenuous analysis in the pages of the U.S. Reports." Pildes, *supra* note 311, at 306.

[315] 358 U.S. 1 (1958).

[316] *Id.* at 18.

[317] 275 U.S. 78 (1927).

[318] *Id.* at 79–80, 84.

colored races."[319] Gong claimed that, though Martha was not white, neither was she colored, and that she was closer to the former than the latter. Gong's lawyer said as much to the Mississippi Supreme Court:

> The court will take judicial notice of the fact that members of the Mongolian race under our Jim Crow statute are treated as not belonging to the negro race. The Japanese are classified with the Chinese. These two races furnish some of the most intelligent and enterprising people. They certainly stand nearer to the white race than they do to the negro race. If the Caucasian is not ready to admit that the representative Mongolian is his equal he is willing to concede that the Mongolian is on the hither side of the half-way line between the Caucasian and African.[320]

The Court rejected this argument. In a unanimous opinion, the Court held that Mississippi was entitled to maintain an all-white school from which all "colored" students were excluded, and that category included Chinese children.[321]

Gong Lum is an ugly, unfortunate case, arguably worse than *Plessy*. Part of the ugliness stems from the fact that this was not a test case; the stakes of the litigation were clear to the Court, which was tasked with assigning a race to the plaintiff, with foreseeable consequences for her projects and plans. As Primus has written, the modern Court — or at least Justice Kennedy — has come to understand race-based policies with individual, identifiable victims in a different and more pernicious light than policies with faceless victims whose identities are not known in advance.[322] More generally, the Court placed its blessing on a scheme whose design cannot be defended as even formally race-neutral. White parents were able (indeed required) to send their children to one of the numerous white-only schools in Mississippi, while students of other races were designated "colored" and lumped together into an undifferentiated mass at scattered, inferior schools. The undifferentiated mass better approximates the modern liberal cosmopolitan ideal, but coupled with separate schools for white students, the system as a whole is inexplicable in terms other than the promotion of white

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[319] MISS. CONST. of 1890, art. 8, § 207 (1890).

[320] Rice v. Gong Lum, No. 24773, 1925 Miss. LEXIS 146, at *22 (May 11, 1925) (transcribing briefing by the appellees).

[321] *Gong Lum*, 275 U.S. at 87.

[322] Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1369 (2010). Operational examples of this distinction include the Court's preference for designing promotional exams with intended racial effects over throwing out an exam already administered that does not achieve those effects, Ricci v. DeStefano, 129 S. Ct. 2658, 2681 (2009); Justice Kennedy's stated preference for drawing school district lines that take race into account over the ex post assignment of students to schools based in part on their race, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2792 (2007) (Kennedy, J., concurring in part and concurring in the judgment); and the assumed constitutional distinction between "ten percent" plans and individualized affirmative action plans, *see* Brief for the United States as Amicus Curiae Supporting Petitioner at 14–17, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 176635.

supremacy.[323] Indeed, the policy the Court blessed virtually required the sorts of racist arguments that Gong's attorney made on his behalf. Like the policy in *Loving v. Virginia*,[324] the Mississippi Constitution sought to protect a space for white racial purity; racial division was neither an unintended nor an instrumental consequence of the policy, but was in fact its goal.[325]

A final case worth mention is *Bowers v. Hardwick*, which upheld a Georgia law criminalizing sodomy.[326] The Court has since said that the case was wrong the day it was decided.[327] *Bowers*'s overruling sharply divided the Court, but less than a decade later, seventy percent of the American people say they would not support a ban on same-sex intimacy.[328] The Court in *Lawrence v. Texas* disavowed both the result and the reasoning of *Bowers*, which assumed the answer to the question presented both by permitting traditional practice to conclusively determine rights under the Due Process Clause and by rejecting Michael Hardwick's claim on the ground that there was no fundamental right of "homosexuals to engage in sodomy."[329] Framed at that level of specificity, there is no fundamental right to do a great many things that the Constitution should and does protect.

The analytic problems of the *Bowers* majority opinion appear almost willful. First is the curious insistence on treating Michael Hardwick's claim as an as-applied challenge even though the statute did not distinguish between same-sex and opposite-sex acts.[330] In doing so the Court expressly reserved judgment on the constitutionality of the law as applied to sodomy between men and women, implying that such a challenge would entail different analysis.[331] But given that the Court based its decision on a tradition of antisodomy laws (which typically did not discriminate based on sex)[332] and the presumptively valid moral concerns that underlie them,[333] one is left to wonder what considerations could possibly motivate a different analysis. Is a communi-

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[323] The Mississippi Supreme Court said as much in its opinion rejecting Gong's claim:

> To all persons acquainted with the social conditions of this state and of the Southern states generally it is well known that it is the earnest desire of the white race to preserve its racial integrity and purity, and to maintain the purity of the social relations as far as it can be done by law.

Rice v. Gong Lum, 104 So. 105, 108 (Miss. 1925).

[324] 388 U.S. 1 (1967).

[325] *See id.* at 11.

[326] 478 U.S. 186, 189 (1986).

[327] Lawrence v. Texas, 539 U.S. 558, 578 (2003).

[328] Stephen Ansolabehere & Nathaniel Persily, Knowledge Networks, Field Report: Constitutional Attitudes Survey 56 (2010) (on file with the Harvard Law School Library).

[329] *Bowers*, 478 U.S. at 190, 191–92.

[330] *See id.* at 188 n.2.

[331] *Id.*

[332] *See Lawrence*, 539 U.S. at 568.

[333] *Bowers*, 478 U.S. at 192–96.

ty's moral condemnation of non-procreative sex less privileged than its moral condemnation of gays?[334] Or is it that any less flagrant a severing of the statute would have branded just about every sexually active person in Georgia — rather than just gays — as criminals?[335] One member of the majority — Justice O'Connor — later implied that it would have been a different case had the Georgia statute applied only to same-sex sodomy.[336] But there was no danger of an opposite-sex couple being prosecuted under the statute,[337] and Justice O'Connor signed on to an opinion that itself saw a constitutional distinction between same-sex and opposite-sex sodomy.[338]

Another member of the majority, Justice Powell, suggested that the case would have come out differently had it involved an Eighth Amendment claim and a serious prison term.[339] But the problem with the law was not the nature of its penalty but the nature of its prohibition. The statute expressed hostility toward a class of citizens, casting a shadow over not just their sex lives but also their employment prospects, their political activity, and their familial relationships. *Bowers* enabled Justice Scalia's powerful retort in *Romer v. Evans*, that a ban on laws disfavoring gays and lesbians was in serious tension with allowing their archetypal conduct to be criminalized.[340] Justice Powell famously told his gay law clerk during deliberations that he had never met a gay person, and he later came to regret his vote in the case.[341]

Bowers authorized the State to visit serious criminal sanctions — or not, at its prosecutors' discretion — upon individuals solely because of whom they choose to love and how. If any decision could be more antithetical to the spirit of liberty, I am not aware of it. The emerging

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[334] *Cf.* WILLIAM N. ESKRIDGE JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, 1861–2003, at 2 (2008) ("From the sixteenth to the twentieth century, the norm reflected in [the Anglo-American legal regime regulating sexuality] was procreative marriage.").

[335] *See* DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* 658 (1994) (quoting a memo written to Justice Marshall by his law clerk Dan Richman during the *Bowers* deliberations: "To repeat the point, which I'm sure many members of the Court will forget or ignore: THIS IS NOT A CASE ABOUT ONLY HOMOSEXUALS. ALL SORTS OF PEOPLE DO THIS KIND OF THING."); JOYCE MURDOCH & DEB PRICE, COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT 316 (2001) ("Homosexuals were being told that when they engaged in certain nearly universal sexual practices the Constitution would not keep cops out of their bedrooms.").

[336] *Lawrence*, 539 U.S. at 583 (O'Connor, J., concurring in the judgment).

[337] A married couple had been plaintiffs in the original action, but their claims were dismissed below on the grounds that there was no risk that they would be prosecuted. *Bowers*, 478 U.S. at 188 n.2.

[338] *Id.* at 190.

[339] *Id.* at 197–98 (Powell, J., concurring).

[340] Romer v. Evans, 517 U.S. 620, 640–41 (1996) (Scalia, J., dissenting).

[341] JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 521, 530 (2001).

consensus on LGBT rights makes *Bowers* look terrifically dated, just eight years after *Lawrence*.

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What is wrong with *Prigg*, *Giles*, *Gong Lum*, and *Bowers*? Or rather, what is right with them? Are they any better reasoned than the anticanon? A well-trained lawyer would recognize many of their "legal" errors. Their moral failings are at least the equal of the cases in the anticanon. The decisions in *Giles* and *Bowers* were highly salient when rendered, and garnered as much or more media attention than did *Plessy* or *Lochner*.[342] If analytic error compounded with immorality is not sufficient to place a case within the anticanon, then we must turn our gaze elsewhere.

III. RECONSTRUCTING THE ANTICANON

Legal canons do not always, or even usually, refer to cases. Canons also refer to rules of construction, particularly for statutes, in a usage not unrelated to the one that motivates this Article. In a well-known essay published in 1950, Karl Llewellyn purported to demonstrate that for every canon of statutory construction, there is a responsive canon that limits or qualifies the operation of the first.[343] For example, plain and unambiguous language must be given its natural effect, but not if doing so would lead to absurd results or frustrate manifest purpose.[344] Llewellyn's point, which endures, was that canons can be as much resources for constructors as rules of construction. Even as commentators and judges insist that canons lend answers to conflicts over the meaning of legal texts, canons are not authoritative on their own. "[T]o make any canon take hold in a particular instance," Llewellyn said, "the construction contended for must be sold, essentially, by means other than the use of the canon."[345] Canons are best described not as a set of instructions but as an argot for those trained in the art of legal argument.

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[342] *Giles* and *Bowers*, like *Lochner* but unlike *Plessy*, were front-page news. *Compare, e.g.*, *The Supreme Court Sustains the Alabama Constitution*, DAILY PICAYUNE, Apr. 28, 1903, at 1, *and Justices Back Ban on Private Homosexual Acts*, CHI. TRIB., July 1, 1986, at 1 (reporting on *Giles* and *Bowers*, respectively), *with New York 10-Hour Law is Unconstitutional*, N.Y. TIMES, Apr. 18, 1905, § 1, at 1 (reporting on *Lochner*), *and infra* p. 442 (discussing relatively light media coverage of *Plessy*).

[343] Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950).

[344] *Id.* at 403.

[345] *Id.* at 401.

I argued in Part I that a decision's anticanonicity is said to consist in its embodiment of a set of legal propositions to be avoided in constitutional adjudication. On this definition, *Dred Scott*, *Plessy*, *Lochner*, and *Korematsu* are the most defensible members of the anticanon. Part II concluded, though, that the frequently articulated argument that these cases achieve anticanonical status because of the uniquely low quality of their legal reasoning, or because they are morally noxious, or both, is not complete. Indeed, these cases stand for a variety of often mutually inconsistent propositions, and are no less defensible or more morally repugnant than many other decisions that remain relatively obscure.

This Part takes as settled that anticanonicity does not result (at least not linearly) from a decision's argumentation or outcome. It instead results from other features of the case that make it a useful resource for subsequent legal communities. Section A recounts the historical path the treatment of these cases took toward realizing their current designations as anticanonical. Section B uses that history, in part, to derive a theory of the anticanon, an account that articulates more systematically the features of the anticanon that enable it to serve its function in constitutional argument.

A. Historicism

For three of the four cases in the anticanon, it is easy to identify the precise moment at which their central holding was decisively repudiated. The first line of the Fourteenth Amendment was specifically intended to overrule the *Dred Scott* decision.[346] *Brown* all but overturned *Plessy*, and a series of per curiam opinions extending *Brown* to public beaches,[347] golf courses,[348] and buses[349] finished the job. *Lochner* is nearly irreconcilable with *West Coast Hotel Co. v. Parrish*.[350] By numerous measures, however, it took much more than formal repudiation to place these decisions in the anticanon. Indeed, as the *Korematsu* example suggests, it is not even clear that formal repudiation is necessary.

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[346] MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 173 (1986).

[347] Mayor v. Dawson, 350 U.S. 877 (1955) (per curiam).

[348] Holmes v. City of Atlanta, 350 U.S. 879 (1955) (per curiam).

[349] Gayle v. Browder, 352 U.S. 903 (1956) (per curiam).

[350] 300 U.S. 379 (1937). *Lochner* also stands in serious tension with *Bunting v. Oregon*, 243 U.S. 426 (1917), which upheld a ten-hour workday for manufacturing employees. *Id.* at 438. Many believed that *Bunting* signaled the end of *Lochner*-style reasoning, until the Court's later decision in *Adkins v. Children's Hospital*, 261 U.S. 525 (1923). *See id.* at 564 (Taft, C.J., dissenting) ("It is impossible for me to reconcile the *Bunting Case* and the *Lochner Case* and I have always supposed that the *Lochner Case* was thus overruled *sub silentio*.").

That is so because recognition of a case as anticanonical is not internal to legal reasoning. A visiting alien who has learned how to negotiate American constitutional argument and is aware of the status of precedents as either good or bad law, but is not aware of the anticanon, could not identify its members.[351] This claim, at least in part, is historicist in nature. A historicist approach to the treatment of legal precedents assumes that the status of a precedent depends on social and historical context rather than on conventional legal reasoning.[352] Under such an approach, it should be possible to specify at least some of the conditions for anticanonicity by examining cases longitudinally, with an eye toward the events and historical conditions that altered how we think about each case.

The most efficient way to begin this inquiry is to return to our citation study. Two results are of particular interest. First, three of the four cases — *Dred Scott*, *Plessy*, and *Lochner* — began to receive significant negative treatment in Supreme Court opinions in the 1960s. Although *Plessy* was first repudiated in 1954, *Dred Scott* and *Lochner* were effectively overruled well before the 1960s. This timing suggests that significant negative treatment in case law reflects a phenomenon that does not depend directly on whether a case is formally good or bad law. Second, the final case, *Korematsu*, in fact receives more positive than negative treatment, and its significant positive treatment ticks up in the 1960s. These two interesting results are related, and understanding them takes us some way toward understanding how the anticanon came into being.

1. Dred Scott. — In many quarters, *Dred Scott* was notorious from the start. In the week after the decision was issued, the *Chicago Tribune* wrote: "We scarcely know how to express our detestation of [the Taney opinion's] inhuman dicta, or to fathom the wicked consequences which may flow from it."[353] The decision was foremost in the minds of Reconstruction Republicans drafting the Fourteenth Amendment; Charles Sumner tried (in vain) to prevent a bust of Chief Justice Taney from being placed in the Supreme Court chamber along with those of Taney's predecessors.[354] Elsewhere, the reaction was somewhat different. The *Augusta* (Georgia) *Constitutionalist* took the decision as an opportunity to declare that "opposition to southern opinion upon [slavery] is now opposition to the Constitution, and morally treason

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[351] *Cf.* Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031, 1039 (1997) ("If we did not already know that *Marbury* was so momentous a case, we would be hard pressed to explain why it is so celebrated.").

[352] *See* Balkin, *supra* note 16, at 679.

[353] FEHRENBACHER, *supra* note 146, at 417 (quoting CHI. TRIB., Mar. 12, 1857).

[354] RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 222 (1977).

against the Government."[355] The reaction in newspapers was not entirely sectional. The *New York Herald*, a northern Democratic paper, wrote: "The supreme law is expounded by the supreme authority, and disobedience is rebellion, treason, and revolution."[356]

This divide alone is reason to doubt that *Dred Scott* was made instantly anticanonical with the passage of the Fourteenth Amendment. A war had just been fought, with partisans of one side willing to kill and to die to defend the decision's presuppositions. In his 1935 biography of Roger Taney, Carl Swisher accused historians assessing the case of exhibiting a pronounced Union bias: "[S]o sublime was their confidence that the North was right and the South wrong in the sectional struggle, they were unable to do anything but condemn all actions based on sympathy with the South."[357] So long as the wounds of the war remained fresh, it would be difficult to use *Dred Scott* as a shared symbol of constitutional error. *Dred Scott* has not been favorably cited in a majority opinion of the Supreme Court in more than 100 years,[358] but the decision did not receive negative treatment — the crux of the anticanon — in any majority opinion between 1901 and 1957.

Indeed, with the notable exceptions of the first Justice Harlan, dissenting in *Plessy*, and Hugo Black, discussed below, the Justices of the Supreme Court did not seem to identify the case as uniquely *sinful* in the way it is thought of today until well into the 1960s.[359] Several of the individual opinions in the *Insular Cases* relied on *Dred Scott* as authority for the constitutional relationship between Congress and acquired territories.[360] Justice Frankfurter referred to the case as a "failure" in his opinion for the Court in *United States v. UAW-CIO*,[361] but for him that consisted in refusing to practice constitutional avoidance, in failing to "take the smooth handle for the sake of repose."[362] The phrase referred to a letter written by Justice Catron to President Buchanan during the *Dred Scott* deliberations, in which the Justice urged

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[355] FEHRENBACHER, *supra* note 146, at 418 (quoting AUGUSTA CONSTITUTIONALIST, Mar. 15, 1857).

[356] *Id.* (quoting N.Y. HERALD, Mar. 8, 1857).

[357] SWISHER, *supra* note 184, at 583.

[358] The last was *Kansas v. Colorado*, 206 U.S. 46 (1907). *See id.* at 81.

[359] Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). That language also speaks, of course, to Justice Harlan's extraordinary prescience in recognizing *Plessy*'s dim future. *See* AMAR, *supra* note 44 (manuscript at 468).

[360] *See* Downes v. Bidwell, 182 U.S. 244, 250, 257 (1901); *id.* at 291 (White, J., concurring); De Lima v. Bidwell, 182 U.S. 1, 196 (1901); *id.* at 209 (McKenna, J., dissenting).

[361] 352 U.S. 567, 590 (1957).

[362] *Id.* at 591 (quoting 10 WORKS OF JAMES BUCHANAN 106 n.1 (John Bassett Moore ed., 1910)) (internal quotation mark omitted). Taney's purported abuse of obiter dictum was also for many years a preoccupation of historians who studied the case. *See* FEHRENBACHER, *supra* note 146, at 335–36.

the President to persuade Justice Grier not to decide the case on the narrow question of whether Scott had even been domiciled at Fort Snelling.[363] Frankfurter's opinion implicitly endorses this narrow holding, under which Scott would have lost on a technicality.

Consistent with this treatment of the case, which today feels oddly disinterested, Noel Dowling's influential constitutional law casebook did not refer to the *Dred Scott* decision in any of its first five editions running from 1937 through 1954.[364] When the case finally appeared in the 1959 edition, it was in a footnote to a discussion of a series of 1950s cases on the meaning and import of national citizenship; there was not a hint of normative disapproval.[365] Indeed, when Gerald Gunther took over the Dowling casebook in 1965, he cited *Dred Scott* as positive authority for the existence of substantive due process.[366]

In a 1953 article on the case, political scientist Wallace Mendelson referred to "a rather general acceptance of it as a 'sincere' judicial effort to solve a nation-wrecking problem."[367] Mendelson was perhaps responding, at least in part, to a then-recent series of rehabilitative writings on Taney in the legal realist tradition. Charles Smith's 1936 biography argues, for example, that "[f]rom the standpoint of technique in interpreting the Constitution as it was written, Taney's opinion . . . is one of the best that he ever wrote."[368] Ben Palmer's 1939 monograph on Chief Justices Marshall and Taney, aptly subtitled "Statesmen of the Law," sought to place the jurists' decisions, including *Dred Scott*, within historical context to "mak[e] a correct appraisal of a man's character and influence, unaffected by the emotional distortion of contemporary view."[369] So doing, Palmer concluded that Taney's Republican opponents had knowingly slandered him by conflating his assessment of "the public attitude toward the negro when the

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[363] 10 WORKS OF JAMES BUCHANAN, *supra* note 362, at 106 n.1.

[364] *See* NOEL T. DOWLING, CASES ON AMERICAN CONSTITUTIONAL LAW (1st ed. 1937); NOEL T. DOWLING, CASES ON CONSTITUTIONAL LAW (2d ed. 1941) [hereinafter DOWLING, SECOND EDITION]; NOEL T. DOWLING, CASES ON CONSTITUTIONAL LAW (3d ed. 1946); NOEL T. DOWLING, CASES ON CONSTITUTIONAL LAW (4th ed. 1950); NOEL T. DOWLING, CASES ON CONSTITUTIONAL LAW (5th ed. 1954). The Dowling casebook is the precursor to the Sullivan and Gunther casebook, authored by Kathleen Sullivan, that is popular in law school classrooms today. SULLIVAN & GUNTHER, *supra* note 84.

[365] NOEL T. DOWLING, CASES ON CONSTITUTIONAL LAW 1127 (6th ed. 1959).

[366] NOEL T. DOWLING & GERALD GUNTHER, CONSTITUTIONAL LAW: CASES AND MATERIALS 862 n.1 (7th ed. 1965).

[367] Mendelson, *supra* note 185, at 16 (citing Charles Evans Hughes, *Roger Brooke Taney*, 17 A.B.A. J. 785, 787 (1931)).

[368] CHARLES W. SMITH, JR., ROGER B. TANEY: JACKSONIAN JURIST 155 (1936).

[369] PALMER, *supra* note 158, at 216.

constitution was adopted"[370] with his own views on slavery, which, to Palmer's mind, revealed him to be "kindly and humane."[371]

And then there was Swisher's biography, already mentioned, which concludes in a wistful air faintly recognizable to modern lawyers:

> Had the Confederacy been permitted to establish itself it might have preserved a rich and vital culture which in its own way gradually removed the worst evils connected with it, and southern territory might not have become the waste lands of northern missionary zeal, inhabited throughout vast areas by a civilization brooding over its own decay. Within his field of action Taney labored to avert this disaster. Those rejecting the biased argument that the victory of the North proved that the South deserved its fate will, at the very least, accord him sympathy and admiration.[372]

Three decades later, however, Swisher contributed to a volume on Supreme Court Justices in which, while not abandoning his desire for a contextual assessment of Taney, he adopted a strikingly different tone. "[I]t is . . . hard to comprehend the seemingly self-willed blindness of Taney and other paternalistic Southerners who refused to look away from peaceful residential plantations to mass-production plantations of other kinds where Negroes were worked to death under the lash of ruthless overseers," he wrote. "To us it simply refuses to make ethical and moral sense, and we cannot see how it could have made sense to intelligent and honest people a century ago."[373]

Swisher's tonal shift spans an important epoch in *Dred Scott*'s precedential life, one punctuated by *Brown* and the events *Brown* presaged. The language of constitutional evil with which we today associate *Dred Scott* went absent from Swisher's biography and Justice Frankfurter's 1957 discussion, but it appeared twice in separate opinions of Justice Black during Frankfurter's tenure. In the 1945 case of *Williams v. North Carolina*,[374] Black wrote in dissent: "I am confident . . . that today's decision will no more aid in the solution of the problem than the *Dred Scott* decision aided in settling controversies over slavery."[375] What is notable about Black's *Williams* opinion is how gratuitous the reference is. The case had nothing at all to do with race, much less slavery; it involved a prosecution for bigamous

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[370] *Id.* at 218.

[371] *Id.* at 219. Palmer also emphasized that Taney would not have reached the question of the constitutionality of slavery in federal territories but for the extended discussion of the issue in Justice McLean's and Justice Curtis's dissenting opinions. *See id.* at 221. Don Fehrenbacher disputes this account of the motivation for reaching the power of Congress to ban slavery in the territories. *See* FEHRENBACHER, *supra* note 146, at 309–11.

[372] SWISHER, *supra* note 184, at 588.

[373] Carl Brent Swisher, *Mr. Chief Justice Taney*, *in* MR. JUSTICE 35, 59 (Allison Dunham & Philip B. Kurland eds., 1964).

[374] 325 U.S. 226 (1945).

[375] *Id.* at 274 (Black, J., dissenting).

cohabitation, which the Court upheld against a full-faith-and-credit challenge.[376] Black was using the decision not as a precedent in the traditional sense, but as a symbolic resource whose mere invocation added an exclamation point to his argument.

Justice Black used *Dred Scott* to similar effect in his dissent in *Cohen v. Hurley*,[377] a 1961 decision in which the majority upheld an attorney disbarment against a due process challenge.[378] Joined by Chief Justice Warren and Justice Douglas, Black criticized the majority for basing its decision in part on tradition: "This argument — that constitutional rights are to be determined by long-standing practices rather than the words of the Constitution — is not, as the majority points out, a new one. It lay at the basis of two of this Court's more renowned decisions — *Dred Scott v. Sandford* and *Plessy v. Ferguson*."[379] This usage of the anticanon was more mature than in Justice Black's *Williams* dissent. As in *Williams*, *Dred Scott* was being used as symbolic authority rather than as controlling precedent. But unlike in *Williams*, we also see a healthy dose of revisionism, as neither *Dred Scott* nor *Plessy* is anti-positivist in the way Justice Black sought to argue. This kind of gratuitous revisionism — *Cohen* is also not a race case — is a common feature of anticanon invocation.

Other Justices similarly deployed *Dred Scott* in subsequent years. In *Bell v. Maryland*,[380] in which the Court vacated convictions for sit-ins, Justice Douglas wrote in his concurrence, "seldom have modern cases (cf. the ill-starred *Dred Scott* decision) so exalted property in suppression of individual rights."[381] Douglas's usage was not revisionist in the way of Black's *Williams* opinion, but one might easily have invoked *Dred Scott* as standing instead for the proposition that the Court should not use creative arguments to constitutionalize matters of local law, as Douglas urged in *Bell*.[382] *Dred Scott*'s symbolic value progressively was becoming such that it was useful to characterize its central propositions at an exceedingly broad level of generality.

Bell also represented the first instance since Justice Harlan's *Plessy* dissent in which the weight of *Dred Scott*'s negative authority was brought to bear against the forces of racial exclusion. Unlike Justice Frankfurter and unlike Dowling, Justice Black and Justice Douglas were using *Dred Scott* as a case about race. This is significant and

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376 *Id.* at 227, 239 (majority opinion).

377 366 U.S. 117 (1961).

378 *Id.* at 118.

379 *Id.* at 142 n.23 (Black, J., dissenting) (citations omitted).

380 378 U.S. 226 (1964).

381 *Id.* at 253 (Douglas, J., concurring in the judgment in part) (citation omitted).

382 *See id.* at 260 (arguing that the petitioners' convictions should be invalidated under the Privileges or Immunities Clause and the Equal Protection Clause).

goes some way toward explaining why the case, though long famous and heavily criticized, was less surely anticanonical before the 1960s. Until that point, *Dred Scott* more commonly stood in for the harms of judicial overreach. This emphasis made sense in light of the juridical commitments of the post–New Deal Court, including, prominently, Frankfurter. As section B discusses, however, anticanonical cases are characterized by their normative multiplicity, and it was not until *Brown* and the civil rights movement that *Dred Scott* could be called to service as a race case. Already available as a warning that judges should "take the smooth handle for the sake of repose," *Dred Scott* became a further, even if at times incompatible, warning that judges should recognize and root out political affronts to black citizenship. In order for *Dred Scott* to enter the anticanon, racial equality had to become not just a legal imperative but an ethical commitment of the American political culture.

Once *Dred Scott* came to be one of the political symbols that signaled that ethical commitment, it took on added life as the prime exemplar of the evils of substantive due process — and therefore of *Roe* — apart from any connection either to racial exclusion or to calamitous political events. In his famous (canonical?) critique of *Roe*, Ely compared the case, quite sensibly, to *Lochner*, not to *Dred Scott*.[383] But *Lochner*'s moral resonance was perhaps insufficient for it to serve this function for conservative opponents of *Roe*. David Currie wrote in 1983 that *Dred Scott* was "at least very possibly the first application of substantive due process in the Supreme Court, and in a sense, the original precedent for *Lochner v. New York* and *Roe v. Wade*."[384] Bork quoted that language favorably in his 1990 monograph, in which he suggested, as noted, that the three cases are indistinguishable.[385]

Indeed, there is no fuller discussion of *Dred Scott* in the last 100 years of Supreme Court case law than in Justice Scalia's partial dissent in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which also quotes Currie to support the link between *Roe*'s and *Dred Scott*'s invocations of substantive due process.[386] More poetically, he continues the comparison in the opinion's coda, which describes the portrait of Taney hanging at Harvard Law School:

> There seems to be on his face, and in his deep-set eyes, an expression of profound sadness and disillusionment. Perhaps he always looked that way, even when dwelling upon the happiest of thoughts. But those of us who know how the lustre of his great Chief Justiceship came to be

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[383] John Hart Ely, *The Wages of Crying Wolf*, 82 YALE L.J. 920, 937–41 (1973).

[384] David P. Currie, *The Constitution in the Supreme Court: Article IV and Federal Powers, 1836–1864*, 1983 DUKE L.J. 695, 736 (footnotes omitted).

[385] BORK, *supra* note 159, at 32.

[386] 505 U.S. 833, 998 (1992) (Scalia, J., dissenting in part).

> eclipsed by *Dred Scott* cannot help believing that he had that case — its already apparent consequences for the Court and its soon-to-be-played-out consequences for the Nation — burning on his mind.[387]

For Scalia and for many other social conservatives, *Roe*, like *Dred Scott*, not only involves substantive due process but also implicates profound questions of "life and death, freedom and subjugation."[388] To deny that *Dred Scott* is anticanonical for the set of reasons Scalia identifies, to assert that it stands instead for the perils of originalism, or positivism more generally, or even racism, is to misunderstand the use of the anticanon. The decision represents all of those things at once.

2. Plessy. — *Plessy*'s route to the anticanon has much in common with *Dred Scott*'s. In both cases, the Supreme Court did not put the decision to real work until its members wished to firm up an ethical departure from Jim Crow during the 1960s. *Plessy*'s centrality to that project is obvious in light of its (reluctant) starring role in the *Brown* opinion. With the exception of that opinion, no Justice cited *Plessy* unfavorably in any opinion between *Plessy* itself and Justice Black's *Cohen* opinion. Prior to *Brown*, and indeed for some years after, there was no consensus even among elites that *Plessy* was wrongly decided, much less anticanonical.[389] The Topeka, Kansas, Board of Education opened the argument section of its first *Brown* appellate brief with an approving citation to *Plessy*,[390] and even the appellants argued not that *Plessy* was eroded or tacitly overruled but rather that it was "not applicable" to racial segregation in elementary education.[391] The *Plessy* decision was not hugely controversial at the time it issued;[392] the *New York Times* and the *Washington Post* gave the decision minimal — and decidedly neutral — attention.[393] Even the New Orleans *Daily Picayune* relegated the decision to a brief and approving mention on page four under the remarkable headline "Equality, but not Socialism."[394]

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[387] *Id.* at 1001–02.

[388] *Id.* at 1002.

[389] *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 32–33 (1959); *Rehnquist Hearing*, *supra* note 70, at 324–25 (memorandum from then-clerk William Rehnquist to Justice Jackson asserting that *Plessy* "was right and should be re-affirmed").

[390] Brief for Appellees at 11–12, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (No. 1), 1952 WL 87553, at *11.

[391] Brief for Appellants at 11, *Brown*, 347 U.S. 483 (No. 1), 1952 WL 47265, at *11.

[392] *See* LOFGREN, *supra* note 145, at 5.

[393] *Louisiana's Separate Car Law*, N.Y. TIMES, May 19, 1896, at 3; *Separate Coach Law Upheld, The Supreme Court Decides a Case from Louisiana*, WASH. POST, May 19, 1896, at 6; *see also* Primus, *supra* note 16, at 257 n.49.

[394] *Equality, but not Socialism*, NEW ORLEANS DAILY PICAYUNE, May 19, 1896, at 4.

Aware of this uninspired reception, Primus offers the possibility that *Plessy* could have become canonical by the 1930s or the 1950s.[395] This appears not to have been so. As Lofgren notes, major treatises and casebooks ignored the case well into the 1940s.[396] Charles Warren's *The Supreme Court in United States History* omits the case in its first edition in 1922, and in a revised edition published four years later mentions *Plessy* only in a brief footnote cataloging twenty-five cases "involving rights of negroes."[397] Dowling's casebook includes *Plessy* in its preliminary edition published in 1931, but the case disappears in subsequent editions produced in 1937, 1941, 1946, and 1950. Tellingly, the *New York Times* story on *Gong Lum*, a case that relies explicitly on *Plessy* to extend the "separate but equal" doctrine to public schooling, does not mention *Plessy* at all.[398]

What happened? Well, *Brown* happened, of course. But it is a mistake to assume that *Brown* itself made *Plessy* anticanonical. For one thing, the *Brown* Court famously refused to label *Plessy* as wrong the day it was decided, instead considering the constitutionality of segregated public education "in the light of its full development and its present place in American life throughout the Nation."[399] For another, *Brown* did not make *Brown* itself canonical in the way in which we speak of it today. The decision's legacy had to overcome "massive resistance" among Southern political leaders;[400] its iconic status was facilitated by subsequent enforcement by the Court in cases like *Cooper v. Aaron*[401] and *Green v. School Board of New Kent County*;[402] and its role in securing civil rights for black Americans was arguably dwarfed and reinforced by the movement energy that led, among other things, to the Civil Rights Act of 1964 and the Voting Rights Act of 1965.[403]

Consistent with what Primus calls its "yoking" to *Brown*,[404] *Plessy* was weaponized in the midst of this movement energy. In *Wright v. Rockefeller*,[405] in which the Court rejected a constitutional challenge to

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395 Primus, *supra* note 16, at 257 n.49.

396 LOFGREN, *supra* note 145, at 5.

397 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 621 n.1 (1926).

398 *Upholds Segregation of Chinese in Schools*, N.Y. TIMES, Nov. 22, 1927, at 14.

399 Brown v. Bd. of Educ., 347 U.S. 483, 492–93 (1954); *see also* Albert M. Sacks, *The Supreme Court, 1953 Term — Foreword*, 68 HARV. L. REV. 96, 98–99 (1954).

400 The Southern Manifesto was signed by 101 Southern members of Congress, including all but three of the South's twenty-two Senators. 102 CONG. REC. 4459–61 (1956).

401 358 U.S. 1 (1958).

402 391 U.S. 430 (1968).

403 *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 39–169 (1991) (arguing that the Court's decision in *Brown* reflected rather than precipitated the social and political changes responsible for civil rights gains).

404 Primus, *supra* note 16, at 255.

405 376 U.S. 52 (1964).

an apparent racial gerrymander of New York City, Justice Douglas invoked *Plessy* in dissent, calling the alleged political division by race a "vestige[]" of *Plessy*.[406] Four years later, Douglas again cited *Plessy* as part of a long list of historical inequities against blacks in his concurring opinion in *Jones v. Alfred H. Mayer Co.*,[407] which upheld the fair housing provisions of the Civil Rights Act of 1968 as within the power of Congress. *Plessy* appeared again in Justice Black's concurring opinion in *Oregon v. Mitchell*,[408] which upheld the Voting Rights Act's ban on literacy tests. Black framed the ban in terms of overcoming unequal educational opportunities: "The children who were denied an equivalent education by the 'separate but equal' rule of [*Plessy*], overruled in [*Brown*], are now old enough to vote."[409] Douglas cited *Plessy* again in his dissent in *Milliken v. Bradley*,[410] in which he argued that failure to endorse an interdistrict desegregation remedy would likely restore *Plessy*'s "separate but equal" regime.[411] In each of these instances, members of the Court used *Plessy* as they used *Dred Scott*: as ammunition in their efforts to eliminate — and to empower political actors to eliminate — the vestiges of racial exclusion from American public life in the 1960s and early 1970s. As with *Dred Scott*, the chief forces behind the use of the case in that way were Black and Douglas.

And as with *Dred Scott*, this new role for *Plessy* led to its later use in very different ways by more conservative members of the Court. Today we associate *Plessy* with Justice Harlan's dissenting opinion, and specifically with his admonition that the Constitution is "color-blind."[412] But that language rarely appeared in Supreme Court opinions until *Regents of the University of California v. Bakke*[413] was decided in 1978. *Bakke* was of course an affirmative action case, and the dispute over the meaning of *Plessy* and of Harlan's dissent was a central debate that would play out similarly in numerous subsequent cases. Justices Brennan and Marshall warned against reading Harlan's quote out of context. Brennan called the "color-blind" language a "shorthand" that "has never been adopted by this Court as the proper meaning of the Equal Protection Clause."[414] Marshall argued that Harlan should be read as recognizing that the "'real meaning' of the [Separate Car Act] was 'that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied

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406 *Id.* at 62 (Douglas, J., dissenting) (internal citations omitted).
407 392 U.S. 409, 445 (1968) (Douglas, J., concurring).
408 400 U.S. 112, 133 (1970) (Black, J., concurring).
409 *Id.* (internal citations omitted).
410 418 U.S. 717 (1974).
411 *Id.* at 759 (Douglas, J., dissenting).
412 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).
413 438 U.S. 265 (1978).
414 *Id.* at 355 (Brennan, J., concurring in the judgment in part and dissenting in part).

by white citizens.'"[415] Brennan and Marshall sought to claim Harlan as antiformalist and attuned to the "social meaning" of segregation.

Meanwhile, Justice Stevens, who wrote for four Justices that the affirmative action policy at issue in *Bakke* violated Title VI, referred to the statement of Senator John Pastore in the legislative debate over the statute: "[T]here is one area where no room at all exists for private prejudices. That is the area of governmental conduct. As the first Mr. Justice Harlan said in his prophetic dissenting opinion in [*Plessy*]: 'Our Constitution is color-blind.'"[416] For Stevens, at least as to the statute, and implicitly for Senator Pastore, Harlan could be marshaled for the proposition that colorblindness implies race blindness in a formal sense. For Brennan and Marshall, in effect, the symbolism of Harlan's dissent was that the Constitution must be "blind" to a particular status inferred by the *presence* of color. In Neil Gotanda's terminology, Stevens took Harlan to mean blindness as to "formal-race," while Brennan and Marshall took him to mean blindness as to "status-race."[417]

Few resources are more valuable to constitutional argument than the dissent to an anticanonical case. The anticanonization of *Plessy* laid the groundwork for the canonization of the Harlan dissent, which in turn reinforced the anticanonicity of the majority opinion.[418] In the

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[415] *Id.* at 392 (Marshall, J., dissenting) (citation omitted).

[416] *Id.* at 416 n.19 (Stevens, J., concurring) (citations omitted) (internal quotation marks omitted).

[417] *See* Neil Gotanda, *A Critique of "Our Constitution is Color-Blind*," 44 STAN. L. REV. 1, 38–39 (1991).

[418] *See* Primus, *supra* note 16, at 248. Justice Harlan's dissent was cited in the Supreme Court just twice before 1971, in *Harper v. Virginia Board of Elections*, 383 U.S. 663, 677 n.7 (1966), and *Garner v. Louisiana*, 368 U.S. 157, 184–85 (1961) (Douglas, J., concurring), and in only two other opinions prior to *Bakke*: *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 150 (1973) (Douglas, J., concurring), and *Palmer v. Thompson*, 403 U.S. 217, 226 (1971). Since *Bakke* it has been invoked in twenty-four opinions in nineteen separate cases, many of which bear no obvious relationship to *Plessy*. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2758 n.14 (2007) (plurality opinion); *id.* at 2782–83, 2787–88 (Thomas, J., concurring); *id.* at 2791–92 (Kennedy, J., concurring in part and concurring in the judgment); *id.* at 2799 n.6 (Stevens, J., dissenting); Johnson v. California, 543 U.S. 499, 513 (2005); Lawrence v. Texas, 539 U.S. 558, 584 (2003) (O'Connor, J., concurring in the judgment); Grutter v. Bollinger, 539 U.S. 306, 378 (2003) (Thomas, J., concurring in part and dissenting in part); Zelman v. Simmons-Harris, 536 U.S. 639, 678, 683 (2002) (Thomas, J., concurring); Bush v. Vera, 517 U.S. 952, 1072 (1996) (Souter, J., dissenting); Romer v. Evans, 517 U.S. 620, 623 (1996); *id.* at 650 (Scalia, J., dissenting); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 272 (1995) (Ginsburg, J., dissenting); Johnson v. De Grandy, 512 U.S. 997, 1030 (1994) (Kennedy, J., concurring in part and concurring in the judgment); Shaw v. Reno, 509 U.S. 630, 642 (1993); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 862–63 (1992); *id.* at 962 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); New York v. United States, 505 U.S. 144, 185 (1992); Metro Broad., Inc. v. FCC, 497 U.S. 547, 637 (1990) (Kennedy, J., dissenting); Rutan v. Republican Party of Ill., 497 U.S. 62, 96 n.1 (1990) (Scalia, J., dissenting); Patterson v. McLean Credit Union, 491 U.S. 164, 174–75 (1989); Richmond v. J.A. Croson Co., 488 U.S. 469, 521 (1989) (Scalia, J., concurring in the judgment); McCleskey v. Kemp, 481 U.S. 279, 344 (1987) (Brennan, J., dissenting);

more than thirty years since *Bakke*, as all sides of the persistent debate over race-conscious governmental decisionmaking have sought to claim Harlan, a set piece has emerged, with more conservative Justices pushing a "formal-race" reading and more liberal Justices adopting something akin to the "status-race" position.[419] For example, in *Fullilove v. Klutznick*,[420] in which the Court upheld a federal government set-aside for minority contractors, Justice Stewart opened his dissenting opinion with Harlan's "color-blind" language and said, "I think today's decision is wrong for the same reason that [*Plessy*] was wrong,"[421] because "racial discrimination is by definition invidious discrimination."[422] And in *Parents Involved*, Chief Justice Roberts contrasted the Seattle school district's statement that they had "no intention 'to hold onto unsuccessful concepts such as [a] . . . colorblind mentality'" with Harlan's dissent.[423] In the same case, Justice Thomas, explicitly taking Justice Breyer's dissent to task for "attempt[ing] to marginalize the notion of a color-blind Constitution,"[424] linked that notion conceptually both to Harlan and to the lawyers who litigated *Brown*.[425] That dissent, for its part, indeed argued that the Fourteenth Amendment's drafters "would have understood the legal and practical difference" between using racial classifications "to keep the races apart" and doing so "to bring the races together."[426] More than a century after *Plessy* was decided, and more than half a century since it was formally repudiated, its negative valence is more certain and its legal meaning less certain than ever.

3. Lochner. — We may be witnessing a transformation from the anticanonicity of *Plessy* to the canonicity of Justice Harlan's more pliable, and therefore more valuable, dissenting opinion. The story of *Lochner* is, in a sense, the converse. Justice Holmes's dissent, which is anything but pliable, was a canonical statement of opposition to the recalcitrance of the judicial conservatives who frustrated Progressive Era social legislation and a significant part of President Franklin De-

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Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 788 (1986) (White, J., dissenting); Fullilove v. Klutznick, 448 U.S. 448, 522–23 (1980) (Stewart, J., dissenting).

[419] *Compare, e.g.*, *Grutter*, 539 U.S. at 378 (Thomas, J., concurring in part and dissenting in part), *Metro Broad.*, 497 U.S. at 637 (Kennedy, J., dissenting), *and J.A. Croson Co.*, 488 U.S. at 521 (Scalia, J., concurring in the judgment), *with Vera*, 517 U.S. at 1071–72 (Souter, J., dissenting).

[420] 448 U.S. 448 (1980).

[421] *Id.* at 523 (Stewart, J., dissenting).

[422] *Id.* at 526.

[423] 127 S. Ct. at 2758 n.14 (plurality opinion) (alteration in original) (quoting Debera Carlton Harrell, *School Website Removed: Examples of Racism Sparked Controvery*, SEATTLE POST-INTELLIGENCER, June 2, 2005, at B1, B5).

[424] *Id.* at 2782 (Thomas, J., concurring).

[425] *Id.* at 2782–83.

[426] *Id.* at 2815 (Breyer, J., dissenting).

lano Roosevelt's economic recovery agenda.[427] The *Lochner* majority opinion itself was not anticanonical, however, until at least the late 1960s, when it became a useful foil to *Griswold v. Connecticut* and its substantive due process progeny.[428]

None of which is to say that *Lochner* was not a significant case. It is to say, rather, that the case itself was no more significant within the judicial imagination than were other cases standing for similarly discredited notions of substantive review of social and economic legislation, such as *Allgeyer v. Louisiana*[429] and *Coppage v. Kansas*.[430] *Allgeyer* unanimously invalidated a Louisiana statute that prevented Louisiana citizens from entering into marine insurance contracts with companies that did not comply with state law,[431] and *Coppage* struck down a state ban on yellow-dog contracts, also on liberty-of-contract grounds.[432] For many years, *Allgeyer* and *Coppage* were at least as significant precedents as *Lochner*. Both the first and the second editions to the Dowling casebook, published in 1937 and 1941 respectively, include extensive excerpts from both *Allgeyer* and *Coppage*, but the two editions combined contain only a single, cursory reference to *Lochner*.[433] Indeed, the first six editions all cover *Coppage* in far greater detail than *Lochner*, which first received extensive treatment (at *Coppage*'s expense) when Gunther took over from Dowling for the seventh edition in 1965.[434] As Figure C indicates, the Supreme Court cited both *Coppage* and *Allgeyer* more frequently than *Lochner* through the 1940s. After those two cases were disavowed, they understandably faded from active citation. By contrast, and typical of the anticanon, *Lochner*'s repudiation gave it new life.

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[427] *See* Bernstein, *supra* note 46, at 1470–73.

[428] *See id.* at 1518 ("While *Lochner* era due process jurisprudence always had its severe critics, *Lochner* itself did not become a common negative touchstone until the early 1970s."); *see also id.* at 1517–18 (arguing that the discussion of *Lochner* in the *Griswold* opinions of Justice Douglas and Justice Black influenced legal scholarship).

[429] 165 U.S. 578 (1897).

[430] 236 U.S. 1 (1915).

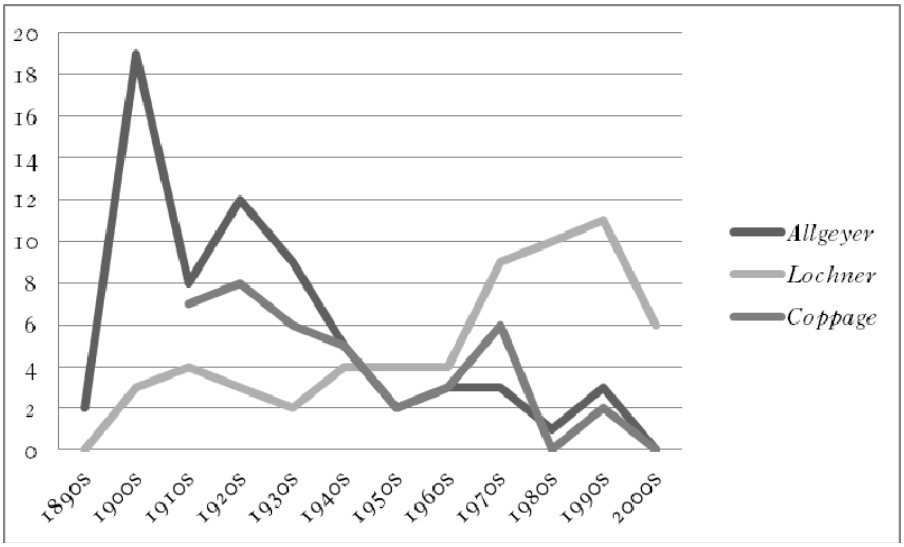
[431] 165 U.S. at 591–93.

[432] 236 U.S. at 13.

[433] DOWLING, SECOND EDITION, *supra* note 364, at 768–72, 866–80. Of the three cases, only *Coppage* receives treatment in the preliminary edition of the casebook. NOEL T. DOWLING, CASES ON AMERICAN CONSTITUTIONAL LAW 847–62 (1931).

[434] DOWLING & GUNTHER, *supra* note 366, at 864–70. That 1965 edition is also the first to cover *Griswold*, but the decision to devote an entire section of the book to "The Aftermath of *Lochner*" almost certainly was made before the *Griswold* decision came down. *Id.* at 745, 870. *Griswold* was decided June 7, 1965, and the cutoff date for materials to be included in the casebook was June 15 of that year. *See* Griswold v. Connecticut, 381 U.S. 479, 479 (1965); DOWLING & GUNTHER, *supra* note 366, at XII.

FIGURE C: SUPREME COURT CASES
REFERRING TO *ALLGEYER*, *LOCHNER*, AND *COPPAGE*



Consistent with this treatment, in recounting the history of substantive due process doctrine for economic regulation, Justice Black's opinion in the 1949 case *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*[435] referred not to the "*Lochner* era," a term that would not enter regular use until the 1970s,[436] but rather to the "*Allgeyer-Lochner-Adair-Coppage* constitutional doctrine."[437] In *Ferguson v. Skrupa*,[438] decided just two years before *Griswold*, Justice Black similarly referred to "[t]he doctrine that prevailed in *Lochner*, *Coppage*, *Adkins* [*v. Children's Hospital*[439]], [*Jay*] *Burns* [*Baking Co. v. Bryan*[440]], and like cases," visiting no special disfavor upon *Lochner*.[441] *West Coast Hotel v. Parrish*,[442] which undermined *Lochner*'s legal premise by upholding a minimum wage law for women, did not single the case

435 335 U.S. 525 (1949).
436 *See* Bernstein, *supra* note 46, at 1473, 1518.
437 *Lincoln Fed. Labor Union*, 335 U.S. at 535. In *Adair v. United States*, 208 U.S. 161 (1908), the Court held that Congress lacked the power to criminalize yellow-dog contracts for interstate carriers. *Id.* at 179–80.
438 372 U.S. 726 (1963).
439 261 U.S. 525 (1923).
440 264 U.S. 504 (1924).
441 *Skrupa*, 372 U.S. at 730. In the *Burns* decision, the Court invalidated a Nebraska statute fixing the permissible weight for loaves of bread. 264 U.S. at 517.
442 300 U.S. 379 (1937).

out, but buried it in a footnote between *Allgeyer* and *Adair*.[443] *Lochner* was at best a first among equals.

Lochner is now much more than that, and it is worth pondering why. There are differences between the cases. *Allgeyer* had to do with choice of law and protectionism in the insurance industry, *Coppage* with yellow-dog contracts, *Lochner* with hour and (implicitly) wage legislation; arguably, *Lochner*'s subject was more central to the nation's economic life, though that is not obvious. More significant is the presence, in *Lochner*, of Justice Holmes's memorable dissent, and the subsequent treatment of that dissent by Progressives, including especially Felix Frankfurter and his disciples.[444] Frankfurter adored Holmes.[445] The two had socialized extensively in the 1910s; both were regulars — and Frankfurter a boarder — at the House of Truth, a Dupont Circle salon that also attracted Progressive intellectuals such as Walter Lippmann and Harold Laski.[446] Frankfurter believed that Holmes's "conception of the Constitution must become part of the political habits of the country, if our constitutional system is to endure; and if we care for our literary treasures, the expression of his views must become part of our national culture."[447]

Frankfurter held Holmes's *Lochner* dissent in especially high regard, viewing it as a near-perfect distillation of what was, for Frankfurter, a perfect judicial philosophy.[448] As a young Harvard professor in 1916, Frankfurter published a study of Holmes's constitutional opinions in which he characterized *Allgeyer* as the "crest" of a wave of natural law thinking on the Court.[449] The wave broke, he wrote, with *Lochner*: "Enough is said if it is noted that the tide has turned. The

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[443] *Id.* at 392 n.1; *see also* Adamson v. California, 332 U.S. 46, 83 n.12 (1947) (Black, J., dissenting) (citing *Lochner* among many other cases invalidating regulatory legislation).

[444] Holmes was not a member of the *Allgeyer* Court, and he filed a very brief dissent in *Coppage* that incorporated by reference his *Lochner* opinion. *Coppage v. Kansas*, 236 U.S. 1, 27 (1915) (Holmes, J., dissenting).

[445] Justice Douglas is said to have remarked, "You know why Frankfurter didn't have any children? Because Holmes didn't." Roger K. Newman, *The Warren Court and American Politics: An Impressionistic Appreciation*, 18 CONST. COMMENT. 661, 677 (2001) (book review) (quoting an interview with Eliot Janeway) (internal quotation marks omitted).

[446] *See* Jeffrey O'Connell & Nancy Dart, *The House of Truth: Home of the Young Frankfurter and Lippmann*, 35 CATH. U. L. REV. 79, 79, 87 (1985); Brad Snyder, The House that Built Holmes (Dec. 27, 2010) (unpublished manuscript) (on file with the Harvard Law School Library).

[447] FELIX FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 29 (1938).

[448] Felix Frankfurter, *The Constitutional Opinions of Justice Holmes*, 29 HARV. L. REV. 683, 691 (1916) [hereinafter Frankfurter, *Constitutional Opinions*] (citing Holmes's *Lochner* dissent as an opinion that "reflects his whole point of view towards constitutional interpretation"); *see also* Felix Frankfurter, *Hours of Labor and Realism in Constitutional Law*, 29 HARV. L. REV. 353, 359 (1916) [hereinafter Frankfurter, *Hours of Labor*] ("[T]he opinion of Mr. Justice Holmes [in *Lochner*] pithily and completely puts the other point of view.").

[449] Frankfurter, *Constitutional Opinions*, *supra* note 448, at 690.

turning point is the dissent in the Lochner case."[450] This strikes a discordant note in the ear of the modern lawyer; many of us learned in law school that *Lochner* began the trend that Frankfurter seems to say it ended. He could not have known at the time that a new wave of *Lochner*-style opinions was on the horizon, but his sentiment is not just dated. For Frankfurter, *Lochner* was inseparable from Holmes, whose dissent, he was certain, was the case's enduring contribution to American law.

Frankfurter would return to the same theme in later lectures, articles, and opinions: that Holmes's *Lochner* dissent played an integral part in altering the Court's thinking on the Fourteenth Amendment. In his 1928 treatise on federal jurisdiction co-written with James Landis, Frankfurter argued that, soon after *Lochner*, "[t]he philosophy behind the constitutional outlook of Mr. Justice Holmes . . . appeared to be vindicated by demonstration in detail."[451] A decade later, in a lecture that would form part of Frankfurter's idolatrous monograph on Holmes,[452] he told a Cambridge audience that "Mr. Justice Holmes' classic dissent in [*Lochner*] will never lose its relevance."[453]

True enough, it now seems, but Frankfurter himself was in large measure responsible for that.[454] Others have remarked that Frankfurter's "great admiration for Mr. Justice Holmes has led him to overemphasize the latter's influence."[455] Whether or not his regard for Holmes's place in history was distorted, we should not understate the impact Frankfurter's views have had on the course of American legal thought (as we might by focusing solely on his Supreme Court tenure). For Progressive intellectuals and politicians searching for the set of arguments that would lead to judicial affirmation of the New Deal,

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450 *Id.* at 691.

451 FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 192 (1928).

452 *See* FRANKFURTER, *supra* note 447, at v.

453 *Id.* at 35.

454 Frankfurter was not the only Progressive to focus on *Lochner* and on Holmes's dissent. *See* David E. Bernstein, *Philip Sober Controlling Philip Drunk:* Buchanan v. Warley *in Historical Perspective*, 51 VAND. L. REV. 797, 819 (1998) ("Holmes's opinion became a statist shrine for Progressive legal theorists."). In a 1909 article, for example, Roscoe Pound wrote that Holmes's words in *Lochner* "deserve to become classical." Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 480 (1909); *see also* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 79 (1921) ("It is the dissenting opinion of Justice Holmes [in *Lochner*], which men will turn to in the future as the beginning of an era. In the instance, it was the voice of a minority. In principle, it has become the voice of a new dispensation, which has written itself into law."). Frankfurter's own attentions might well have been piqued by Theodore Roosevelt's public denunciation of *Lochner* in a speech in 1910. *See* Nourse, *supra* note 243, at 779–84.

455 Walter Wheeler Cook, Book Review, ANNALS AM. ACAD. POL. & SOC. SCI., May 1939, at 228, 229 (reviewing FRANKFURTER, *supra* note 448); *see also* Snyder, *supra* note 446, at 12 ("A key component of the House [of Truth]'s canonization of Holmes was alerting the public to the rightness of his opinions and elevating his dissents into super-precedents.").

Frankfurter was a kind of guru. Before he even reached the Court, Frankfurter had the ears of Justices Holmes, Brandeis, and Stone, as well as of President Roosevelt.[456] "[I]n the Thirties," Joseph Lash writes, "for men concerned with the intellectual aspects of law and politics, a pilgrimage to Harvard to talk to Frankfurter and to be present at his weekly at-homes on Brattle Street, thronged as they were with Boston's brightest and best born, was obligatory."[457]

As is well known, moreover, many of Frankfurter's legal views proved metastatic, spreading through his extensive network of former students, law clerks, and professionally indebted mentees. Accomplished New Dealers Benjamin Cohen,[458] Thomas Corcoran,[459] David Lilienthal,[460] Charles Wyzanski,[461] Nathan Margold,[462] Alger Hiss,[463] and Landis[464] (also a former Harvard Law School dean) were former students and protégés, as was Dean Acheson,[465] whom Frankfurter placed in a clerkship with Louis Brandeis. His former clerks included legendary professors at most of the nation's top law schools: Bickel at Yale, Louis Henkin at Columbia, Currie and Philip Kurland at Chicago, Albert Sacks at Harvard.[466] Frankfurter placed numerous other renowned professors in clerkships with other Justices, including Paul Freund (Brandeis),[467] Henry Hart (Brandeis),[468] Louis Jaffe (Brandeis),[469] and Arthur Sutherland (Holmes).[470]

It is difficult to gauge the precise influence that Frankfurter's views on Holmes and on *Lochner* had on the many prominent lawyers and academics he trained and advised — not all were bullied into writing Holmes biographies, as Frankfurter's former student Mark De Wolfe Howe was.[471] We do know, though, that Bickel's *The Morality of Consent* mentions neither *Allgeyer* nor *Coppage* but repeatedly laments that the Warren Court was doing very nearly what Holmes — who

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456 JOSEPH P. LASH, FROM THE DIARIES OF FELIX FRANKFURTER 50 (1975).

457 *Id.*

458 Melvin I. Urofsky, *Conflict Among the Brethren: Felix Frankfurter, William O. Douglas and the Clash of Personalities and Philosophies on the United States Supreme Court*, 1988 DUKE L.J. 71, 112.

459 LASH, *supra* note 456, at 36.

460 *Id.*

461 H.N. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER 98 (1981).

462 BRUCE ALLEN MURPHY, THE BRANDEIS/FRANKFURTER CONNECTION: THE SECRET POLITICAL ACTIVITIES OF TWO SUPREME COURT JUSTICES 395 n.65 (1982).

463 LASH, *supra* note 456, at 36.

464 *Id.* at 35.

465 *Id.* at 36.

466 *Id.* at 351.

467 PETER H. IRONS, THE NEW DEAL LAWYERS 141 (1982).

468 LASH, *supra* note 456, at 204 n.2.

469 IRONS, *supra* note 467, at 141.

470 G. Edward White, *Hiss and Holmes*, 28 OHIO N.U. L. REV. 231, 252 (2002).

471 LASH, *supra* note 456, at 36, 54–55.

comes off quite well by Bickel — had sagaciously warned the *Lochner* Court not to do.[472] And that Kurland considered Holmes, Learned Hand, Brandeis, and Frankfurter the leaders of the "lonely crowd of jurists dedicated to 'self-restraint,'" who were "big enough" to resist reading their personal preferences into the Constitution.[473] Charles Fairman, one of the most influential Fourteenth Amendment scholars of the twentieth century, was also Frankfurter's student and mentee.[474] Fairman's 1948 *American Constitutional Decisions*, designed for undergraduate courses in American government,[475] devotes a chapter to *Lochner*.[476] Fairman situates *Lochner* as the central case on constitutional limitations between the *Slaughterhouse Cases*[477] and *West Coast Hotel*, with Justice Holmes carrying on the noble fight begun by Justice Miller.[478] Eight of the ten paragraphs of Fairman's commentary on *Lochner* are tributes to Justice Holmes.[479] Of the Holmes dissent, he writes:

> An entire philosophy is compressed into three paragraphs. Many men know those sentences by heart. A number of Holmes' best remembered opinions in later years were but the application of the Lochner dissent to the circumstances of the particular case. His point of view has now become a part of the accepted doctrine of the Court.[480]

Even those protégés who took a more measured view of Holmes than Frankfurter did — Currie complained of Holmes's "inclination to substitute epigrams for analysis," with the Herbert Spencer line as Exhibit A[481] — would have had to confront their old mentor, in the classroom, in articles, in casual discussion, in order to complete the argument.

The only two Supreme Court opinions prior to 1963 that cite to Holmes's Spencer line (there have been seven such opinions in the last eighteen years) were written by Frankfurter.[482] In the first, *Winters v.*

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[472] ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 25–28 (1975) (arguing that in the 1960s, contra Holmes, "a majority of the justices, under Earl Warren, again began to dictate answers to social and sometimes economic problems").

[473] PHILIP B. KURLAND, MR. JUSTICE FRANKFURTER AND THE CONSTITUTION 5 (1971).

[474] Richard L. Aynes, *Charles Fairman, Felix Frankfurter, and the Fourteenth Amendment*, 70 CHI.-KENT L. REV. 1197, 1205–06 (1995). The full article explores the relationship between Frankfurter and Fairman at some length.

[475] CHARLES FAIRMAN, AMERICAN CONSTITUTIONAL DECISIONS iii (rev. ed. 1950).

[476] *Id.* at 325–41.

[477] 83 U.S. (16 Wall.) 36 (1873).

[478] *See* FAIRMAN, *supra* note 475, at 324 ("Peckham, J., in upholding the new 'liberty of contract,' carried on where [Justice] Field [dissenting in the *Slaughterhouse Cases*] once led, and Holmes, dissenting, fought for the values which Miller had defended.").

[479] *Id.* at 335–37.

[480] *Id.* at 335.

[481] CURRIE, *supra* note 194, at 82.

[482] Frankfurter also cited to Holmes's *Lochner* dissent in *Harris v. United States*, 331 U.S. 145, 157 (1947) (Frankfurter, J., dissenting) ("If I begin with some general observations, it is not be-

New York,[483] Frankfurter dissented from the Court's invalidation of an obscenity conviction with the tart comment, "If 'the Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics,' neither does it enact the psychological dogmas of the Spencerian era."[484] The following year, in *American Federation of Labor v. American Sash & Door Co.*,[485] Frankfurter again assimilated the significance of *Lochner* to the prescience of Holmes. Under the *Lochner* order, he wrote:

> Adam Smith was treated as though his generalizations had been imparted to him on Sinai . . . . [E]conomic views of confined validity were treated by lawyers and judges as though the Framers had enshrined them in the Constitution. . . . Had not Mr. Justice Holmes' awareness of the impermanence of legislation as against the permanence of the Constitution gradually prevailed, there might indeed have been "hardly any limit but the sky" to the embodiment of "our economic or moral beliefs" in that Amendment's "prohibitions."[486]

The opinion reports a standard critique of the *Lochner* era. It implicitly exaggerates the aggressiveness of the Court in invalidating economic legislation, and it expressly promotes the views of Holmes, who (like Frankfurter) believed that the Fourteenth Amendment imposes few substantive limits on legislative choices that do not implicate civil liberties.[487]

This standard critique was challenged on the Court less than two decades later, surprisingly perhaps, from the left. Thus, Justice Douglas, dissenting in *Poe v. Ullman*,[488] the precursor to *Griswold*, wrote, just before quoting Holmes's *Lochner* dissent, that "[f]or years the Court struck down social legislation when a particular law did not fit the notions of a majority of Justices as to legislation appropriate for a free enterprise system."[489] Douglas refused, however, to adopt the absolutist position associated with Holmes and with Frankfurter.[490] "The error of the old Court, as I see it, was not in entertaining inquiries concerning the constitutionality of social legislation but in applying the standards that it did," Douglas wrote.[491] "Social legislation dealing with business and economic matters touches no particularized prohibition of the Constitution,"[492] but to say that "whatever the ma-

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cause I am unmindful of Mr. Justice Holmes' caution that 'General propositions do not decide concrete cases.'" (internal citation omitted)).

483 333 U.S. 507 (1948).

484 *Id.* at 527 (Frankfurter, J., dissenting) (internal citation omitted).

485 335 U.S. 538 (1949).

486 *Id.* at 543 (internal citation omitted).

487 *See* FRANKFURTER, *supra* note 447, at 49–51.

488 367 U.S. 497 (1961).

489 *Id.* at 517 (Douglas, J., dissenting).

490 Frankfurter wrote the *Poe* majority opinion holding the challenge nonjusticiable.

491 *Poe*, 367 U.S. at 517 (Douglas, J., dissenting).

492 *Id.*

jority in the legislature says goes" would serve to "reduce[] the legislative power to sheer voting strength and the judicial function to a matter of statistics."[493]

Douglas was laying a foundation for his majority opinion in *Griswold*, which also confronted *Lochner* directly and distinguished it as "touch[ing] economic problems, business affairs, [and] social conditions" rather than "an intimate relation of husband and wife."[494] Why did Justice Douglas feel the need to address *Lochner*, and not *Coppage* or *Allgeyer*?[495] For one thing, Thomas Emerson's appellant's brief[496] raised *Lochner* directly, and did not discuss those other cases. It roughly drew the distinction that would later emerge in the case law, between legislative judgments "as to the need and propriety of all types of economic regulation," which should receive "full leeway" from courts,[497] and "legislation which impairs the freedom of the individual to live a fruitful life or to sustain his position as citizen rather than subject,"[498] which the Court "has subjected to much more intensive scrutiny."[499] The brief singled out *Lochner* as exemplary: "We are not, in short, asking here for reinstatement of the line of due process decisions exemplified by [*Lochner*]."[500]

As important (and related), by 1965 Holmes's *Lochner* dissent had become canonized. The sixth edition of the Dowling casebook, published in 1959, quotes Holmes's *Lochner* dissent at far greater length than it does the majority opinion.[501] Both the 1954 and the 1961 editions of the Frankfurter-inspired casebook authored by Freund, Sutherland, Howe, and Ernest Brown also quote the Holmes dissent at length.[502] One could not invalidate legislation under the substantive protections of the due process clause without meeting Holmes's — and the late Frankfurter's[503] — challenge.

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493 *Id.* at 518.

494 381 U.S. 479, 482 (1965).

495 Dissenting, Justice Black mentions *Lochner* most prominently in a string cite along with *Coppage*, *Jay Burns Baking Co.*, and *Adkins*. *Id.* at 514–15 (Black, J., dissenting).

496 Brief for Appellants, *Griswold*, 381 U.S. 479 (No. 496), 1965 WL 92619.

497 *Id.* at *22.

498 *Id.* at *22–23.

499 *Id.* at *23.

500 *Id.* Remarkably, the state of Connecticut did not mention *Lochner* (or any other discredited substantive due process case) in its briefing. *See* Brief for Appellee, *Griswold*, 381 U.S. 479 (No. 496), 1965 WL 92620.

501 DOWLING, *supra* note 365, at 739–40.

502 PAUL A. FREUND ET AL., 2 CONSTITUTIONAL LAW: CASES AND OTHER PROBLEMS 1309–10 (2d ed. 1961); PAUL A. FREUND ET AL., 2 CONSTITUTIONAL LAW: CASES AND OTHER PROBLEMS 1158–59 (1st ed. 1954).

503 Frankfurter died on February 22, 1965, just weeks before *Griswold* was argued. *See Griswold*, 381 U.S. at 479 (stating that the case was argued on March 29–30, 1965); Edward G. McGrath, *Felix Frankfurter Dies*, BOS. GLOBE, Feb. 23, 1965, at A1.

Once *Lochner* started down the road to anticanonicity, partisans on both sides of the substantive due process debate reinforced their respective views in subsequent opinions.[504] The introduction to the majority opinion in *Roe v. Wade* contains only one external citation[505]: to Justice Holmes's "now-vindicated" dissent in *Lochner*, which Justice Blackmun emphasized the need to "bear in mind."[506] But the message was not the familiar admonition against judicial activism. Rather, Justice Blackmun took the essential message of Holmes to be: "[The Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."[507] Through Holmes, in other words, *Lochner* meant that a community's aversion to a particular practice, in this case abortion, does *not* settle the question of the constitutionality of a prohibition of that practice. How times had changed.

Then-Justice Rehnquist, in dissent, took the traditional view of *Lochner*. "While the Court's opinion quotes from the dissent of Mr. Justice Holmes in [*Lochner*]," he wrote, "the result it reaches is more closely attuned to the majority opinion of Mr. Justice Peckham in that case."[508] Such accusations, on both sides, have become a familiar, nearly hackneyed, part of our constitutional discourse. Thus, Ely's denunciation of *Roe* largely took the form of a comparison of the case to *Lochner*.[509] Ely plainly regarded the latter case as already anticanonical: "[I]t is impossible candidly to regard *Roe* as the product of anything [other than the 'philosophy of *Lochner*']. That alone should be enough to damn it."[510]

Playing defense, Justice Powell's plurality opinion in *Moore v. City of East Cleveland*[511] acknowledged, while overturning a municipal housing ordinance on substantive due process grounds, that "[a]s the history of the *Lochner* era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court."[512]

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504 *See* Bernstein, *supra* note 46, at 1473.

505 The introduction also cites to *Roe v. Wade*'s companion case, *Doe v. Bolton*, 410 U.S. 179 (1973), but the citation is used only for cross-reference and not to support any proposition. *See* Roe v. Wade, 410 U.S. 113, 116 (1973).

506 *Roe*, 410 U.S. at 117.

507 *Id.* (alteration in original) (quoting Lochner v. New York, 198 U.S. 45, 76 (1905)) (internal quotation marks omitted).

508 *Id.* at 174 (Rehnquist, J., dissenting).

509 Ely, *supra* note 383, at 937–43.

510 *Id.* at 939–40.

511 431 U.S. 494 (1977).

512 *Id.* at 502 (plurality opinion).

Moore, decided in 1977, marks the first time the term "*Lochner* era" appeared in any published opinion of a state or federal court.[513] The phrase reappeared in the first edition of Laurence Tribe's constitutional law treatise,[514] published in 1978, after which, according to Bernstein, "use of the phrase '*Lochner* era' in the law review literature skyrocketed."[515] By the time Justice Scalia — on offense, per custom — used *Lochner* to attack Justice Kennedy's opinion in *Lawrence*, he did not need to refer to the case by name: "[The Texas law] undoubtedly imposes constraints on liberty. So do laws prohibiting prostitution, recreational use of heroin, and, for that matter, working more than 60 hours per week in a bakery."[516] Q.E.D.

4. Korematsu. — *Korematsu*'s path to the anticanon necessarily looks different from that of the others. *Korematsu* is not only the most recent of the cases but it is also, as discussed, the only one that receives consistently positive citation, namely for its early articulation of the strict scrutiny standard. For example, the Court in *Bolling v. Sharpe*[517] cited both *Hirabayashi* and *Korematsu* for the proposition that "[c]lassifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect."[518] Likewise, Justice White's unanimous opinion in *McLaughlin v. Florida*,[519] which invalidated a state statute that prohibited interracial cohabitation, took *Korematsu* to hold, as relevant, that racial classifications must be "subject to the 'most rigid scrutiny.'"[520] And *Loving v. Virginia*, which *McLaughlin* presaged, cited the same passage. Though each of those cases dealt directly with

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[513] Bernstein, *supra* note 46, at 1520. According to Bernstein, the phrase was "virtually unknown" before it appeared in the Gunther casebook in 1970. *Id.* at 1518. In that edition, which contained lengthy discussion of the "evils of the *Lochner* philosophy," Gunther wrote: "Rejection of the Lochner heritage is a common starting point for modern Justices; reaction against the excessive intervention of the 'Old Men' of the pre-1937 Court has strongly influenced the judicial philosophies of the successors." GERALD GUNTHER & NOEL T. DOWLING, CONSTITUTIONAL LAW: CASES AND MATERIALS 962 (8th ed. 1970). The term "*Lochner* era" reappeared in several scholarly articles in subsequent years, including in the *Harvard Law Review* Forewords authored by Gunther and by Laurence Tribe. *Id.*; *see* Gerald Gunther, *The Supreme Court, 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 11 (1972); Laurence H. Tribe, *The Supreme Court, 1972 Term — Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 12 (1973). Gunther was both a protégé and biographer of Learned Hand, Frankfurter's intellectual kinsman and longtime friend. GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE ix, 221, 564–65 (1994).

[514] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 434–36, 438, 441, 456, 564, 919 (1st ed. 1978).

[515] Bernstein, *supra* note 46, at 1521.

[516] 539 U.S. 558, 592 (2003) (Scalia, J., dissenting).

[517] 347 U.S. 497 (1954).

[518] *Id.* at 499.

[519] 379 U.S. 184 (1964).

[520] *Id.* at 192.

instances of government racial discrimination, none distanced itself from *Korematsu*'s disturbing holding.

It may be that the freshness of the case through much of the period in which *Dred Scott*, *Plessy*, and *Lochner* became anticanonical is a sufficient explanation for its being spared the Court's rod for so many years. Another possibility is that, as discussed in Part I, neither the courts nor the political branches had come to terms with *Korematsu*'s wrongness until the 1980s. But there may be a simpler explanation for the near-absence of any negative citation to *Korematsu* during the entirety of the Warren Court and the civil rights era: shame. Recall that the anticanonization of *Dred Scott* and *Plessy* was largely the work of Justice Black, Justice Douglas, and to a lesser degree, Chief Justice Warren. Black wrote, and Douglas joined, the discredited majority opinion in *Korematsu*. Warren was not yet on the Court at the time of *Korematsu*, but as attorney general of California during World War II, he had been a vocal supporter of Japanese internment and had helped the military to implement the policy. As Warren biographer G. Edward White writes, "he was the most visible and effective California public official advocating internment and evacuation."[521]

Warren wrote *Bolling*, which was the first case to cite *Korematsu* expressly to defend strict scrutiny in race cases.[522] At least one other member of the Warren Court, Justice Harlan, clearly found the decision odious. In *Poe*, he cited *Korematsu* as a negative example — in precisely the sense in which anticanonical cases are cited — to demonstrate that the Due Process Clause must sometimes protect substantive rights, lest "the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of [life, liberty, and property]."[523] But in race cases, the Warren Court Justices consistently refused to invoke *Korematsu* for its obvious negative lessons, and instead treated it unself-consciously as a precedent to be cited for its positive contributions to the Court's race jurisprudence.

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[521] G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE 71 (1982).

[522] There were eleven cases that cited *Korematsu* prior to *Bolling*. In only two of those opinions was *Korematsu* cited remotely to defend strict scrutiny in race cases, and the majority opinion in one of those two was written by Justice Black. *See* Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 418 (1948) (Black, J.); Hurd v. Hodge, 334 U.S. 24, 30 (1948). In the remaining nine cases, the citations to *Korematsu* were not made in the context of strict scrutiny. *See* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 222 (1953) (Jackson, J., dissenting); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 661 (1952) (Clark, J., concurring in the judgment); Harisiades v. Shaughnessy, 342 U.S. 580, 589 (1952); Terminiello v. Chicago, 337 U.S. 1, 34 (1949) (Jackson, J., dissenting); Ludecke v. Watkins, 335 U.S. 160, 175 (1948) (Black, J., dissenting); Lichter v. United States, 334 U.S. 742, 767 (1948); Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28, 37 (1948); Oyama v. California, 332 U.S. 633, 671 (1948) (Murphy, J., concurring); *Ex parte* Endo, 323 U.S. 283, 308 (1944) (Murphy, J., concurring).

[523] 367 U.S. 497, 541 (1961) (Harlan, J., dissenting).

We cannot know whether the Warren Court's silence — nay, doublespeak — on the dangers of *Korematsu* stemmed from embarrassment, stubbornness, both, or some other source. We do know that Warren wrote in his memoirs that he "deeply regretted" his involvement in the internment, and that thinking of the "innocent little children who were torn from home" left him "conscience-stricken,"[524] though he refused to acknowledge that regret publicly until 1974.[525] Black defended his opinion until his death, though Roger Newman writes that he was reluctant to discuss the case even with his clerks.[526] Douglas wrote in his memoirs that it was a mistake to affirm the use of internment camps,[527] and his discussion of the case near the end of his tenure on the Court strikes a conspicuously defensive tone. In *DeFunis v. Odegaard*,[528] Douglas dissented from the Court's holding that a challenge to the University of Washington Law School affirmative action program was moot.[529] He noted that the Court last sustained a racial classification in *Korematsu* and *Hirabayashi*, and he appended the following in a footnote whose tone cannot easily be captured in excerpt:

> Our Navy was sunk at Pearl Harbor and no one knew where the Japanese fleet was. We were advised on oral argument that if the Japanese landed troops on our west coast nothing could stop them west of the Rockies. The military judgment was that, to aid in the prospective defense of the west coast, the enclaves of Americans of Japanese ancestry should be moved inland, lest the invaders by donning civilian clothes would wreak even more serious havoc on our western ports. The decisions were extreme and went to the verge of wartime power; and they have been severely criticized. It is, however, easy in retrospect to denounce what was done, as there actually was no attempted Japanese invasion of our country. While our Joint Chiefs of Staff were worrying about Japanese soldiers landing on the west coast, they actually were landing in Burma and Kota Bharu in Malaya. But those making plans for defense of the Nation had no such knowledge and were planning for the worst. Moreover, the day we decided *Korematsu* we also decided [*Endo*], holding that while evacuation of the Americans of Japanese ancestry was allowable under extreme war conditions, their detention after evacuation was not.[530]

One is forgiven the impression that the Justice doth protest too much. There is much to quarrel with in Douglas's legacy-building re-

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[524] EARL WARREN, THE MEMOIRS OF EARL WARREN 149 (1977).

[525] ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 159, 520 (1997).

[526] ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 318–19 (1994).

[527] WILLIAM O. DOUGLAS, THE COURT YEARS: 1939–1975, at 280 (1980). Douglas wrote but withdrew a concurring opinion arguing that the evacuation was constitutionally authorized but that detention was not. *Id.*

[528] 416 U.S. 312 (1974).

[529] *Id.* at 320 (Douglas, J., dissenting).

[530] *Id.* at 339 n.20.

visionism, some of which I discussed in Part II. Suffice for now to say that it was impossible to place *Korematsu* in the anticanon, even as circumstances bid it there, while Warren, Black, and Douglas sat on the Court.

More recently, Supreme Court discussion of *Korematsu* has begun to approximate the pattern of other anticanonical cases: use across the political spectrum to serve a variety of different morals. Thus, when Justice Marshall marshaled *Korematsu* against compulsory drug testing for railroad employees, he adopted an absolutist stance, citing the case for the danger of "allow[ing] fundamental freedoms to be sacrificed in the name of *real or perceived* exigency."[531] In *Metro Broadcasting, Inc. v. FCC*,[532] the dissenting Justice O'Connor took *Korematsu* to teach us that racial classifications "endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict."[533] In *Reno v. Flores*,[534] which upheld an INS policy of juvenile detention, Justice Stevens in dissent appeared to view *Korematsu*'s error not as violating any absolute restriction but rather as representing the danger of inadequate or incompetent process: "[T]he [*Korematsu*] Court approved a serious infringement of individual liberty without requiring a case-by-case determination as to whether such an infringement was in fact necessary to effect the Government's compelling interest in national security."[535]

Korematsu's use by Justice Scalia is perhaps the best signal of its true arrival in the anticanon. Scalia has invoked the decision twice in abortion-related cases, for which he reserves his angriest work product. In *Madsen v. Women's Health Center, Inc.*,[536] dissenting from a decision upholding an injunction against antiabortion protesters, he cited Justice Jackson's *Korematsu* dissent and said: "What was true of a misguided military order is true of a misguided trial-court injunction. . . . [T]he Court has left a powerful loaded weapon lying about today."[537] Then, more stridently, in *Stenberg v. Carhart*,[538] in dissent from a decision invalidating Nebraska's ban on so-called "partial birth" abortions, Justice Scalia began his dissent: "I am optimistic

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[531] Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting) (emphasis added); *see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 275 (1995) (Ginsburg, J., dissenting) (arguing that the *Korematsu* Court approved "an odious, gravely injurious racial classification").

[532] 497 U.S. 547 (1990).

[533] *Id.* at 603 (O'Connor, J., dissenting).

[534] 507 U.S. 292 (1993).

[535] *Id.* at 345 n.30 (Stevens, J., dissenting).

[536] 512 U.S. 753 (1994).

[537] *Id.* at 815 (Scalia, J., concurring in part and dissenting in part).

[538] 530 U.S. 914 (2000).

enough to believe that, one day, *Stenberg v. Carhart* will be assigned its rightful place in the history of this Court's jurisprudence beside *Korematsu* and *Dred Scott*."[539] Both cases were identified solely by their petitioner, and neither was given — nor needed — a citation.

B. Theory

We are ready, at last, to articulate a theory of the anticanon. We have seen that anticanonicity is not solely a function of poor conventional legal reasoning, nor of immorality, nor of the two in combination. We have also seen that historical accident plays an important role in establishing a case as anticanonical.[540] *Dred Scott* and *Plessy* would not have achieved that status in the absence of a Court prepared to write civil rights protections into positive constitutional law in the 1960s and 1970s. *Lochner* arguably would have been lost to history without Frankfurter's canonization of Holmes. *Korematsu*'s treatment reflected the composition of the Court at key moments of historical evaluation and revision. More broadly, history confirms that decisions that acquire anticanonical status are used as distinctive resources in later constitutional controversies; this use then itself becomes a litmus test for anticanonicity.

In this section let us think more systematically about how this use is accomplished. Among the first features one notices about the anticanon is that its authority is universally invoked. It is used by all sides of modern political and legal controversies. What enables this feature to persist is that the arguments against these cases span the ideological spectrum.[541] *Dred Scott* is wrong both because it employs substantive due process and because it is overly positivist and originalist. *Plessy* is wrong both because it fails to be colorblind and because it is overly formalistic about race, missing the social meaning of Jim Crow. *Lochner* is wrong both because it resorts to substantive due process and because it exalts liberty of contract and laissez-faire capitalism over progressive legislation. *Korematsu* is wrong both because it defers negligently to the Executive and because it is not colorblind. For both *Plessy* and *Lochner*, the presence of memorable dissenting opinions surfaces an even greater range of arguments, facilitating claims by a wide array of participants.

We can restate the pluripotency of the anticanon using the language of incompletely theorized agreements, a concept popularized

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[539] *Id.* at 953 (Scalia, J., dissenting).

[540] *Cf.* Balkin & Levinson, *supra* note 16, at 995 (describing canons as "historical creations in which rational design and precision engineering are wishful thinking").

[541] *Cf.* Primus, *supra* note 16, at 280 n.144 ("[O]nce a dissent becomes sufficiently canonical, both sides of controversial positions will try to shape its holding to give themselves support.").

within law by Sunstein.[542] He argues that incompletely theorized agreements allow a pluralistic society with disparate views to produce some semblance of political and legal consensus.[543] The various participants in a legal dispute might agree on an outcome without necessarily agreeing on broader principles or explanations.[544] Sunstein's paradigmatic examples describe a policy outcome — protection for endangered species or strict liability for torts, say[545] — and diverse reasons for supporting that outcome.[546] The suggestion here is a twist on the concept: there is agreement that anticanonical cases are wrongly decided, but there is disagreement both as to the best explanation of their errors and as to how to apply their lessons to future specific cases.[547]

Incomplete theorization in this sense is an essential feature of anticanonical cases. These cases represent shared reference points not because they signal unanimity or consensus but because they enable discourse — "dialogue" would be too strong — amid dissensus. There is something of this explanation in Godwin's Law, which posits that as an online discussion grows longer the probability of a comparison involving Nazis or Hitler approaches one.[548] Leo Strauss expressed a similar idea when he long ago lamented "the fallacy that in the last decades has frequently been used as a substitute for the *reductio ad absurdum*: the *reductio ad Hitlerum*."[549] Hitler has become a rhetorical common denominator whose historical commitments are (for that reason) necessarily obscured. The universal condemnation of the Nazi regime both enables and is enabled by the fact that it may simultaneously stand in for the excesses of democracy or of totalitarianism, of moral relativism or of moral certainty. We may all find comfort in associating our opponent's position with the anticanon, and cognitive dissonance (at least) inhibits our seeing the anticanon in ourselves. It is what we are not.

The anticanon, then, is normatively unstable. It is a space in which diverse participants in constitutional debate work out mutually

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542 *See* Sunstein, *supra* note 22, at 1735–36.

543 *Id.*

544 *Id.*

545 *Id.* at 1736.

546 *Id.* at 1736, 1739–40.

547 This Article's usage approximates what Sunstein calls agreement on a "mid-level" principle but disagreement both as to the more general theory that accounts for the mid-level principle and as to the outcomes that the principle specifies. *Id.* at 1739.

548 *See* Tom Chivers, *Internet Rules and Laws: The Top 10, from Godwin to Poe*, THE TELEGRAPH (Oct. 23, 2009, 7:30 AM), http://www.telegraph.co.uk/technology/news/6408927/Internet-rules-and-laws-the-top-10-from-Godwin-to-Poe.html.

549 LEO STRAUSS, NATURAL RIGHT AND HISTORY 42 (1953).

eligible but *competing* ethical commitments.[550] Jack Balkin has made a somewhat analogous point about the constitutional canon: "Canonical cases are protean — they can stand for (or be made to stand for) many different things to different theorists, and that is what makes them so useful for the work of theory."[551] Balkin's point is that canonical cases serve as a test for the viability and creativity of academic theories about constitutional law, and they could not play this role if they could only be understood in one way. This is true a fortiori of anticanonical cases. Because canonical cases are good law, they would be relevant to constitutional law even if they were not especially useful to constitutional theory.[552] The anticanon, in contrast, has no reason for being except to serve as a test for theories — whether academic or judicial — about legal substance or method. Save as historical footnotes, anticanonical cases are invoked only to serve this purpose. It is all the more important, then, that the anticanon be, as Balkin says, "protean."

This feature relates intimately to a second important characteristic of the anticanon. Recall my suggestion in section II.A.4 that *Korematsu* is both the least defensible of the anticanon cases and presents the weakest case for anticanonicity, and that these features are related.[553] In fact, they are positively correlated. Imagine that, instead of detaining Japanese Americans, the military were executing them summarily. And imagine *Korematsu* came out the same way. Under the circumstances, citing *Korematsu* to illustrate the dangers of affirmative action, or even wartime detention of enemy combatants, would be at least hyperbolic, and would border on category error. And the error would grow in proportion to the perceived egregiousness of *Korematsu*. All of which is to say that, beyond some threshold, the more obviously wrong a decision, the fewer the reasonable opportunities for citation. The most obvious constitutional errors are the least likely to be replicated.[554]

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[550] *See, e.g.*, GRABER, *supra* note 161, at 20–28 (describing divergent criticisms of *Dred Scott* and noting that "each school of contemporary constitutional thought hopes to discredit rival theories and the judicial opinions believed to rely on those theories," *id.* at 20–21).

[551] Balkin, *supra* note 16, at 681.

[552] And as Balkin and Levinson acknowledge, not all canonical cases are especially useful to modern constitutional theory. *See* Balkin & Levinson, *supra* note 16, at 973–76 (discussing *McCulloch* and noting that, despite its canonical status in law school curricula, it receives little attention in law reviews).

[553] *See supra* p. 422–23.

[554] A related phenomenon may provide a partial explanation for the failure of *Buck v. Bell*, 274 U.S. 200 (1927), or *Bradwell v. Illinois*, 83 U.S. 130 (1873), to gain more traction among judges and commentators. Both are better known for the shock value of particular phrases in associated opinions than for their contested application of an otherwise acceptable legal norm. *See Buck*, 274 U.S. at 207 ("Three generations of imbeciles are enough."); *Bradwell*, 83 U.S. at 141 (Bradley, J., concurring in the judgment) ("Man is, or should be, woman's protector and defender. . . . The

This is perhaps another way of saying that anticanonical cases must, on some replicable metric, be correct. These are not the products of rogue judges — incompetent, drunk, or on the make. Hardly. Anticanonical cases tend toward the peculiar logic of judicial formalism so often praised in other contexts: a delegation to history; an appeal to neutral principles; a posture of deference to governmental branches more in the know. These cases are useful because a certain style of reasoning may arguably lead both to the result in the anticanonical case and to a result that relevant participants in modern controversies also espouse. This is most obviously true of *Lochner*, whose reasoning may lead, on a set of reasonable assumptions, to *Griswold*, to *Roe*, to *Lawrence*, and to numerous other cases that have generated constitutional controversy. If substantive due process were obviously incorrect, *Lochner* would long ago have faded from memory.

Finally, an important criterion of anticanonical cases is that the competing claims that they embody relate to issues of (small "c") constitutional significance. That is, the debates the anticanon facilitates do not just implicate the Constitution as a legal document but are central to national identity. It is no wonder that at least three of the four anticanon cases — *Dred Scott*, *Plessy*, and *Lochner* — have been used by prominent conservatives to attack *Roe*.[555] Argument through the anticanon is a form of ethical argument, and the presence of the anticanon signals the independent significance of ethical argument as a modality of constitutional interpretation. I am borrowing from Philip Bobbitt, who describes ethical argument as "denot[ing] an appeal to those elements of the American cultural ethos that are reflected in the Constitution."[556]

As Bobbitt does, it is important here to distinguish ethics from morals,[557] since the anticanon implicates both. Ethics refers, or may refer, to the context-specific values of a particular community, whereas in my usage morals refers to values that make claims that span communities, perhaps because grounded in some deeper religious or quasi-

constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.") These opinions might be sui generis in the sense that reasonable opportunities for associating an opponent's position with these claims will presumably be rare.

555 *See, e.g.*, *supra* pp. 441; *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 957 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

556 PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 20 (1991).

557 *See id.* at 20–21; PHILIP BOBBITT, CONSTITUTIONAL FATE 94–95 (1982) ("Ethical constitutional arguments do not claim that a particular solution is right or wrong in any sense larger than that the solution comports with the sort of people we are and the means we have chosen to solve political and customary constitutional problems.").

religious imperative.[558] The relevant community here is the American people, but the relevant ethos embodies their values as refracted through existing legal and political institutions. *Dred Scott* is immoral on any acceptable moral theory, but it takes work to establish that it was unethical in its time — its claims about black citizenship were consistent with much of American legal and political practice late into the last century. Placing *Dred Scott* within the anticanon contributed to a project of conferring official recognition upon an ethical transformation with regard to race relations. Likewise, many cases besides *Dred Scott* are inarguably immoral, including perhaps all of my shadow anticanon.[559] But immorality is neither a necessary nor a sufficient feature of the anticanon. Inconsistency with ethos, by contrast, is an affirmative feature of anticanonical cases. Along with incomplete theorization and legal defensibility, it enables anticanonical cases to be used as resources in constitutional argument.

If I have succeeded in making that case, we should be able to say something, even if not dispositive, about what the shadow anticanon lacks. It is in the nature of historical contingency that one possible answer is "nothing." It may be that these cases simply missed some historical boat, and might just as well have done the work of the cases that made it on. Even apart from historical contingency, moreover, the features of anticanonicity that I have identified may be necessary but not sufficient, insofar as the anticanon is self-reinforcing. The more decisively anticanonical a case is, the more likely it is to be cited and discussed across the political spectrum, in diverse and potentially incompatible ways. Indeed, as with Godwin's Law, the diversity (and therefore potential incompatibility) may itself expand over time, such that the anticanon — because it is so pluripotent — approaches a closed set of cases to which partisans of nearly every contested ethical position eventually refer. Still, it may expand our understanding to seek to identify features that make it less likely that the shadow anticanon could serve the same function within constitutional argument as the actual anticanon.

As to *Prigg*, it is difficult to extract the decision from the context of slavery. We pray that we will never again ask judges to interpret the Fugitive Slave Clause, and unlike in *Dred Scott*, the majority opinion bears no obvious methodological residue that many of us feel the need to disclaim. *Giles*, which addresses questions of equity jurisdiction, the political question doctrine, and separation of powers that remain highly relevant, requires a different explanation. It may be, as Samuel

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[558] *Cf.* Peter Singer, *Introduction* to ETHICS 3, 4 (Peter Singer ed., 1994) ("[Ethics] is sometimes used to refer to the set of rules, principles, or ways of thinking that guide, or claim authority to guide, the actions of a particular group . . . .").

[559] *See* section II.B, *supra* pp. 427–34.

Brenner argues, that *Giles* failed to catch on because it was "procedurally messy."[560] As likely, I suggest, are its authorship, its cynicism, and its terseness. As to authorship, Holmes has had his critics over the years, and a bad case can sully an otherwise admired body of judicial work,[561] but placing an opinion of a canonized Justice into the anticanon requires double the work of pulling down the likes of Rufus Peckham — perhaps triple in light of Frankfurter's counterpressure. Justice Holmes's acidly cynical reasoning comes into tension with the need for the reasoning of anticanonical cases to resonate with modern controversy. The decision is so unorthodox methodologically that it is difficult to imagine opportunities for using its analysis as a trump in serious debates of today. Finally, and relatedly, its brevity limits points of entry into the majority's reasoning; it manages to be obscure — Holmes liked his opinions that way[562] — such that anyone wishing to understand it and to incorporate its rejection into a broad theory has real work to do.

Brevity may work, as well, to the disadvantage — or rather, advantage — of *Gong Lum*. Its author, Chief Justice Taft, specifically referred to it as an easier case than *Plessy*,[563] and even as I have argued that *Gong Lum* is more disturbing, it is easy to regard the case as entirely derivative of *Plessy*'s reasoning. That is not to say that preserving *Plessy* but holding for Gong Lum cannot be done. A court resolved to do so might argue, for example, that segregated railcars are more innocuous or less socially significant than segregated schools.[564] Still, it requires some imagination to argue for a different result without reconsidering the earlier decision. *Gong Lum* also issued without dissent, and we have seen with both *Lochner* and *Plessy* the important work that dissenting opinions can do to propel a majority opinion into the anticanon.

Bowers is a poor fit for the anticanon not merely for the fact that it is so recent, and therefore has detritus floating throughout the legal system,[565] but also for the implications its recent vintage has for the

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[560] Samuel Brenner, Note, *"Airbrushed out of the Constitutional Canon": The Evolving Understanding of* Giles v. Harris*, 1903–1925*, 107 MICH. L. REV. 853, 872 (2009).

[561] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 1002 (1992) (Scalia, J., dissenting in part) (discussing Chief Justice Taney).

[562] *See* Snyder, *supra* note 446, at 46–47.

[563] 275 U.S. 78, 86 (1927).

[564] *Cf.* Robert A. Leflar & Wylie H. Davis, *Segregation in the Public Schools — 1953*, 67 HARV. L. REV. 377, 389–90 (1954) (suggesting that the *Brown* Court had the option of preserving the doctrine of "separate but equal" while holding that it applies differently to different phases of the education process, for example, as between academic versus nonacademic activities).

[565] *Compare* McDonald v. City of Chicago, 130 S. Ct. 3020, 3051, 3053–54 (2010) (Scalia, J., concurring), *with id.* at 3097 n.16 (Stevens, J., dissenting) (debating whether *Lawrence* or *Washington v. Glucksberg*, 521 U.S. 702 (1997), which relies on *Bowers*, will be the more enduring precedent).

constitutional landscape. It may be that seventy percent of the American people oppose anti-sodomy laws, but it is quite possible that if *Lawrence* were decided today, it would be a 5–4 decision rather than 6–3. Some of the reasons that slow the pace of methodological innovation more generally — the gravitational pull of precedent in a common law system, life tenure for federal judges, simple inertia — are also likely to slow anticanon evolution and reconfiguration.

These examples may suggest a set of weak criteria for inclusion in the anticanon: the presence of a strong dissent; the identity of the judge writing either the majority opinion or an important dissent; and the age of the decision. A strong dissent offers its own set of resources, both to those who seek to erode a precedent and to those who seek to use an antiprecedent once it achieves that status. We have already seen, for example, that Justice Harlan's *Plessy* dissent was elevated into the canon by the anticanonization of *Plessy* itself, and that the status of the two opinions has since become mutually reinforcing.[566] An opinion authored by a judge of great renown — Justice Holmes, for *Giles* — or who remains on the Court during periods in which the opinion might otherwise be used as a negative precedent — Justice Black, for *Korematsu* — might impair the progression of a case into the anticanon or, if in dissent, accelerate it. We must be cautious here, as identification of a judge as great or not depends in part on his body of work, and so it may be difficult to discern the direction of causation.[567] Finally, a relatively recent decision, like *Bowers* today or *Korematsu* in the 1960s, might be too intimate, too raw, for universal condemnation. These features may not be necessary for a case to function as anticanonical, but they may either help or hinder the contingent process that makes a case eligible for anticanonical treatment.

IV. SHAPING THE ANTICANON

If the anticanon did not exist, would we have to invent it? Would we want to? The answer is not clear. There is little evidence that the anticanon as we know it existed prior to the 1960s — it appears that, before then, even long-reviled decisions like *Dred Scott* were generally discussed in legal contexts as matters of history, not contemporary relevance.[568] Importantly, each of the cases in the anticanon focuses on individual rights, a category of cases less central to the Supreme

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[566] *See* Primus, *supra* note 16, at 256–57.

[567] *See* PALMER, *supra* note 158, at 145–46 ("[T]he dark shadow of [Chief Justice Taney's] opinion in [*Dred Scott*] has blotted out other features in a judicial career of singular interest and of great value to America."); Primus, *supra* note 16, at 259 ("Perhaps . . . the heroism of the dissenting judge and the greatness of his dissenting opinion are constructed in tandem, each supporting the other.").

[568] *See* section III.A, *supra* pp. 435-60.

Court's pre–Warren Court docket, and less likely at the time to be discussed at length in casebooks, treatises, or other academic literature. Structure cases are not inherently unsuitable for anticanonical treatment, but errors in structure cases are more likely to sound in positive law, and are therefore perhaps less likely to generate the disgust that *Dred Scott*, *Plessy*, and *Korematsu* evoke. On this view *Lochner* is an outlier insofar as its error is one of excessive solicitude for rights, though notably it becomes anticanonical in the course of reinforcing a rights narrative — recall that it is Thomas Emerson, not the State of Connecticut, who discusses *Lochner* in the *Griswold* briefing before the Supreme Court.

An anticanon might be a predictable sign of a mature constitutional system. In such a system, normative disagreement about the Constitution need not reference the text itself, or even broad principles embodied within the text, but may have a degree of separation from both; the reference points are freighted symbols comprising an argot that sophisticated participants in the debate are meant to understand. Think of an old married couple who communicate as much through raised eyebrows as through active conversation. Or think of curse words, whose full range of meaning can be especially difficult for second-language learners to internalize. Sophisticated discourses among insiders tend to converge on an efficient shorthand. That shorthand might be especially useful in discussions of historical episodes meant to illustrate some broader proposition about constitutional norms. As Primus writes, "when courts make arguments from constitutional history, they argue from a small subset of all available historical materials, a subset limited to those aspects of history with which the judges are familiar."[569] We can think of the anticanon as a kind of set piece made necessary, or at least convenient, by the complexity and breadth of available history and the relative incompetence of judges to engage in serious historical inquiry.

Certain features of our constitutional culture might make ours a particularly ripe space for anticanon formation. We remain obsessed, for example, with the countermajoritarian difficulty. Unelected judges are granted authority to overturn the enactments of popularly elected legislative bodies. In principle, we are comfortable having them do so insofar as they are faithful agents of the instructions immanent within the Constitution, which was popularly ratified by a supermajority. This principal-agent conception of judges is a fiction, however, as it is premised on the notion that those instructions both are reasonably clear and in fact reflect values or intentions that are entitled to demo-

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[569] Richard A. Primus, *Judicial Power and Mobilizable History*, 65 MD. L. REV. 171, 174 (2006).

cratic weight. A very old Constitution that is very difficult to amend and whose provisions are often stated in very broad terms cannot often satisfy those conditions. And so we are left with four options when adjudicating irreconcilable constitutional conflicts between litigants: abandon the Constitution, abandon judicial review, abandon democracy, or, through acts of cognitive dissonance, selectively blame the messenger when judicial review goes horribly awry. This last option is the most stability enhancing of the four, and constructing an anticanon is a means of achieving it.

There remains, however, the significant question of whether the anticanon is a good thing for our constitutional culture. Regardless of whether the anticanon is itself an inevitable or a contingent feature of our legal order, it may still profit us to consider how we might influence its content, and whether it is desirable to emphasize it as against other juridical resources. The possibility that the anticanon may be responsive to our fixation on the countermajoritarian difficulty suggests an important potential benefit. The anticanon is a tool through which judges square nontextual constitutional change with the rule of law. It may be illuminating to consider the question through the lens of Ackerman's well-known work on "constitutional moments."[570] Ackerman's project has been to develop and apply a means of identifying the positive constitutional commitments of the American people as worked out through dialogue between the people and their political and legal institutions.[571] Ackerman's paradigm cases are the moments that virtually all constitutional lawyers recognize as paradigm-shifting in the history of American rights protection at the Supreme Court: Reconstruction,[572] the New Deal era,[573] and the civil rights revolution.[574] Reconstruction is the repudiation of *Dred Scott*, the New Deal era a repudiation of *Lochner*, and the civil rights revolution a repudiation of *Plessy*. To fully inhabit a world in which these cases constitute the anticanon is to accept the corollary that our Constitution requires, and always has required, a post-Reconstruction, post–New Deal, and post–civil rights era social and political order. That social and political order must be reconciled with the Constitution, both to prevent a debilitating level of cognitive dissonance and to write our ethical commitments into positive higher law. By inventing or exaggerating interpretive errors that obstruct constitutional evolution, the anticanon aids in this task without undermining the Constitution itself and with-

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[570] *See generally* 1 ACKERMAN, *supra* note 15; 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998); Ackerman, *Living Constitution*, *supra* note 48.

[571] *See* Ackerman, *Living Constitution*, *supra* note 48, at 1754.

[572] *See* 2 ACKERMAN, TRANSFORMATIONS, *supra* note 570, at 7.

[573] *See id.*

[574] *See* Ackerman, *Living Constitution*, *supra* note 48, at 1757–93.

out formally ceding lawmaking power to unelected judges. If there is no harm in this exercise (on which more later), then there is no foul.

There is another, more controversial, benefit to maintaining an anticanon. If the anticanon is, as suggested, a subterfuge, then it is, like all subterfuges, an insider's game. That is, control over the content of the anticanon may be substantially in the hands of the most sophisticated participants in legal discourse. I will have more to say about this premise below, but let us assume that legal professionals in fact exert substantial control over devising and refereeing the anticanon. There may be value in maintaining professional leverage over constitutional interpretation in a world in which intermediaries between academic and public discourse are in steady and perhaps irreversible decline.[575] The long tradition of constitutional interpretation outside the courts includes substantive claims sounding in original meaning that can be both illiberal and ill-informed, including by Know Nothings, Klansmen, McCarthyites, and certain elements of the modern Tea Party movement. As the historian Jill Lepore has written, "[s]et loose in the culture, . . . [originalism] is to history what astrology is to astronomy, what alchemy is to chemistry, what creationism is to evolution."[576] Once we know what the "people out-of-doors"[577] look like, we may see value in retaining substantial professional influence over constitutional law and history. Insofar as continuing to construct and to make use of the anticanon is an important means of doing so, there is reason to continue that project.

Consider, for example, the stakes of the debate over the meaning of *Plessy v. Ferguson*. As discussed, *Plessy* is a prominent location at which debate over affirmative action occurs, with one side claiming that the case, via Justice Harlan, represents an ideal of colorblindness, and the other claiming that it stands for the significance of viewing government recognition of race contextually.[578] But the relevance of the distinction extends beyond affirmative action. The 2010 Arizona immigration law, Support Our Law Enforcement and Safe Neighborhoods Act[579] (S.B. 1070), criminalizes failure to carry immigration documents and authorizes state officers to request such documents based

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[575] *See* Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 702–04 (2009) (discussing the decline of traditional intermediaries between academic and public discourse on constitutional methodology).

[576] JILL LEPORE, THE WHITES OF THEIR EYES: THE TEA PARTY'S REVOLUTION AND THE BATTLE OVER AMERICAN HISTORY 123–24 (2010).

[577] The term has old roots, as reflected in LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 35, 47 (2004).

[578] *See supra* pp. 444–45.

[579] 2010 Ariz. Sess. Laws 0113 (amended by 2010 Ariz. Sess. Laws 0211 (H.B. 2162, 49th Leg., 2d Sess. (Ariz. 2010))).

on a "reasonable suspicion" standard.[580] Like the Separate Car Act, S.B. 1070 is race-neutral, but both statutes have a racially discriminatory social meaning. A formalist approach to *Plessy* ignores this commonality; a contextual view makes it plain. Ceding responsibility for anticanon construction and maintenance cedes a powerful resource in ongoing constitutive arguments.

There is, however, a dark side to the anticanon. Each of the benefits noted above has associated costs, and they are dear. First, for every Know Nothing there is an Anti-Garrisonian, advancing what Balkin has called "off the wall" constitutional arguments in the service of some higher moral end.[581] Indeed, as they see it, many *Lochner* revisionists labor in this tradition. Second, it may be normatively unappealing — and it is certainly elitist — to attempt, through the anticanon or any other device, to declare any community's claims void ab initio.[582] It may also tend systematically to privilege "mainstream" claims or those most comforting to members of the dominant social order. On this view, a case like *Bradwell v. Illinois* may escape the attention of those responsible for constructing the anticanon not out of disagreement, per se, with the political equality of women but out of tacit and perhaps ill-considered discomfort with the status of that proposition as unassailable.[583] That ambivalence is reflected in legal doctrine: the intermediate scrutiny standard is an announcement that the women's movement stands in a different relation to higher law than does the civil rights movement. That relation is both, in part, cause and, in part, effect of the treatment of *Bradwell* by legal academics and judges.

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[580] *Id.* As of July 2011, the Arizona law had inspired similar legislation in Georgia, Indiana, Alabama, South Carolina, and Utah. H.B. 87, 151st Gen. Assemb., Reg. Sess. (Ga. 2011); S. Enrolled Act 590, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011); H.B. 56, 2011 Leg., Reg. Sess. (Ala. 2011); S.B. 20, 119th Gen. Assemb. (S.C. 2011); H.B. 497, 2011 State Leg., Gen. Sess. (Utah 2011).

[581] Balkin, *supra* note 62, at 1710 (discussing Frederick Douglass's argument that the original Constitution was antislavery, *id.* at 1709–10).

[582] *Cf.* Robert M. Cover, *The Supreme Court, 1982 Term — Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 43 (1983) ("Insular communities often have their own, competing, unambiguous rules of recognition. They frequently inhabit a *nomos* in which their distinct *Grundnorm* is supreme from its own perspective.").

[583] No sex discrimination case sits at the core of the anticanon even though such cases account for one third of the opinions mentioned in law reviews as anticanonical or antiprecedential. *See supra* notes 45–62 and accompanying text; *cf.* Annette Kolodny, *Dancing Through the Minefield: Some Observations on the Theory, Practice, and Politics of a Feminist Literary Criticism*, 6 FEMINIST STUD. 1, 8–16 (1980) (defending the proposition that male readers' discomfort with modern women's literature has contributed to the "diminished status of women's products and their consequent absence from major canons," *id.* at 14); Judith Resnik, *Constructing the Canon*, 2 YALE J.L. & HUMAN. 221, 221 (1990) ("We women . . . have been closed out of the hierarchy of holding the power to write the canon.").

What we might call, on this view, the "gatekeeping" cost of forming and maintaining an anticanon may be higher than the analogous cost of maintaining a canon. The core of the anticanon amounts to no more than four cases. These four cases stand for an ever-expanding set of normative propositions, and so the stakes of placing a case within the anticanon — and the price of removing one — are high. Indeed, it appears that no case ever has left the anticanon, notwithstanding the concerted efforts of multiple generations of *Lochner* revisionists. Richard Epstein wrote as early as 1984 that he believed *Lochner* was correctly decided,[584] and at Clarence Thomas's confirmation hearing Joseph Biden, then chair of the Senate Judiciary Committee, said Epstein's "school of thought is now receiving wider credence and credibility."[585] Yet John Roberts, a Republican nominee, stated clearly and repeatedly at his hearing fourteen years later (as Thomas had earlier)[586] that *Lochner* was wrongly decided.[587] To have denied Roberts the opportunity to cite *Lochner* as his paradigm case for judicial activism, or to dilute the force of his repeated evocations, would have required that he significantly alter his confirmation strategy. These kinds of "stickiness" effects multiply any costs, including gatekeeping costs, associated with the process of anticanon construction.

Third, placing a case in the anticanon carries with it the implication that the central problem with the case is bad judging. The prevailing *Dred Scott* narrative, for example, casts Roger Taney as a villain who ignored the Constitution in order to implement his personal racist preferences. Taney might be perfectly villainous, but this is a distraction from the reasonable possibility that the Constitution itself enabled Scott to lose. As Graber argues, *Dred Scott*'s status as anticanonical sanitizes the Constitution and prevents us from confronting the problem of "constitutional evil."[588] Balkin has made a similar argument about *Plessy*:

> *Plessy* must always have been inconsistent with the meaning of the Fourteenth Amendment and with the premises of the Reconstruction Constitution. To believe otherwise would be to accept facts about our country that are painful to accept. We do not want *Plessy* to have been right — regardless of the constitutional common sense of the period in which it was decided — because we do not want to be the sort of country in which *Plessy* could have been a faithful interpretation of the Constitution.[589]

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[584] Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 733–34 (1984).

[585] *Thomas Hearing*, *supra* note 70, at 115.

[586] *Id.* at 115, 173, 241.

[587] *Roberts Hearing*, *supra* note 66, at 162, 408, 633.

[588] *See* GRABER, *supra* note 161, at 8–12.

[589] Balkin, *supra* note 16, at 709–10.

Maintaining an anticanon helps avoid such cognitive dissonance about our history. While it can be valuable in promoting a sense of possibility about our constitutional culture, exalting a flawed Constitution can have unfortunate consequences. For one, it complicates the position of those of us who believe that we should not aspire to originalist modes of constitutional argument. The primary appeal of originalism lies less in the rule-of-law claims advanced by some constitutional theorists than in the cultural resonance of the founding generation and its political work.[590] Certain uses of the anticanon may impede serious engagement with that generation's dangerous bargain with slavery interests,[591] and with the ways in which features of that bargain continue to manifest themselves in our constitutional structure.[592] Justice Scalia's, Judge Bork's, and Justice Black's disproportionate invocations of the anticanon might reflect a need for originalists in particular to imagine what Henry Monaghan calls a "perfect" Constitution, one shorn of any insufferable commitments.[593]

For those who profess support for originalism, there is something in deemphasizing the anticanon as well. Pretending that judges rather than the Constitution are always responsible for the most objectionable results reinforces judicial supremacy and discourages the American people from taking ownership over the Constitution. If indeed the Constitution may rightly, or at least not wrongly, be interpreted to embrace constitutional evil, then all the better that we strive constantly to engage with it, that we may better it through appropriate democratic channels.

Much of the work of transforming how we think about the anticanon can perhaps be accomplished through a change in emphasis. It is tempting to teach *Dred Scott* as part of the anticanon because of its devotion to racism or to originalism or to substantive due process. But it is more accurate to change those "or"s to "and"s. Legal professionals — including, especially, law professors — might emphasize that what cases like *Dred Scott* best symbolize are not errors in constitutional reasoning, but limitations upon it. Some of those limitations inhere in the document itself, which might contain text that is too inflexible to permit a judge to come to what we now understand to be the correct decision. Other limitations are imposed by traditional con-

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590 *See* Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 63–64 (2009).

591 For discussion of what he calls "the Constitution's concessions to slavocracy," see Alexander Tsesis, *Furthering American Freedom: Civil Rights & the Thirteenth Amendment*, 45 B.C. L. REV. 307, 319, 319–22 (2004).

592 *See* DAVID WALDSTREICHER, SLAVERY'S CONSTITUTION: FROM REVOLUTION TO RATIFICATION 3–10, 81–84 (2009) (arguing that the bargain over slavery influenced, among other things, the Revenue Clause, the structure of the electoral college, and equal suffrage in the Senate).

593 Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 356 (1981).

ceptions of the judicial role. In either case, these limitations should be discussed openly and challenged where appropriate. Rather than succumb to, ignore, or (in vain, perhaps) seek to eliminate the anticanon, we might reimagine it in the service of a contextual view of the judicial role.

A venerable objection remains. It is no longer fashionable to suggest that law professors have substantial agency in influencing constitutional content, or even (to a degree) method.[594] Popular constitutionalists and scholars of American political development have argued persuasively that constitutional law is fashioned through a complex conversation among social and political movement participants,[595] elite opinion leaders,[596] political entrepreneurs, and judges.[597] In other work, I have argued that this process need not be limited to the substance of constitutional law, but may also influence the Court's rhetoric about, and to a lesser degree use of, methodologies that have engaged relevant members of the public.[598] I have argued in particular that political and social movement players have worked with conservative elites to emphasize and to legitimate originalist approaches to constitutional interpretation.[599]

According to Balkin and Levinson, participants in constitutional discourse — particularly law professors — may have even less control over the constitutional canon than they have over other aspects of constitutional law. "Much of what is canonical is not the result of conscious planning," they write, "but of the serendipitous development of the ever-shifting contours of a culture, a discipline, or an interpretive community."[600] This is another way of saying that the canon is historically contingent, a point with which I agree in respect to the canon, the anticanon, and indeed much of constitutional lawmaking. Balkin and Levinson advance the further claim that while liberal arts faculty members assert substantial control over the canons within their disciplines because "[t]hey teach the courses, assign the books, and become the arbiters of quality and taste in intellectual production and in sig-

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[594] *See* Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 36 (1992) ("[T]oo few law professors are producing articles or treatises that have direct utility for judges, administrators, legislators, and practitioners . . . .").

[595] *See generally* Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323 (2006).

[596] *See generally* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009).

[597] *See generally* KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY (2007); Robert C. Post, *The Supreme Court, 2002 Term — Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4 (2003).

[598] Greene, *supra* note 575, at 700–02.

[599] Greene, *supra* note 590, at 13–14, 17; Greene, supra note 576, at 680–82.

[600] Balkin & Levinson, *supra* note 16, at 995.

nificant parts of 'high culture,'" constitutional law professors have much less control over their own academic theory canon.[601] This is because the courts and the political branches play such an important mediating role in shaping the content of constitutional law and the agenda for constitutional theory.[602]

That may well be true as a comparative claim about canon formation across academic disciplines. But there is reason to believe it is far less true of the anticanon. Historically, the players driving the content of the anticanon have been Black and Frankfurter, Gunther and Tribe, Scalia and Bork. They have not been Margaret Sanger or Glenn Beck, or even Ronald Reagan or Edwin Meese III. Movement leaders, politicians, and indeed the mass public help to create the conditions under which the anticanon may be invoked and to generate the stakes of anticanon use; the forces that contribute to the construction of constitutional law are responsible, ultimately, for the scope and substance of constitutional method as well. But with respect to the anticanon, that process is mediated through and policed substantially by legal academics and by judges acting in their roles as advocates rather than as decisionmakers.[603] Unlike the canon, which is necessarily directed in part by the demands of positive law, the anticanon remains inert until it is used for some rhetorical purpose in either academic theory or legal or political decisionmaking. Making use of the canon has a substantial element of craftsmanship, while deploying the anticanon is part and parcel of the art of legal persuasion.[604]

CONCLUSION

If the mission of the anticanon is to demonstrate how not to do constitutional law, then the anticanon is a failure. An examination of the ways in which anticanonical cases have been used reveals that the anticanon's lessons can be very different for different users. Indeed, the uses of such cases can be so varied as to be incompatible, such that demonstrating how not to do constitutional law may be the function the anticanon performs least well. This is not, however, ironic. The

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[601] *Id.* at 1001.

[602] *Id.*

[603] *Cf.* Bartrum, *supra* note 16, at 368 ("*Lochner* is evidence that the academy . . . [can] have a profound impact on the constitutional canon and constitutional meanings.").

[604] This is not to suggest that actors outside of the legal profession neither make use of the anticanon nor advance claims through it. In a 2004 presidential debate, for example, President George W. Bush negatively referenced *Dred Scott* in response to a question about the sorts of judges he would appoint to the Supreme Court. *President George W. Bush and Senator John F. Kerry Participate in the Second Presidential Debate*, CQ TRANSCRIPTIONS, Oct. 8, 2004. This was code that conservative activists would have identified with opposition to *Roe*. But *Dred Scott* does not owe its anticanonicity to anti-*Roe* activists, even as they help it to retain that status. *See* section III.A.1, pp. 436–42.

primary purpose of the anticanon is not to show how not to reason in constitutional cases, but rather to supply a rhetorical trump that can identify the limits of conventional constitutional argument under a guise of acting within those conventions.

To call *Dred Scott*, *Plessy*, *Lochner*, and *Korematsu* constitutional martyrs seems to imply a nobility that they do not deserve. I do not believe any of these cases was correctly decided, and I hope that were I a judge in any of the four, I would have dissented, and angrily. But martyrs need not merit our admiration. The German word *blutzeuge*, or martyr, is associated with the National Socialist Party, which used the term to describe those who died for the Nazi cause.[605] Anticanonical cases are martyrs insofar as they are vilified out of proportion to their conventional errors in order to save us all from ourselves. They obstruct serious engagement with the reality that constitutional interpretation is often contested, unstable, and susceptible to otherwise appropriate use for tragic ends. By implying that constitutional interpretation, properly performed, should always have produced the results we now want it to produce, that obstruction helps us to sustain an ideal of coherent democratic governance, over time, in a constitutional system. The problem, on this view, is the temptation inherent in judicial review; it is and always has been *they the judges*, not *we the people*.

I do not know whether it serves us, on balance, to sustain this illusion. The anticanon is most effective when used unreflectively to defeat opposing claims. And for those of us who teach lawyers how to construct constitutional arguments; who propagate academic theories meant to bring constitutional doctrine into balance; who write casebooks, file amicus briefs, and generally help, over time, to define constitutional error, it is our special duty to reflect. At the same time, so long as we properly understand its glorious and unreflective pluripotency, the anticanon's very existence makes obvious the essential contestability that lies at the heart of constitutional law, and that the best constitutional lawyers must internalize. It serves us, perhaps, to recognize that supplying meaning to the anticanon is a constitutive element of legal advocacy, and that something vital would be lost were we willingly to let it die.

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[605] *See* Elisabeth Däumer, *Blood and Witness: The Reception of* Murder in the Cathedral *in Postwar Germany*, 43 COMP. LITERATURE STUD. 79, 94–96 (2006).