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The Anticanon

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The Anticanon

Jamal Greene[†]

Abstract

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 their status is reaffirmed as subsequent interpretive communities avail themselves of the rhetorical resource the anticanon represents. 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 that use is justified.

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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*, *Plessy*, *Lochner*, and *Korematsu*.¹ They are the American anticanon. Each case embodies a set of propositions that all legitimate constitutional decisions must be prepared to refute. Together, they map out the landmines of the American constitutional order, and thereby help to constitute that order: We are what we are not.

The anticanon poses a distinctive 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 controversies. Most

¹ *Dred Scott v. Sandford*, 60 U.S. 393 (1857); *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Lochner v. New York*, 198 U.S. 45 (1905); *Korematsu v. United States*, 323 U.S. 214 (1944).

constitutional law courses identify a set of materials that students may draw from to perform this task with respect to constitutional cases. These materials are well-known: constitutional text, structure, and history, judicial and political precedent, and prudential or policy considerations.² 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. As I will show, however, the status of a decision as anticanonical does not depend on the presence of contemporaneous analytic errors by the deciding Court. Rather, it depends on the attitude the constitutional interpretive community takes towards 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 as a product 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* 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.³ And yet, *Brown* was inconsistent with longstanding precedent; was self-consciously in tension with the original expected application of the Fourteenth Amendment; was not compelled by the text of the Equal Protection Clause; and has required a Herculean effort—one well beyond the Court's competence—to implement comprehensively. 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 *anticanonical* decisions in textbooks, in syllabi, and as decisional precedent 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, out of a

² See PHILIP BOBBITT, *CONSTITUTIONAL FATE* (1982); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987).

³ *Brown v. Board of Education*, 347 U.S. 483 (1954); see Louis Michael Seidman, *Brown and Miranda*, 80 CALIF. L. REV. 673, 675 (1992).

Burkean prudence that counsels deference to past decisions of long standing, or indeed because the legal culture's acceptance of a case works a kind of informal constitutional amendment that acquires democratic purchase.⁴ 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. And 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 have discussed the constitutional canon, and some of those articles also refer to the anticanon as a particular species of canon.⁵ 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 distinctive phenomenon requiring distinctive theoretical treatment.

For one, as I argue in Part I, the anticanon differs from the canon in that it is both narrower and less contested. The content of the constitutional 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.⁶ 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 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.

⁴ See *Planned Parenthood of Southeastern Pa. v. Casey*, 515 U.S. 833, 854 (1992) (Joint Op.); Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353 (2006); BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1993).

⁵ See J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963 (1998); Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243 (1998); Jack M. Balkin, *Wrong the Day It Was Decided': Lochner and Constitutional Historicism*, 85 B.U. L. REV. 677 (2005).

⁶ Balkin & Levinson, *supra* note 5, at 970–76.

Part II explicates the dilemma that I have so far only suggested. Namely, anticanonical cases are not distinguished by unusually poor reasoning, because of 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 reject any of the four cases, or at least to identify any of them as of uniquely low quality. To assist in making out that “negative” case for anticanonicity, I also discuss four other cases—*Prigg v. Pennsylvania*, *Giles v. Harris*, *Gong Lum v. Rice*, and *Bowers v. Hardwick*⁷—that are particularly poorly reasoned or morally challenged but are not, as a descriptive matter, anticanonical.

Part III reconstructs the anticanon. Since logic is not dispositive alone, 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. For *Dred Scott* and *Plessy*, the evolving consensus around the evils of official racial discrimination 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 doctrinal 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.⁸ 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 related, the traditional modes of legal analysis arguably support the result 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

⁷ *Prigg v. Pennsylvania*, 41 U.S. 539 (1842); *Giles v. Harris*, 189 U.S. 475 (1903); *Gong Lum v. Rice*, 275 U.S. 78 (1927); *Bowers v. Hardwick*, 478 U.S. 186 (1986).

⁸ See Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (2005).

supports the independent significance of ethos-based argument as a mode of constitutional reasoning.⁹

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.”¹⁰ 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 in 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;”¹¹ a canonical work’s indispensability is ostensibly a measure of quality, not an opportunity to torture students, though it is easy to elide 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* from the secondary school curriculum.¹²

⁹ See Balkin, *supra* note 5, at 710; PHILIP BOBBITT, CONSTITUTIONAL FATE 106–07 (1982).

¹⁰ Balkin & Levinson, *supra* note 5, at 1001.

¹¹ HAROLD BLOOM, THE WESTERN CANON: THE BOOKS AND SCHOOL OF THE AGES 18 (1994).

¹² HARPER LEE, TO KILL A MOCKINGBIRD (1960).

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*¹³ and *McCulloch v. Maryland*,¹⁴ stand for a set of essential truths of American constitutional law:¹⁵ “It is emphatically the province and duty of the judicial department to say what the law is;”¹⁶ “we must never forget that it is a *constitution* we are expounding;”¹⁷ and “the doctrine of ‘separate but equal’ has no place.”¹⁸ These are the fixed stars in our constitutional constellation. Of course, Justice Jackson’s famous phrase, from his majority opinion in *West Virginia State Board of Education v. Barnette*, 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.”¹⁹ To this we should add that judges should specially guard against “prejudice against discrete and insular minorities” in the political process.²⁰ And who can forget that an individual subject to custodial interrogation must be informed of his “right to remain silent?”²¹

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.”²² Thus, the pedagogical canon is the set of materials that are “important for educating law students;” the academic canon constitutes those texts that “serve as a benchmark for testing academic theories about the law;” and the cultural literacy canon “ensure[s] a necessary

¹³ 5 U.S. (1 Cranch) 137 (1803).

¹⁴ 17 U.S. 316 (1819).

¹⁵ See Primus, *supra* note 5, at 252.

¹⁶ *Marbury*, 5 U.S. at 177.

¹⁷ *McCulloch*, 17 U.S. at 407.

¹⁸ 347 U.S. 483, 495.

¹⁹ 319 U.S. 624, 642 (1942).

²⁰ *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938).

²¹ *Miranda v. Arizona*, 384 U.S. 436, 467–68 (1966).

²² Balkin & Levinson, *supra* note 5, at 970.

cultural literacy for citizens in a democracy.”²³ *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.²⁴

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.²⁵ It remains important for us to teach, to cite to, 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 must show are wrongly decided,”²⁶ and as “wrongly decided cases that help frame what the proper principles of constitutional interpretation should be.”²⁷ Others describe the anticanon, or what Mary Anne Case has called “anti-precedents,” in similar terms.²⁸ Gerard Magliocca calls anticanon cases “examples of a judicial system gone wrong. These cases are the haunted houses of constitutional law—abandoned yet frightening.”²⁹ Akhil Amar writes that *Dred Scott*, *Plessy*, and *Lochner* “occupy the lowest circle of constitutional Hell.”³⁰

There is plenty of disagreement over the normative question of which cases are the most incorrectly decided, but unlike with the canon, there is

²³ *Id.*

²⁴ *See id.* at 974–75.

²⁵ Balkin has suggested as an important feature of the anticanon that the modern Court is willing to say the case was “wrong the day it was decided.” Balkin, *supra* note 5, at 684–90. As I show below, the Supreme Court’s infrequent declarations that prior decisions were wrong the day they were decided—I am aware of none other than *Plessy*, *see* *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 863 (1992) (Joint Op.), and *Bowers v. Hardwick*, 478 U.S. 186 (1986); *see* *Lawrence v. Texas*, 539 U.S. 558, 578 (2003)—share some features with the anticanon but do not adequately define it. 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 5, 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.

²⁶ *Id.* at 1018.

²⁷ Balkin & Levinson, 20 *CARDOZO L. REV.* 1513, 1553 (1999); *accord* Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 *NW. L. REV.* 549, 586 (2009).

²⁸ *See* Stephen I. Vladeck, *The Problem of Jurisdictional Non-Precedent*, 44 *TULSA L. REV.* 587, 590 n.27 (2009); Michael R. Dimino, *The Futile Quest for a System of Judicial ‘Merit’ Selection*, 67 *ALB. L. REV.* 803 n.3 (2004); 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).

²⁹ Gerard N. Magliocca, *Preemptive Opinions: The Secret History of Worcester v. Georgia and Dred Scott*, 63 *U. PITT. L. REV.* 487, 487 (2002).

³⁰ AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: BETWEEN THE LINES AND BEYOND THE TEXT* (unpublished manuscript at 464).

remarkable consensus around the descriptive question of which decisions the legal community regards as the worst of the worst. The consensus is such that the pedagogical, academic, and cultural literacy canons converge on the four decisions I have identified: *Dred Scott*, *Plessy*, *Lochner*, and *Korematsu*. No other case so uniformly acknowledged as essential to legal education, professional practice, or elite cultural literacy is so uniformly acknowledged to have been wrongly decided. This consensus suggests either agreement as to how bad these cases actually are or agreement as to the *status* of these cases as especially bad. 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 January 2011, the Lexis-Nexis database contained 56 U.S. law review articles that made reference to an anticanon or to anticanonical legal texts,³¹ and an additional 13 that referred to “antiprecedent” or to antiprecedential decisions. Thirteen decisions are described in any of these 69 articles as anticanon or antiprecedent cases: *Dred Scott*, *Plessy*, *Lochner*, *Korematsu*, *Bradwell v. Illinois*,³² *Muller v. Oregon*,³³ *Goesaert v. Cleary*,³⁴ *Buck v. Bell*,³⁵ *Dennis v. United States*,³⁶ *Johnson v. M’Intosh*,³⁷ *Cherokee Nation v. Georgia*,³⁸ *Worcester v. Georgia*,³⁹ and *Prigg v. Pennsylvania*.⁴⁰ Of these 13 decisions, only six are called anticanon or antiprecedent by more than one author: *Dred Scott*, *Plessy*, *Lochner*, *Korematsu*, *Bradwell*, and *Dennis*. Only the first four are called anticanon or antiprecedent by more than two authors. Balkin and Levinson, who have done the most work in elaborating the anticanon, appear to limit it to these four cases.⁴¹ In six articles in which either Balkin or Levinson or both have referenced the anticanon, and in multiple editions of the constitutional law casebook they co-edit, they have never placed any other case in that category.⁴²

³¹ This number excludes articles referring to an anticanon strictly in literature as opposed to law, or as the opposite of a canon of statutory construction.

³² 83 U.S. 130 (1873).

³³ 208 U.S. 412 (1908).

³⁴ 335 U.S. 464 (1948).

³⁵ 274 U.S. 200 (1927).

³⁶ 341 U.S. 494 (1951).

³⁷ 21 U.S. (8 Wheat.) 543 (1823).

³⁸ 30 U.S.1 (1831).

³⁹ 31 U.S. (6 Pet.) 515 (1832).

⁴⁰ 41 U.S. 539 (1842).

⁴¹ Balkin and Levinson do not, however, believe that the anticanon is limited to cases. Balkin & Levinson, *supra* note 5, at 1018.

⁴² See BREST, LEVINSON, ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 252–53 (5th ed. 2006); Balkin, *supra* note 27, at 586; Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at Dred Scott*, 82 CHI.-KENT L. REV. 49, 76, 82 (2007); Balkin, *supra* note 5, at 681–85, 688–89, 700–14; Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110

Those seeking to be confirmed as federal judges, and presumably their professional handlers, also appear to regard these four cases as especially *non gratus*. Responses given at confirmation hearings are not the only measure of anticanonicity, but they should be among the most reliable. Those responses reflect not only the considered view of an accomplished lawyer sufficiently attuned 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 lawyers believe it is safe to repudiate. 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 to 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."⁴³ 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."⁴⁴

For that reason, I and a research assistant examined the written transcript of each of the 32 Supreme Court confirmation hearings in which the nominee testified openly and without restriction. 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. Through 32 hearings over seven decades, and despite numerous invitations, there are only six cases that any successful Supreme Court nominee has asserted was wrongly decided: *Dred Scott*, *Plessy*, *Lochner*, *Korematsu*, *Adkins v. Children's Hospital*, and *Bradwell v. Illinois*. Only the first four of these six have been repudiated by multiple nominees.⁴⁵

YALE L.J. 1407, 1449–50 (2001); Balkin & Levinson, *supra* note 5, at 1018; J.M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 *FORDHAM L. REV.* 1703, 1708–11 (1997) [hereinafter Balkin, *Agreements*].

⁴³ Michael C. Dorf, *Whose Ox Is Being Gored? When Attitudinalism Meets Federalism*, 21 *ST. JOHN'S J.L. COMM.* 497, 521–22 (2005).

⁴⁴ Strauss, *supra* note 42, at 373.

⁴⁵ Notoriously, Robert Bork criticized the reasoning of *Griswold v. Connecticut*, *Shelley v. Kraemer*, *Reynolds v. Sims*, *Harper v. Virginia Department of Taxation*, *Katzenbach v. Morgan*, *Cohen v. California*, and *Bolling v. Sharpe* at his 1987 confirmation hearing. ⁴⁵ *The Nomination of Judge Robert H. Bork To Be Associate Justice of the Supreme Court Before S. Comm. on the*

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 11 textbooks used widely in undergraduate courses in constitutional law.⁴⁶ Goldman constructed an index comprising "principal" 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."⁴⁷ As Primus has noted, of the 10 cases included in every one of the 11 casebooks Goldman reviewed in 1992, only one—*Lochner*—is never cited for its positive legal authority.⁴⁸ Among the eight additional cases that appear in 10 of the 11 casebooks, only *Plessy* stands as unquestionably bad law. In a follow-up study that relaxed some of the standards for inclusion, Goldman added nine cases to his "canon" list. Only one of these additional cases, *Dred Scott*, is even arguably anticanonical.⁴⁹

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.⁵⁰ Of 21 principal cases that appeared in all 10 casebooks, the only one the modern legal culture generally treats as error is *Lochner*. Of the 60 principal cases that appeared in 9 of the 10 casebooks, only three additional cases are treated as

Judiciary, 100th Cong., 1st sess., 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. Bork's failure points up the risk in saying that any case is poorly reasoned at a confirmation hearing, even those 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.

⁴⁶ Goldman actually reviewed 12 casebooks, but one of the books focused exclusively on individual rights rather than structure. See Jerry Goldman, *Is There a Canon of Constitutional Law?*, 2 L. & POL. BOOK REV. 134, 135 (1992).

⁴⁷ *Id.* at 134.

⁴⁸ Primus, *supra* note 5, at 244.

⁴⁹ Jerry Goldman, *The Canon of Constitutional Law Revisited*, 15 L. & POL. BOOK REV. 648, 650 (2005).

⁵⁰ My definition of a principal case was somewhat broader than Goldman's. Although I did require that substantial portions of the opinion were verbatim rather than paraphrased, I did not require that the casebook's treatment of a case begin with language so indicating.

error: *Plessy*, *Korematsu*, and *Hammer v. Dagenhart*.⁵¹ *Dred Scott* appears as a principal case in 7 of the 10 casebooks.

The table in the appendix indicates the 10 books selected and whether each book treats each of eight potential “anticanon” cases—*Dred Scott*, *Plessy*, *Lochner*, *Korematsu*, *Bradwell*, *Dennis*, *Adkins*, and *Buck v. Bell*—as a principal case. As the table shows, *Bradwell* and *Buck* are principal cases in only three casebooks. In contrast, *Dennis* and *Adkins* each receives significant coverage, with the former case listed in eight of the ten casebooks and the latter listed in seven. Section II.E 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 principal cases in two casebooks. *Gong Lum* is a principal case in none of the 10 books, and *Bowers* is a principal case in eight of the ten. Given that *Bowers* was decided just 25 years ago, this makes some sense, but as I discuss in Section III.B, that is a surer indication that *Bowers* is not yet fully disavowed than that it is part of the anticanon.

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 is “successful” on all of our criteria. *Adkins v. Children’s Hospital* was specifically disavowed by one Supreme Court nominee and appears frequently as a principal case in constitutional law textbooks but is not typically discussed as an antiprecedent in academic literature. *Dennis v. United States* is mentioned more than once in discussions of antiprecedent within the law reviews, 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.⁵²

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

⁵¹ 247 U.S. 251 (1918).

⁵² *Bradwell* presents an example of a decision that is anticanonical within certain subcommunities but is not universally depreciated within the larger constitutional culture. Woman’s rights advocates who speak in the language of legal precedent are intimately familiar with *Bradwell*, as legally attuned gay rights advocates have long considered the wrongness of *Bowers v. Hardwick* to be self-evident.

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.

The first chart in the appendix demonstrates graphically the pattern of citation in the Supreme Court, by decade, for 11 majority opinions: the four that I argue are in the anticanon, plus *Adkins*, *Dennis*, *Bradwell*, and three of the four cases in the “shadow” anticanon discussed in Section II.E—*Prigg*, *Giles*, and *Bowers*.⁵³ The chart separates “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 the cited decision. The chart 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 will occur in the course of historical discussion that is tangential to the normative arguments at issue in the citing case.

The chart 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, the 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 *Dennis* and *Bowers* have been cited with any frequency in recent decades, and both cases, like *Korematsu*, have received more positive than negative citation.

The citation pattern for *Korematsu* is surprising. The decision has not been formally overruled by the Supreme Court, but by the other criteria already discussed, it presents a strong case for sharing the status of *Dred Scott*, *Plessy*, and *Lochner*. Moreover, Fred Korematsu’s conviction was vacated by a district court on a writ of coram nobis in litigation brought in 1983.⁵⁴ In that litigation, the government did not formally confess error but it refused to oppose Korematsu’s petition, on the ground that the statute of conviction “has been soundly repudiated.”⁵⁵ The government noted that Executive Order 9066, under which Korematsu was ordered evacuated and detained, can no longer be issued without prior congressional authorization due to the Non-Detention Act of 1971.⁵⁶ For his

⁵³ I omit a chart for *Gong Lum* because it has no non-neutral citation in any subsequent Supreme Court opinion.

⁵⁴ *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Calif. 1984).

⁵⁵ *Id.* at 1413.

⁵⁶ 18 U.S.C. § 4001(a).

part, *Korematsu* relied on the findings of the 1982 Report of the Commission of Wartime Relocation, which concluded that “a grave injustice” was done to those interned and that “today the decision in *Korematsu* lies overruled in the court of history.”⁵⁷ The government agreed with that assessment in its filings,⁵⁸ and Congress officially apologized for the internment and allocated more than \$1.6 billion in reparations in 1988.

These events might well have influenced citing courts. Citation to *Korematsu* has been fairly balanced between positive and negative since the 1970s. Given the peculiar precedential status of *Korematsu*, however, it is useful to conduct a somewhat different experiment. Formally, *Korematsu* should be a valuable precedent for the government in its prosecution of the war on terror, owing to its outsized deference to executive power. One test, then, of the extent to which *Korematsu* is in fact a member in good standing of the anticanon is to examine whether the government—or, more likely, habeas petitioners—have chosen to cite the majority opinion in national security cases since September 11, 2001. To that end, I examined the merits briefing and the published opinions in 10 detention-related cases to reach the Supreme Court or the federal courts of appeals since September 11: *Al-Odah/Rasul v. Bush*;⁵⁹ *Rumsfeld v. Padilla*;⁶⁰ *Hamdi v. Rumsfeld*;⁶¹ *Hamdan v. Rumsfeld*;⁶² *Boumediene v. Bush*;⁶³ *Al-Marri v. Pucciarelli*;⁶⁴ *Munaf v. Geren*;⁶⁵ *Al-Maqaleh v. Gates*;⁶⁶ *Bismullah v. Gates*;⁶⁷ and *Al-Bihani v. Obama*.⁶⁸ I have also searched every publicly available Office of Legal Counsel opinion.

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.⁶⁹ 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* unselfconsciously cites the case as an example of the Court’s *rejection* of claims of unreviewable executive authority.⁷⁰ Jose Padilla’s merits brief before the

⁵⁷ *Korematsu*, 584 F. Supp. at 1420.

⁵⁸ *Id.*; see also David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 993 (2002).

⁵⁹ 542 U.S. 466 (2004).

⁶⁰ 542 U.S. 426 (2004).

⁶¹ 542 U.S. 507 (2004).

⁶² 548 U.S. 557 (2006).

⁶³ 553 U.S. 723 (2008).

⁶⁴ 534 F.3d 215 (4th Cir. 2008) (en banc).

⁶⁵ 553 U.S. 674 (2008).

⁶⁶ 605 F.3d 84 (D.C. Cir. 2010).

⁶⁷ 514 F.3d 1291 (D.C. Cir. 2008).

⁶⁸ 590 F.3d 866 (D.C. Cir. 2010).

⁶⁹ 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.”).

⁷⁰ Reply Brief in *Al-Odah v. United States*, at 11 n.27, No. 03-1027 (Apr. 7, 2004).

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."⁷¹ In no publicly available OLC opinion since September 11 has any mention been made of *Korematsu*. That includes the memo authored by John Yoo asserting that any reading of the statutory prohibition on torture that interfered with the President's conduct of a military campaign would be unconstitutional.⁷² Even though that memorandum argues that "it is for the President alone to decide what methods to use to best prevail against the enemy," it does not cite *Korematsu*, which is perhaps the most direct precedent for that proposition.⁷³

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 warns of "the lesson of *Korematsu*," a case whose holding "history has long since rejected."⁷⁴ In reply, Judge Wilkinson feels the need to assert 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*."⁷⁵ 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*, in which the Court erected constitutional barriers to libel prosecutions, one of the most significant "precedents" discussed was the Sedition Act of 1798,⁷⁶ 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."⁷⁷ We can also imagine political documents other than statutes to become notorious in the style of an anticanonical judicial decision. The Southern Manifesto, a resolution signed by nearly the entire Southern congressional

⁷¹ Brief of Respondent in *Rumsfeld v. Padilla*, at 44 n.33, No. 03-1027 (Apr. 12, 2004).

⁷² Memorandum from John Yoo, Office of Legal Counsel, to Alberto Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002), at 2.

⁷³ *Id.* at 38.

⁷⁴ 337 F.3d 335, 375 (4th Cir. 2003) (Motz, J., dissenting from denial of rehearing en banc).

⁷⁵ *Id.* at 344 (Wilkinson, J., concurring in the denial of rehearing en banc).

⁷⁶ 1 Stat. 596

⁷⁷ 376 U.S. 254, 273-76, 276 (1964).

delegation pledging resistance to the Court's decision in *Brown*,⁷⁸ 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*, *Brown II*, or *Cooper v. Aaron*.⁷⁹ The Southern Manifesto has not in fact been used in this way, however, as it has only twice been referenced in federal court decisions, and never in the Supreme Court.

A perhaps more common use of something like an antiprecedent is what Kim Lane Scheppele calls “aversive” citation of the practices of foreign courts or institutions in the course of constitutional drafting and interpretation.⁸⁰ 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*, of government racial assignment with “precedents such as the First Regulation to the Reich Citizenship Law of November 14, 1935.”⁸¹ 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.⁸²

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 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.”⁸³ 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 way, we

⁷⁸ 102 CONG. REC. 1459–60 (1956).

⁷⁹ 358 U.S. 1 (1958).

⁸⁰ Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models*, 1 INT'L J. CONST. L. 296 (2001); see also Heinz Klug, *Model and Anti-Model: The United States Constitution and the “Rise of World Constitutionalism,”* 2000 WISC. L. REV. 597.

⁸¹ 448 U.S. 448, 534 n.5 (1980) (Stevens, J., dissenting).

⁸² David Fontana, *Refined Constitutional Comparativism*, 49 UCLA L. REV. 539, 551 n.59 (2004).

⁸³ See, e.g., David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

should want desperately to have a sense of its prevalence, its potential and its limitations.⁸⁴

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.⁸⁵ 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. 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 never have had [*Brown*], and [*Plessy*] would still be the law.”⁸⁶ Justice O’Connor suggested something similar at her confirmation hearing in 1981, when she said that the *Brown* Court had determined that *Plessy* violated the original intent of the Equal Protection Clause.⁸⁷

⁸⁴ This discussion raises the question of whether other constitutional systems have their own “anticanons.” That question exceeds this Article’s scope, but two examples come readily 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. AG Canada*, [1930] A.C. 124 (P.C.) (appeal taken from Can.), and the “frozen concepts” approach associated with the *Labour Conventions* Case, *AG Ontario* [1937] A.C. 326 (P.C.) (appeal taken from Can.). See, e.g., 2004 3 S.C.R. 698 ¶¶ 22–23. 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* 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 (2004). A second example is India. Pratap Bhanu Mehta has said of *ADM Jabalpur v. Shivakant Shukla* AIR, 1976 SC 1207, in which the Supreme Court of India upheld 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).

⁸⁵ See Balkin, *supra* note 5, at 679; cf. H.L.A. HART, *THE CONCEPT OF LAW* 134–35 (2d ed. 1994).

⁸⁶ Sen. Coburn: Kagan ‘Ignorant’ of Constitutional Principles; ‘I Wouldn’t Rule out a Filibuster,’ at <http://blogs.abcnews.com/thenote/2010/06/sen-coburn-kagan-ignorant-of-constitutional-principles-i-wouldnt-rule-out-a-filibuster.html>.

⁸⁷ *The Nomination of Judge Sandra Day O’Connor of Arizona to Serve as an Associate Justice of the Supreme Court of the United States Before S. Comm. on the Judiciary*, 97th Cong. 66, 84 (1981).

They are not alone. Commentators frequently accuse the Courts that decided *Dred Scott*, *Plessy*, *Lochner*, and *Korematsu* of defective reasoning.⁸⁸ This practice is more common among politicians and judges than academics, who often tend towards 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 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. 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, those failings are inadequate to justify their modern-day treatment.

A. *Dred Scott v. Sandford*

The *Dred Scott* case involved a slave, Dred Scott, who sued his nominal master, John Sanford, for his freedom. Scott claimed that because a former master had taken him first to the free state of Illinois and then to the Northwest Territories, where slavery was prohibited, he could not legally be re-enslaved in the slave state of Missouri, where he resided. 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. In a convoluted opinion, Chief Justice Roger 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. The Court also ruled, in a holding sometimes described as dicta and 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.

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

⁸⁸ See Case, *supra* note 28, at 1469 n.112; see also Paul Finkelman, *Scott v. Sandford: The Court's Most Dreadful Case and How It Changed History*, 82 CHI.-KENT L. REV. 3, 7–8 (2007).

entail their equal treatment with whites, which was a non-starter.⁸⁹ 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.⁹⁰ His originalism, moreover, was bad originalism. 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.⁹¹ And Taney’s privileges and immunities argument was a non sequitur: The fact that, under Article IV, black citizens could not be denied the privileges and immunities of citizenship in one state based on their residence in another did not mean that they could not be subjected to racial discrimination.⁹² These errors raise a suspicion that Taney’s aggressive positivism was but a façade for his abject racism.

That is not all. Taney’s further holding that Congress could not ban slavery in the territories adds insult to injury. For one thing, it is premised on the notion that slaves are not people but property, and indeed property whose Fifth Amendment rights to liberty are not 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 Northwest Territory.⁹³ Most important, perhaps, the *Dred Scott* decision rendered unconstitutional the political position of Stephen Douglas and other northern Democrats on the question of slavery in the territories. The Republican Party maintained that the territories should remain free, and southern Democrats insisted that they should not. Douglas and other northern Democrats adopted the compromise position that residents of the territories should be able to determine for themselves whether to permit slavery. 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

⁸⁹ *Scott v. Sandford*, 60 U.S. 393, 405 (1857); U.S. CONST. art. IV § 2.

⁹⁰ See Eisgruber, *supra* note 42, at 167; Paul Finkelman, *Teaching Slavery in American Constitutional Law*, 34 AKRON L. REV. 261, 270 (2000).

⁹¹ See AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 252 (2006).

⁹² See DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS* 265 (1992).

⁹³ See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 31 (1989).

interpretive resources that made its claims just as plausible as the dissent's.⁹⁴ He notes that the argument typically criticized by modern commentators as the most odious—that blacks could not be American citizens—“reflected beliefs held by the overwhelming majority of antebellum jurists in both the North and the South,” and was consistent with the views of large segments of the American public.⁹⁵ Taney's historical case against black citizenship was flawed but, on Graber's view, Taney would have come out no differently if it were flawless.⁹⁶ 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. The basic question 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 keep blacks as chattel slaves, and a fortiori 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.”⁹⁷

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. To hold in the face of such precedent that the same Constitution recognizes the citizenship of free blacks feels like the rankest sophistry.⁹⁸ No nation worth its salt could abide the treatment of its citizens in this way. Either the treatment or the designation of blacks as citizens had to go. Only the designation was before the Court, and the war came.

⁹⁴ MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 4 (2006).

⁹⁵ *Id.* at 28–33.

⁹⁶ *Id.* at 46.

⁹⁷ *Scott*, 30 U.S. at 407; see Eisgruber, *supra* note 42, at 168.

⁹⁸ 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.

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. We do not ordinarily perceive substantive due process difficulties when regulations in one state reduce the value of chattels transported across state lines. 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. One could imagine a colorable (but still, I think, unsuccessful) argument that it would violate substantive due process to refuse to return the hash upon the visitor's exit, and perhaps we can analogize that argument to Scott's claim to perpetual freedom. But if that is the claim, then the due process violation in *Dred Scott*, if any, would have been committed not by Congress but by the state of Missouri, whose laws Scott claimed granted him freedom upon his exit to free territory. Since Missouri is not bound by the Fifth Amendment, Taney's substantive due process argument would be baseless.

More generally, the argument that Congress could not prohibit slavery in federal 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 is also the same Congress that passed the Bill of Rights, whose Fifth Amendment Taney claims 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."⁹⁹

These points do not, however, form the usual case against *Dred Scott*'s substantive due process holding. It is not uncommon 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.¹⁰⁰ That assumption, though, was unassailable. A slightly more sophisticated criticism faults Taney for resorting to substantive due process at all. Robert Bork writes: "Once 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."¹⁰¹ Here

⁹⁹ Abraham Lincoln, *Lincoln at Chicago, July 10, 1858*, in THE COMPLETE LINCOLN-DOUGLAS DEBATES OF 1858, at 26, 37 (Paul M. Angle ed., 1958). Thanks to Akhil Amar for reminding me of Lincoln's neologism.

¹⁰⁰ See, e.g., Beck, Apr. 30, 2010 (Fox News Network) (statement of David Barton); Adam Liptak, *Path to Court: Speak Capably but Say Little*, N.Y. TIMES, Jul. 12, 2009, at 1.

¹⁰¹ BORK, *supra* note 90, at 32; accord *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 998 (1992) (Scalia, J., concurring in part and dissenting in part).

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 suggested that the Fifth Amendment actually *forbid* slavery in federal territories—likely a correct claim in 2011¹⁰²—surely *Dred Scott* would not today be regarded as anticanonical, or even wrong.¹⁰³

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.¹⁰⁴ 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. In his time, Taney could not easily have held other than he did. And had he done so, 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. 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.¹⁰⁵ *Dred Scott* told us we had to take or leave a Constitution that enshrined white supremacy. We left it, and we are the better for it.¹⁰⁶

B. 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.¹⁰⁷ Without dissent, the Court held that the statute did not offend the Equal Protection Clause

¹⁰² 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).

¹⁰³ The claim would have been in tension with the original understanding of the Fifth Amendment. *See* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 *YALE L.J.* 408 (2010).

¹⁰⁴ *See* GRABER, *supra* note 94, at 1–10; Balkin, *Agreements*, *supra* note 42, at 1704–20.

¹⁰⁵ *See* Eisgruber, *supra* note 42, at 181.

¹⁰⁶ *See* ACKERMAN, *supra* note 4, at 64 (“Perhaps Americans really did have to fight a Civil War before blacks could become citizens of the United States.”).

¹⁰⁷ *Pace v. Alabama*, 106 U.S. 583 (1882).

because it did not discriminate between races: “the punishment of each offending person, whether white or black, is the same.”¹⁰⁸ 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 challenged in *Plessy*.¹⁰⁹ 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.”¹¹⁰

So why is *Plessy* wrong? And why have most lawyers never heard of *Pace*?¹¹¹ There are several views on the first question, and they stand in some tension. As discussed in Part I, Sandra Day O’Connor has offered that *Plessy* was inconsistent with the intent of the framers of the Fourteenth Amendment. This is an unorthodox view of the Fourteenth Amendment (and a counterfactual view of *Brown*). The Congress that debated the Fourteenth Amendment did so before segregated galleries that it was fully empowered to integrate; the visitor’s galleries remained segregated until the 1960s.¹¹² The debate over whether that same Congress intended the Equal Protection Clause to mandate public school integration continues, though most scholars believe it did not.¹¹³ The Reconstruction Republicans were concerned above all with eliminating discrimination in “civil” rights such as the right 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.¹¹⁴

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.”¹¹⁵ On this view, the overriding command of the Equal Protection Clause is that government is not to recognize racial

¹⁰⁸ *Id.* at 585.

¹⁰⁹ Acts of 1890, no. 111.

¹¹⁰ *Id.* 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).

¹¹¹ See DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY*, 1888–1986, at 40 (1994); Balkin, *supra* note 5, at 707.

¹¹² E-mail from Laura O’Hara, Historical Publications Specialist, Office of History and Preservation, U.S. House of Representatives, to Melissa Lerner (Oct. 13, 2010) (on file with author); e-mail from Katherine Scott, Assistant Historian, U.S. Senate Historical Office, to Melissa Lerner (Oct. 12, 2010) (on file with author).

¹¹³ Compare Michael J. Klarman, Brown, *Originalism and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1882 (1995), with Michael W. McConnell, *Originalism and the Segregation Decisions*, 81 VA. L. REV. 947 (1995).

¹¹⁴ RICHARD A. PRIMUS, *THE AMERICAN LANGUAGE OF RIGHTS* 154–55 (1999).

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

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.”¹¹⁶ A noble goal, perhaps, but colorblindness is an even less obvious imperative of the Fourteenth Amendment than 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.¹¹⁷ And given that colorblindness is foreign 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. 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.¹¹⁸

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. 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.”¹¹⁹ The third common critique of *Plessy*, then, follows Justice Harlan’s lead: The majority’s error was in 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

¹¹⁶ *Adarand Constructors v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment)

¹¹⁷ See Jed Rubenfeld, *Affirmative Action*, 107 *YALE L.J.* 427, 430–32 (1997).

¹¹⁸ *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

¹¹⁹ *Id.*

sure it never occurred to anyone, white or colored, to question its meaning.”¹²⁰ It was problematic enough for the *Plessy* Court to maintain that it lacked the competence to ascribe a white supremacist social meaning to segregation. The Court’s absurd suggestion that blacks were inventing such a meaning compounded the error many fold.¹²¹ I am comfortable in my agreement with Black that, on this point, “the curves of callousness and stupidity intersect at their respective maxima.”¹²²

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. There is at least a strong argument that the decision is consistent with the original understanding of the Fourteenth Amendment. 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 would mean integration.¹²³ Segregation of rail cars in particular was a common feature of civil society in nineteenth-century America.¹²⁴ Writes Charles Lofgren, “[I]n states of the former Confederacy, from the end of the war into the late 1880s and early 1890s, 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.”¹²⁵ 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.¹²⁶ We might instead look to the touchstone of modern equal protection analysis, discriminatory legislative intent. Intent was sometimes considered important even in the nineteenth century: In *Yick Wo v. Hopkins*, which the *Plessy* majority discusses, the Court invalidated a series of San Francisco laundry regulations that conferred discretion on city

¹²⁰ Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424 (1960).

¹²¹ *Plessy*, 163 U.S. at 551.

¹²² Black, *supra* note 120, at 422 n.8.

¹²³ Herbert Hovenkamp, Book Review, *The Cultural Crisis of the Fuller Court*, 104 YALE L.J. 2339–40 (1995) (reviewing OWEN M. FISS, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910* (1993)).

¹²⁴ See Cheryl I. Harris, *The Story of Plessy v. Ferguson: The Death and Resurrection of Racial Formalism*, in *CONSTITUTIONAL LAW STORIES*, at 181, 194–96 (2004).

¹²⁵ CHARLES A. LOFGREN, *THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION* 17 (1988).

¹²⁶ See PRIMUS, *supra* note 114, at 174–76.

supervisors to deny permits on an arbitrary basis.¹²⁷ The Court recognized the law as an obvious subterfuge for banning Chinese laundries from the city. A reasonable judge could have inferred similarly odious intent in *Plessy*, but the Separate Car Act conferred no discretion on train conductors except to assign races to their passengers, and the Court suggested that an erroneous assignment could give rise to an action in tort.¹²⁸ And a judge would not have been unreasonable in ascribing to the Louisiana legislature a concern for “the promotion of [passenger] comfort, and the preservation of the public peace and good order.”¹²⁹ 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.¹³⁰ 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 McCordle*, 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.”¹³¹ 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.”¹³² There has always been some play in the joints here. We must carefully distinguish, as Justice Black sought to do,¹³³ between subjective indicia of legislative motivation, which have long been deemed non-discoverable, and objective indicia of motive that may appear on the face of a statute.¹³⁴ 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 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,¹³⁵ and a statute that formally recognizes race but does so in the spirit of *dismantling* a racial caste system is presumptively unconstitutional. *Parents Involved in Community Schools v. Seattle*

¹²⁷ 118 U.S. 356 (1886).

¹²⁸ *Plessy*, 163 U.S. at 549.

¹²⁹ *Id.* at 550.

¹³⁰ *Cf.* Black, *supra* note 120, at 424.

¹³¹ 74 U.S. 506, 514 (1868).

¹³² *Palmer v. Thompson*, 403 U.S. 217, 224 (1971).

¹³³ *Id.* at 225.

¹³⁴ Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784, 1787 (2008).

¹³⁵ *Washington v. Davis*, 426 U.S. 229 (1976).

School District No. 1 is perhaps the 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.¹³⁶ The notion that *Plessy* is anticanonical because too formalistic rings hollow these days.

Justice Harlan's dissent was contrary to Court precedent and contrary to the most defensible original understanding of the Fourteenth Amendment. *Plessy* is also consistent 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 war 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.¹³⁷ We cannot say how history would have unfolded, but recall that invalidating a political compromise between North and South over volatile issues of race is precisely the error many attribute to the *Dred Scott* decision. *Plessy* might well have kept the peace.

C. *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 and law students "resist the very suggestion that *Lochner* might have been a legally plausible decision in 1905."¹³⁸ 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 touchstone of judicial error."¹³⁹ David Strauss says, with only

¹³⁶ 551 U.S. 701 (2007).

¹³⁷ ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 576 (1988).

¹³⁸ ACKERMAN, *supra* note 4, at 64.

¹³⁹ David E. Bernstein, *Lochner's Legacy's Legacy*, 82 TEX. L. REV. 1, 2 (2003); *see generally* DAVID E. BERNSTEIN, REHABILITATING LOCHNER (forthcoming 2011).

mild hyperbole, “You have to reject *Lochner* if you want to be in the mainstream of American constitutional law today.”¹⁴⁰

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 universal 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.”¹⁴¹ Naked fear for the results will not do as jurisprudential rhetoric, however, 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 “the Fourteenth Amendment does not enact Mr. Herbert Spencer’s *Social Statics*.”¹⁴² 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. 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. 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.¹⁴³

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.¹⁴⁴ 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

¹⁴⁰ Strauss, *supra* note 42, at 373.

¹⁴¹ ACKERMAN, *supra* note 4, at 64.

¹⁴² 198 U.S. 45, 75 (Holmes, J., dissenting).

¹⁴³ *Id.* at 65 (Harlan, J., dissenting).

¹⁴⁴ BORK, *supra* note 93, at 44.

Justice Harlan's—or is not a constitutional right at all. On this view, unenumerated rights that satisfy some other rule of recognition might be affirmed, such as the right to privacy, but the right to contract fails to meet the test.¹⁴⁵ We might particularly have it in for a Court that exalts weak or non-existent rights such as the right to contract but refuses to grant constitutional protection, for example, to speech by political dissidents.¹⁴⁶

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. First off, it had been recognized in prior cases, including unanimously in *Allgeyer v. Louisiana*.¹⁴⁷ More generally, Howard Gillman has shown that the right to contract grew out of the free labor ideology of the Jackson era and the antislavery movement.¹⁴⁸ 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 relationship. 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 *Lochner*-era Court upheld vastly more challenged state laws than it invalidated.¹⁴⁹

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*, 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.¹⁵⁰ 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 overprotected civil rights. Owen Fiss makes a related point: “*Lochner* sought to say clearly and unequivocally that the legislative power was indeed limited, and

¹⁴⁵ See Strauss, *supra* note 42, at 381.

¹⁴⁶ *Id.* at 376 (referring to cases such as *Debs v. United States*, 249 U.S. 211 (1919), *Schenck v. United States*, 249 U.S. 47 (1919), and *Abrams v. United States*, 250 U.S. 616 (1919)).

¹⁴⁷ 165 U.S. 578 (1897).

¹⁴⁸ HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 6 (1993).

¹⁴⁹ Victoria Nourse has argued that such scrutiny was far more likely at the time of *Lochner* to favor state interests. Victoria F. Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CAL. L. REV. 751 (2009).

¹⁵⁰ Strauss, *supra* note 42, at 374.

to do so during a time when those limits were being called dramatically into question.”¹⁵¹ 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.¹⁵² 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. William 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.¹⁵³ 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: a statute which, without reason, distinguishes between two groups of citizens is unreasonable, arbitrary, and therefore void.”¹⁵⁴

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*, 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.¹⁵⁵ On this conception, the repudiation of *Lochner* entails deference to legislatures except for rights enumerated within the Bill of Rights, infringements upon the channels of political change, and laws curtailing the rights of “discrete and insular minorities.”¹⁵⁶ Ely argued that discreteness and insularity were distinct disadvantages in political bargaining because they tended to be markers of irrational discrimination.¹⁵⁷ Whether or not that is correct as a matter of positive political science,¹⁵⁸ most can agree that judges should give special solicitude to politically powerless groups whose members are the victims of extraordinary legislation benefiting political majorities.

¹⁵¹ FISS, *supra* note 123, at 165.

¹⁵² See GILLMAN, *supra* note 148, at 128.

¹⁵³ WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 77–80 (1988).

¹⁵⁴ *Id.* at 199.

¹⁵⁵ *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

¹⁵⁶ *Carolene Products*, 304 U.S. at 152 n.4.

¹⁵⁷ ELY, *supra* note 155, at 135–36.

¹⁵⁸ Cf. Bruce Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985).

The Bakeshop Act passed unanimously in both houses of the New York legislature. The legislative consensus around the measure might not necessarily have reflected approval of the maximum-hours provision, as the bill also contained consumer-friendly regulations focused on maintaining sanitary conditions in bakeries.¹⁵⁹ 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.¹⁶⁰ 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 Confectionary Workers' International, which had successfully organized many of the larger upstate New York bakeries.¹⁶¹ Many of the smaller bakeries in New York City remained non-unionized and, significantly, staffed by Italian, French, and Jewish immigrants.¹⁶² The union had already made significant 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.¹⁶³ Thus, the union newspaper the *Baker's Journal* warned of "the cheap labor of the green hand from foreign shores,"¹⁶⁴ 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."¹⁶⁵

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

¹⁵⁹ PAUL KENS, *LOCHNER V. NEW YORK: ECONOMIC REGULATION ON TRIAL* 65 (1998). The baker's union referred to the Act in its journal as "a sanitary measure solely." David E. Bernstein, *Lochner v. New York: A Centennial Retrospective*, 83 WASH. U. L.Q. 1469, 1481 (2005).

¹⁶⁰ *E.g.*, Oral Argument at 55:55, *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 129 S.Ct. 2504; cf. http://www.neshamah.net/reb_barrys_blog_neshamah/2007/03/the_rabbi_and_t.html#more (suggesting that Scalia might not agree with these kinds of procedural obstacles).

¹⁶¹ KENS, *supra* note 159, 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 159, at 1484–85, 1491–92.

¹⁶² David E. Bernstein, *The Story of Lochner v. New York: Impediment to the Growth of the Regulatory State*, in CONSTITUTIONAL LAW STORIES 325, 329 (2004).

¹⁶³ *Id.* at 328–29.

¹⁶⁴ *Now for the Ten-Hour Day*, BAKER'S J., Apr. 20, 1895, at 1 (quoted in Bernstein, *supra* note 159, at 1477).

¹⁶⁵ *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 (quoted in Bernstein *supra* note 159, at 1481).

approving of *Lochner*: “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.”¹⁶⁶ 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.

D. *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 arguments. These features of the case are directly related, as I show in Part III. 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 DeWitt’s orders establishing a curfew for all individuals of Japanese ancestry residing on the West Coast and subsequently requiring that they leave their homes and report to residential assembly centers for a determination of loyalty was bad racial profiling because it was 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.”¹⁶⁷ 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.”¹⁶⁸ In a Recommendation to the Secretary of War dated February 14, 1942, DeWitt wrote that “[t]he very fact that no sabotage has taken place to date is a disturbing

¹⁶⁶ Editorial, *A Check on Union Tyranny*, NATION, May 4, 1905, at 346, 347.

¹⁶⁷ *Id.* at 236 (Murphy, J., dissenting).

¹⁶⁸ *Id.* at 236 n.2.

and confirming indication that such action will be taken.”¹⁶⁹ 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, “The 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.”¹⁷⁰

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 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 constitutes *any* evidence of subversion.¹⁷¹ This distinction graphs on to 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 otherwise 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.¹⁷² 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.”¹⁷³ Justice Jackson affirmed that view in his *Korematsu* dissent, in which he implied that the Court should have avoided decision: “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.”¹⁷⁴

¹⁶⁹ DEWITT FINAL REPORT: U.S. ARMY, WESTERN DEFENSE COMMAND, FINAL REPORT, JAPANESE EVACUATION FROM THE WEST COAST, 1942, at 34 (1943).

¹⁷⁰ Eugene V. Rostow, *The Japanese-American Cases: A Disaster*, 54 YALE L.J. 489, 496 (1945).

¹⁷¹ See, e.g., Cole, *supra* note 58, at 994 (“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.”).

¹⁷² ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 111–98 (1962).

¹⁷³ *Id.* at 128.

¹⁷⁴ *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting).

Korematsu was argued on October 11 and 12, 1944, and came down on December 18 of the same year. By then Allied victory in the Pacific was a question of when rather than if. Five months earlier, American forces had secured the island of Saipan, which led to the resignation in disgrace of Japanese Prime Minister Hideki Tojo. The day before the decision issued, the War Department announced its revocation of the evacuation orders (effective two weeks thence), and the day of the decision the War Relocation Authority, in charge of administering the evacuations, announced the closing of all camps by the end of the following year.¹⁷⁵ Those decisions were based on the view within the Department that “the continued mass exclusion from the West Coast of persons of Japanese ancestry is no longer a matter of military necessity.”¹⁷⁶ 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.¹⁷⁷ 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 is the first case to note. 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*.¹⁷⁸ In *Hirabayashi* the Court upheld General DeWitt’s Area No. 1 curfew order even though it applied only to Japanese. If *Hirabayashi* is wrong, then it should either replace or join *Korematsu* in the anticanon. If *Hirabayashi* is correct, the argument against *Korematsu* must be 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.¹⁷⁹

¹⁷⁵ 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).

¹⁷⁶ PETER IRONS, *JUSTICE AT WAR: THE STORY OF THE JAPANESE-AMERICAN INTERNMENT CASES* 276 (1993).

¹⁷⁷ See WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 206–11 (2000).

¹⁷⁸ 320 U.S. 81 (1943).

¹⁷⁹ See *Korematsu*, 323 U.S. at 231–32 (Roberts, J., dissenting); IRONS, *supra* note 176, at 258.

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 Jackson’s opinion in *Youngstown Sheet & Tube Co. v. Sawyer* has become the leading doctrinal framework for evaluating claims of Executive authority.¹⁸⁰ The *Korematsu* decision appears, though not without qualification, to fall into Jackson’s category 1, which comprises Presidential acts pursuant to an express or implied congressional authorization. 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.¹⁸¹ 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.¹⁸² Again, whether to place the order in category 1 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.¹⁸³ 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. 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.”¹⁸⁴

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

¹⁸⁰ 343 U.S. 579 (1952).

¹⁸¹ 7 Fed. Reg. 1407 (Feb. 19, 1942).

¹⁸² National Emergencies Act, Pub. L. No. 77-501-503, § 56, Stat. 173 (1942), repealed by P.L. No. 94-412 § 501(e), 90 Stat. 1255 (1976).

¹⁸³ *Korematsu*, 323 U.S. at 244 (Jackson, J., dissenting).

¹⁸⁴ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring in the judgment); *see also* *Korematsu v. United States*, 140 F.2d 289, 290 n.2 (9th Cir. 1943).

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 amounts of prophecy.’”¹⁸⁵ With favorable cites both to Justice Jackson’s *Youngstown* opinion and to *Hirabayashi*, 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.”¹⁸⁶ 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.

E. 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, and 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.¹⁸⁷ What does have the capacity to change over the course of just a couple of generations is conventional morality. Given that, 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 the 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 it is entirely wrong. 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 demands 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

¹⁸⁵ *Hamdi v. Rumsfeld*, 542 U.S. 507, 583 (2004) (Thomas, J., dissenting) (quoting *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948)).

¹⁸⁶ *Id.* at 584.

¹⁸⁷ See Philip Bobbitt, *Reflections Inspired by My Critics*, 72 TEX. L. REV. 1869, 1916–17, 1919 (1994).

demonstrate the anticanon's special pattern of citation. Considerations of brevity prevent extended discussion, but what follows should provide the necessary flavor.

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 who was likely not a fugitive slave and her two children, who assuredly were not. The Court's holding was that the Fugitive Slave Clause prohibited states from subjecting slave catchers to a state-sanctioned civil process, except to prevent "breach of the peace, or any illegal violence."¹⁸⁸ 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 black-skinned Americans in both the North and the South.¹⁸⁹ In 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, *Prigg* therefore made *Dred Scott* a fait accompli.

Justice Story's reading of the Fugitive Slave Clause is not defensible. His opinion omits any consideration either of Pennsylvania's obligations towards 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 is strained. It would, for example, divorce the interpretation of that provision from the parallel language of the Extradition Clause, which the Court later found not to be judicially enforceable.¹⁹⁰ The *Prigg* Court's additional holding that Congress could not force state officials to comply with administration of the Fugitive Slave Act formed a significant link in the chain of events that led to the establishment of the Republican Party and the outbreak of Civil War.¹⁹¹ In his 1860 State of the Union Address, delivered 17 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."¹⁹² Even if Justice Story was right that the Constitution prevents states

¹⁸⁸ *Prigg v. Pennsylvania*, 41 U.S. 539, 613 (1842).

¹⁸⁹ Barbara Holden-Smith, *Lords of Lash, Loom, and Law: Justice Story, Slavery, and Prigg v. Pennsylvania*, 78 CORNELL L. REV. 1086, 1086 (1993).

¹⁹⁰ *Kentucky v. Dennison*, 65 U.S. 66 (1861).

¹⁹¹ See Earl M. Maltz, *Slavery, Federalism, and the Constitution: Ableman v. Booth and the Struggle over Fugitive Slaves*, 56 Clev. S. L. Rev. 83, 86–89 (2008).

¹⁹² James Buchanan, *Fourth Annual Message, December 3, 1860*, in AMERICAN PRESIDENTS: FAREWELL MESSAGES TO THE NATION, 1996–2001, at 174, 177 (Gleaves Whitney ed., 2003).

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 whom had pushed a strategy of seeking jury trials in slave-recapture cases.¹⁹³ It is also the central error attributed to *Dred Scott*. To paraphrase Bork, who says *Dred Scott* must say *Prigg*.¹⁹⁴

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. 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 40 acres of land; the registrar was invested, moreover, with unreviewable discretion to deny new registrants. Those, like Giles, who were registered prior to the new law were grandfathered for life, but only if directly descended from (or themselves) a veteran of the Revolutionary War, the War of 1812, the Mexican-American War, or the *Confederate* side of the Civil War.¹⁹⁵ It is difficult to concoct a more transparent attempt to evade the Fifteenth Amendment, or even to imagine a scheme that would violate so many present-day statutory and constitutional provisions. 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.”¹⁹⁶

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

¹⁹³ See ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 164–68 (1975).

¹⁹⁴ BORK, *supra* note 93, at 32 (“Who says *Roe* must say *Lochner* and *Scott*.”).

¹⁹⁵ Ala. Const. §§ 177–84 (1901).

¹⁹⁶ 1 Official Proceedings of the Constitutional Convention of the State of Alabama, May 21st, 1901 to September 3rd, 1901, p. 8 (1940), quoted in *Hunter v. Underwood*, 471 U.S. 222, 229 (1985).

given by them or by the legislative and political department of the Government of the United States.¹⁹⁷

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

Giles is the anti-*Cooper v. Aaron*. 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."¹⁹⁸ *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*.¹⁹⁹ 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. 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 colored races."²⁰⁰ 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.²⁰¹

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.

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

¹⁹⁷ *Giles v. Harris*, 189 U.S. 475, 488 (1903). Richard Pildes calls this reasoning "the most legally disingenuous analysis in the pages of the U.S. Reports." Richard Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMM. 295, 306 (2000).

¹⁹⁸ 358 U.S. 1, 18 (1958).

¹⁹⁹ 275 U.S. 78 (1927).

²⁰⁰ Miss. Const. § 207 (1890).

²⁰¹ Brief for Appellees, *Rice v. Gong Lum*, 104 So. 105 (Miss. 1927).

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.²⁰² 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 supremacy. Indeed, the policy the Court blessed virtually required advocates to advance the sorts of racist arguments that Gong’s attorney made on his behalf. Like the policy in *Loving v. Virginia*, the Mississippi Constitution sought to protect a space for white racial purity; racial division was neither an unintended nor instrumental consequence of the policy, but was in fact its goal.²⁰³

A final case worth mention is *Bowers v. Hardwick*, which upheld a Georgia law criminalizing sodomy.²⁰⁴ The Court has since said that the case was wrong the day it was decided.²⁰⁵ That overruling sharply divided the Court, but less than a decade later, 70 percent of the American people say they would not support a ban on same-sex intimacy.²⁰⁶ The *Lawrence* Court 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

²⁰² 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 (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 Community Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789 (2007) (Kennedy, J. concurring in the judgment); and the assumed constitutional distinction between “ten percent” plans and individualized affirmative action plans, *see* Brief for United States as *Amicus Curiae* in *Gratz v. Bollinger*, OT 2002, No. 02-516, at 18.

²⁰³ *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

²⁰⁴ 478 U.S. 186 (1986).

²⁰⁵ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

²⁰⁶ Stephen Ansolabehere & Nathaniel Persily, Knowledge Networks, Field Report: Constitutional Attitudes Survey 56 (2008) (on file with author).

sodomy.”²⁰⁷ 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. Both Justice White’s majority opinion and Chief Justice Burger’s concurrence emphasize the “ancient roots” of anti-sodomy laws, but neither Justice seemed aware that the European Court of Human Rights five years earlier had invalidated Northern Ireland’s sodomy ban as inconsistent with the European Convention on Human Rights.²⁰⁸ One member of the majority—Justice O’Connor—later argued that it would be a different case if the Georgia statute applied only to same-sex sodomy.²⁰⁹ But the claim before the Court was as-applied to same-sex sodomy; a heterosexual married couple had been plaintiffs in the original action, but their claims were dismissed below on the grounds that there was no danger that they would be prosecuted under the statute.²¹⁰ Another member of the majority, Justice Powell, suggested that the case would come out differently had it involved an Eighth Amendment claim and a serious term.²¹¹ 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 that cast a shadow over not just their sex lives but 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 protecting gays and lesbians was in serious tension with allowing their archetypal conduct to be criminalized.²¹² 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.²¹³

Bowers authorized the State to visit serious criminal sanctions—or not, at its prosecutors’ discretion—upon individuals solely because of whom they chose to love and how. If any decision could be more antithetical to the spirit of liberty, I am not aware of it. The emerging consensus on LGBT rights makes *Bowers* look terrifically dated, even eight years after *Lawrence*.

* * *

What is wrong with *Prigg*, *Giles*, *Gong Lum*, and *Bowers*? Or rather, what is right with them? A well-trained lawyer would recognize their legal errors. Are they any better reasoned than the anticanon? Their moral failings are at least the

²⁰⁷ *Bowers*, 478 U.S. at 190.

²⁰⁸ *Dudgeon v. United Kingdom*, Appl. No. 7525/76, Council of Europe: European Court of Human Rights, 22 Oct. 1981.

²⁰⁹ *Lawrence*, 539 U.S. at 583 (O’Connor, J., concurring in the judgment).

²¹⁰ *Bowers*, 478 U.S. at 188 n.2.

²¹¹ *Id.* at 198 (Powell, J., concurring).

²¹² *Romer v. Evans*, 517 U.S. 620, 640–43 (1995) (Scalia, J., dissenting).

²¹³ JOHN JEFFRIES, JUSTICE LEWIS F. POWELL: A BIOGRAPHY 521, 530, 537 (2001).

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 *Plessy* or *Lochner*.²¹⁴ 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 article 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.²¹⁵ For example, plain and unambiguous language must be given its natural effect, but not if it would lead to absurd results or frustrate manifest purpose.²¹⁶ 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 says, "the construction contended for must be sold, essentially, by means other than the use of the canon."²¹⁷ Canons are best described not as a set of instructions but as an argot for those trained in the art of legal argument.

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 nor more morally repugnant than many other decisions that remain relatively obscure.

²¹⁴ Compare *The Supreme Court Sustains the Alabama Constitution*, DAILY PICAYUNE, Apr. 28, 1903, at 1, and *Justices Set Back Gay Rights*, CHI. TRIB., Jul. 1, 1986, at 1, with text accompanying nn. 246–247, *infra*.

²¹⁵ Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules of Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395 (1950).

²¹⁶ *Id.* at 403.

²¹⁷ *Id.* at 401.

This Part takes as settled that anticanonicity does not result (or at least does not result linearly) from a decision's argumentation or outcome. It instead results from other features that make the case a useful resource for subsequent legal communities. Part III.A recounts the historical path the treatment of these cases took to realizing their current designations as anticanonical. Part III.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.²¹⁸ *Brown* all but overturned *Plessy*, and a series of per curiam opinions extending *Brown* to public beaches, golf courses, and buses finished the job.²¹⁹ *Lochner* is nearly irreconcilable with *West Coast Hotel v. Parrish*.²²⁰ By numerous measures, however, it took much more than formal repudiation to place these decisions in the anticanon. As the *Korematsu* example suggests, it is not even clear that formal repudiation is necessary.

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. 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 conventional legal logic.²²¹ If the appropriate methodology for reconstructing the anticanon is historicist, then it should be possible to specify at least some of the conditions for anticanonicity by

²¹⁸ U.S. Const. amend. XIV § 1; MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 173 (1986).

²¹⁹ *Mayor v. Dawson*, 350 U.S. 877 (1955); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955); *Gayle v. Browder*, 352 U.S. 903 (1956).

²²⁰ 300 U.S. 379 (1937). *Lochner* also stands in serious tension with *Bunting v. Oregon*, which upheld a 10-hour workday for manufacturing employees. 243 U.S. 426 (1917). *Bunting* was believed by many to signal the end of the *Lochner* era, until the Court's later decision in *Adkins v. Children's Hospital*, 261 U.S. 525 (1923); see *id.* at 563 (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.").

²²¹ Balkin, *supra* note 5, at 679.

examining cases longitudinally, with an eye towards 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. That 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 towards understanding how the anticanon came into being.

1. Dred Scott

In some quarters, *Dred Scott* was notorious from the start. The Chicago *Tribune* wrote in the week after the decision was issued: “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.”²²² The decision was foremost in the mind of Reconstruction Republicans drafting the Fourteenth Amendment; Charles Sumner tried (in vain) to prevent a bust of Roger Taney from being placed in the Supreme Court chamber along with those of his predecessors.²²³ 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 against the Government.”²²⁴ 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.”²²⁵

This divide is reason alone to doubt that *Dred Scott* was instantly made 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

²²² CHI. TRIB., Mar. 12, 1857, quoted in DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 417 (2001).

²²³ RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 128 (1977).

²²⁴ AUGUSTA CONSTITUTIONALIST, Mar. 15, 1857, quoted in FEHRENBACHER, *supra* note 222, at 418.

²²⁵ N.Y. HERALD, Mar. 8, 1857, quoted in FEHRENBACHER, *supra* note 222, at 418.

decision's presuppositions. By 1896, Justice Harlan's *Plessy* dissent seemed to regard *Dred Scott* as the preeminent example of constitutional law gone wrong,²²⁶ but Harlan was one of eight, and he may have been ahead of his time in the depth of his disdain for the decision. *Dred Scott* has not been favorably cited in a majority opinion of the Supreme Court in more than 100 years,²²⁷ but the decision was not *negatively* cited—the grist of the anticanon—in any majority opinion between 1901 and 1957.

Indeed, with the notable exception of 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. Several of the individual opinions in the *Insular Cases* relied on *Dred Scott* as authority for the constitutional relationship between Congress and acquired territories.²²⁸ Justice Frankfurter referred to the case as a “failure” in his unanimous opinion for the Court in *United States v. International Union United Automobile and Agricultural Workers of America*, but for him that consisted in refusing to practice constitutional avoidance, for failing to “take the smooth handle for the sake of repose.”²²⁹ The phrase referred to a letter written by Justice Catron to President Buchanan during the *Dred Scott* deliberations, in which the Justice urged 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.²³⁰ Frankfurter's unanimous 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 1954.²³¹ 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.²³² Indeed,

²²⁶ 163 U.S. 537, 559 (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 30, at 468.

²²⁷ See *Kansas v. Colorado*, 206 U.S. 46, 81 (1907).

²²⁸ 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, 174 (1901); *id.* at 291 (McKenna, J., dissenting).

²²⁹ 352 U.S. 567, 591 (1957) (quoting 10 WORKS OF JAMES BUCHANAN 106). Taney's purported abuse of obiter dictum was also for many years a preoccupation of historians who studied the case. FEHRENBACHER, *supra* note 222, at 336.

²³⁰ *Id.*

²³¹ The Dowling casebook is the precursor to the Sullivan and Gunther casebook, authored by Kathleen Sullivan, that is popular in law school classrooms today.

²³² NOEL T. DOWLING, CONSTITUTIONAL LAW: CASES AND MATERIALS 1127 (6th ed. 1959).

when Gerald Gunther took over the Dowling casebook in 1965, he cited *Dred Scott* as *positive* authority for the existence of substantive due process.²³³

The language of constitutional evil with which we today associate *Dred Scott* appeared twice, however, in separate opinions of Justice Black. In the 1945 case of *Williams v. North Carolina*, 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.”²³⁴ 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 cohabitation, which the Court upheld against a full faith and credit challenge. 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*, a 1961 decision in which the majority upheld an attorney disbarment against a due process challenge. 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 most renowned decisions—*Dred Scott v. Sandford* and *Plessy v. Ferguson*.”²³⁵ This usage of the anticanon was more mature than 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 wants to argue. This kind of gratuitous revisionism—*Cohen* is also not a race case—is a common feature of anticanon invocation.

Other Justices got in on the act in later years. In *Bell v. Maryland*, in which the Court invoked the due process clause to invalidate prosecutions 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.”²³⁶ Douglas’s usage is not revisionist in the way of Black’s *Williams* opinion, but an opponent of the *Bell* holding might easily have invoked *Dred Scott* as standing for the proposition that the Court should not use creative due process arguments to federalize matters of state law, as it did in *Bell*. *Dred Scott*’s

²³³ NOEL T. DOWLING AND GERALD GUNTHER, CONSTITUTIONAL LAW: CASES AND MATERIALS 862 n.1 (7th ed. 1965).

²³⁴ 325 U.S. 226, 274 (1945) (Black, J., dissenting).

²³⁵ 366 U.S. 117, 142 (1961) (some citations omitted).

²³⁶ 378 U.S. 226, 253 (1964) (Douglas, J., concurring) (citation omitted).

symbolic value was progressively becoming such that it was useful to characterize its central propositions at an exceedingly broad level of generality.

Bell v. Maryland 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 goes some way towards explaining why the case was less surely anticanonical before the 1960s. In order for a case about race to join the anticanon, there must be consensus about some salient race-related proposition. Before the 1960s, there was no such consensus—or at least none that could be publicly acknowledged—among legal and political elites about the iniquity of Jim Crow. In other words, 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.²³⁷

Once *Dred Scott* came to be one of the political symbols that signaled that ethical commitment, it took on a life of its own. Sometime during the 1980s, for example, *Dred Scott* came to represent the potential evil of substantive due process—and therefore *Roe*—apart from any connection to racial exclusion. In his famous (canonical?) critique of *Roe*, Ely compared the case, quite sensibly, to *Lochner*, not to *Dred Scott*.²³⁸ 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*.”²³⁹ Bork quoted that language favorably in his treatise, in which he suggested, as noted, that the three cases are indistinguishable.²⁴⁰

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.²⁴¹ More poetically, he continues the comparison in the opinion's coda, which describes the portrait of Taney hanging in 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

²³⁷ That might explain, in part, the absence of any gender-related cases from the anticanon.

²³⁸ John Hart Ely, *The Wages of Crying Wolf*, 82 YALE L.J. 920 (1973).

²³⁹ David P. Currie, *The Constitution in the Supreme Court: Article IV and Federal Powers, 1836–1864*, 1983 DUKE L.J. 695, 736.

²⁴⁰ BORK, *supra* note 93, at 32.

²⁴¹ 505 U.S. 833, 998 (Scalia, J., dissenting in part).

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 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.²⁴²

For Scalia and for many other social conservatives, *Roe*, like *Dred Scott*, not only involves substantive due process but implicates profound questions of “life and death, freedom and subjugation.”²⁴³ 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 work until it wished to firm up an ethical departure from Jim Crow during the 1960s. With the exception of Chief Justice Warren’s opinion for the Court in *Brown*, 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.²⁴⁴ The decision was not hugely controversial at the time it issued;²⁴⁵ the *New York Times* and the *Washington Post* gave the decision minimal—and decidedly neutral—attention.²⁴⁶ Even the *New Orleans Daily Picayune* relegated the decision to a brief and approving mention on page 4, under the remarkable headline “Equality, but not Socialism.”²⁴⁷

Aware of this uninspired reception, Primus offers the possibility that *Plessy* could have become canonical by the 1930s or the 1950s.²⁴⁸ This appears not to have been so. As Charles Lofgren notes, major treatises and casebooks ignored the case well into the 1940s.²⁴⁹ Charles Warren’s *The Supreme Court in*

²⁴² *Id.* at 1001–02.

²⁴³ *Id.* at 1002.

²⁴⁴ See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); NEWSWEEK, Dec. 13, 1971, at 32 (Rehnquist memo).

²⁴⁵ See LOFGREN, *supra* note 125, at 5.

²⁴⁶ *Louisiana’s Separate Car Law*, N.Y. TIMES, May 19, 1896, at 3; *Separate Coach Law Upheld*, WASH. POST, May 19, 1896, at 6.

²⁴⁷ *Equality, but not Socialism*, NEW ORLEANS DAILY PICAYUNE, May 19, 1896, at 4.

²⁴⁸ Primus, *supra* note 5, at 257.

²⁴⁹ LOFGREN, *supra* note 125, at 5.

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 25 cases “involving rights of Negroes.”²⁵⁰ Dowling’s casebook includes *Plessy* in its preliminary edition published in 1931 but the case disappears in subsequent editions produced in 1941, 1946, and 1950. Tellingly, the *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.²⁵¹

What happened? Well, *Brown* happened, of course. But it is a mistake to assume that *Brown* made *Plessy* anticanonical. For one thing, *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;²⁵² its iconic status was facilitated by subsequent enforcement by the Court in cases like *Cooper v. Aaron*²⁵³ and *Green v. School Board of New Kent County*,²⁵⁴ 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 1965.²⁵⁵

Consistent with what Primus calls its “yoking” to *Brown*, *Plessy* was weaponized in the midst of this movement energy. In *Wright v. Rockefeller*, in which the Court rejected a constitutional challenge to 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*.²⁵⁶ Four years later, Justice 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.*, which upheld the fair housing provisions of the Civil Rights Act of 1968 as being within the power of Congress.²⁵⁷ *Plessy* appeared again in Justice Black’s opinion for himself in *Oregon v. Mitchell*, which upheld the Voting Rights Act’s ban on literacy tests.²⁵⁸ 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

²⁵⁰ *Id.*; CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 621 n.1 (1922).

²⁵¹ *Upholds Segregation of Chinese in Schools*, N.Y. TIMES, Nov. 22, 1927, at 14.

²⁵² The Southern Manifesto was signed by 101 Southern members of Congress, including all but three of the South’s 22 Senators. 102 CONG. REC. 1459–60 (1956).

²⁵³ 358 U.S. 1 (1958).

²⁵⁴ 391 U.S. 430 (1968).

²⁵⁵ See GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

²⁵⁶ 376 U.S. 52, 62 (1964) (Douglas, J., dissenting) (internal citations omitted).

²⁵⁷ 392 U.S. 409, 445 (1968) (Douglas, J. concurring).

²⁵⁸ 400 U.S. 112, 133 (1970) (opinion of Black, J.).

vote.”²⁵⁹ Justice Douglas cited *Plessy* again in his dissent in *Milliken v. Bradley*, in which he argued that failure to endorse an interdistrict anti-segregation remedy would likely restore *Plessy*’s “separate but equal” regime.²⁶⁰ 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 Justice Black and Justice 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. We today associate *Plessy* with Justice Harlan’s dissenting opinion, and specifically with his admonition that the Constitution is “color-blind.”²⁶¹ But that language rarely appeared in Supreme Court opinions until *Regents of the University of California v. Bakke* was decided in 1978. *Bakke* was of course an affirmative action case, and the dispute over the meaning of *Plessy* and of Justice 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.”²⁶² Justice Marshall argued that Justice 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 by white citizens.’”²⁶³ Brennan and Marshall sought to claim Justice Harlan as anti-formalist and attuned to the “social meaning” of segregation.

Meanwhile, Justice Stevens, who wrote for four Justices that the affirmative-action policy at issue 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.’”²⁶⁴ For Justice Stevens, at least as to the statute, and implicitly for Senator Pastore, Justice Harlan could be marshaled for the proposition that colorblindness implies race-blindness in a formal sense. For Justice Brennan and Justice Marshall, in effect, the symbolism of Justice Harlan was that the Constitution must be “blind” to a

²⁵⁹ *Id.* (internal citations omitted).

²⁶⁰ 418 U.S. 717, 759 (Douglas, J., dissenting).

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

²⁶² *Regents of the University of California v. Bakke*, 438 U.S. 265, 355 (1978) (Brennan, J., dissenting).

²⁶³ *Id.* at 392 (Marshall, J., dissenting).

²⁶⁴ *Id.* at 416 n.19 (opinion of Stevens, J.).

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.”²⁶⁵

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.²⁶⁶ In the three decades-plus 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.²⁶⁷ For example, in *Fullilove v. Klutznick*, in which the Court upheld a federal government set-aside for minority contractors, Justice Stewart opened his dissenting opinion with the “color-blind” language and said, “I think today’s decision is wrong for the same reason that [*Plessy*] was wrong,” because “racial discrimination is by definition invidious discrimination.”²⁶⁸ And in *Parents Involved*, Chief Justice Roberts contrasted the Seattle school district’s referral to a “colorblind mentality” as an “unsuccessful concept[.]” with Justice Harlan’s dissent,²⁶⁹ and Justice Thomas explicitly took Justice Breyer’s dissent to task for “attempt[ing] to marginalize the notion of a color-blind Constitution,” by linking it conceptually both to Justice Harlan and to the lawyers who litigated *Brown*.²⁷⁰ That dissent, for its part, indeed argued that colorblindness is an “aspiration” that “cannot be a universal constitutional principle.”²⁷¹ 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 opposite. Justice

²⁶⁵ Neil Gotanda, *A Critique of ‘Our Constitution is Color-Blind,’* 44 STAN. L. REV. 1, 38 (1991).

²⁶⁶ See Primus, *supra* note 5, at 248.

²⁶⁷ See *Johnson v. California*, 543 U.S. 499 (2005); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Bush v. Vera*, 517 U.S. 952 (1996); *Adarand Constructors v. Peña*, 515 U.S. 200 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993); *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

²⁶⁸ *Fullilove v. Klutznick*, 448 U.S. 448, 522–23, 526 (1980) (Stewart, J., dissenting).

²⁶⁹ 551 U.S. 701, 730 n.14 (2007) (plurality opinion).

²⁷⁰ *Id.* at 772 (Thomas, J., concurring in the judgment).

²⁷¹ *Id.* at 788 (Breyer, J., dissenting).

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 Delano Roosevelt's economic recovery agenda.²⁷² The *Lochner* majority opinion itself was not anticanonical, however, until at least the 1960s, when it became a useful foil to *Griswold v. Connecticut* and its substantive due process progeny.²⁷³

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 other cases standing for similarly discredited notions of substantive review of social and economic legislation, such as *Allgeyer v. Louisiana*, which unanimously invalidated a Louisiana statute that prevented Louisiana citizens from entering into marine insurance contracts with companies that did not comply with state law, and *Coppage v. Kansas*, which struck down a state ban on yellow-dog contracts, also on liberty of contract grounds. For many years, *Allgeyer* and *Coppage* were at least as significant precedents as *Lochner*. The second edition of the Dowling casebook, published in 1941, includes extensive excerpts from both *Allgeyer* and *Coppage*, but contains no reference at all to *Lochner*.²⁷⁴ Indeed, the first six editions all cover *Coppage* in far greater detail than *Lochner*, which first received extensive treatment (indeed, at *Coppage*'s expense) when Gunther took over from Dowling for the seventh edition in 1965.²⁷⁵ As the second chart in the appendix 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.

Consistent with this treatment, in recounting the history of substantive due process doctrine for economic regulation, Justice Black in 1949 in *Lincoln Federal Labor Union v. Northwestern Iron and Metal Co.* referred not to the “*Lochner* era,” a term that would not enter regular use until the 1970s,²⁷⁶ but rather to the “*Allgeyer-Lochner-Adair-Coppage* constitutional doctrine.”²⁷⁷ In *Ferguson v. Skrupa*, decided just two years before *Griswold*, Justice Black

²⁷² See Bernstein, *supra* note 159, at 1470–73.

²⁷³ 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.”).

²⁷⁴ NOEL T. DOWLING, CASES ON CONSTITUTIONAL LAW 768–72, 866–80 (2d ed. 1941). Of the three cases, only *Coppage* receives treatment in the first edition of the casebook. NOEL T. DOWLING, CASES ON AMERICAN CONSTITUTIONAL LAW 847–62 (1931).

²⁷⁵ That 1965 edition is also the first to cover *Griswold*, but it seems likely that the decision to devote an entire section of the book to “The Aftermath of *Lochner*” was made before June 1965, when the *Griswold* decision came down.

²⁷⁶ Bernstein, *supra* note 159, at 1473, 1518.

²⁷⁷ 335 U.S. 525, 535 (1949). In *Adair v. United States*, 208 U.S. 161 (1907), the Court held that Congress lacked the power to criminalize yellow-dog contracts for interstate carriers.

similarly referred to “[t]he doctrine that prevailed in *Lochner*, *Coppage*, *Adkins* [*v. Children’s Hospital*], [*Jay*] *Burns* [*Baking Co. v. Bryan*], and like cases,” visiting no special disfavor upon *Lochner*.²⁷⁸ *West Coast Hotel v. Parrish*, which undermined *Lochner*’s legal premise by upholding a minimum wage law for women, did not single the case out, but buried it in a footnote between *Allgeyer* and *Adair*.²⁷⁹ *Lochner* was at best a first among equals.

It is now much more than that, and it is worth pondering why. There are differences between the cases. *Allgeyer* has 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 Felix Frankfurter and his disciples. Frankfurter adored Holmes.²⁸⁰ 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.²⁸¹ 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.”²⁸²

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.²⁸³ As a young Harvard professor, 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; the wave broke, he wrote in 1916, with *Lochner*: “Enough is said if it is noted that the tide has turned.

²⁷⁸ *Ferguson v. Skrupa*, 372 U.S. 726, 729–30 (1963). In the *Burns* decision, the Court invalidated a Nebraska statute fixing the permissible weight for loaves of bread. 264 U.S. 504 (1924).

²⁷⁹ 300 U.S. 379, 392 n.1 (1937); see also *Adamson v. California*, 332 U.S. 46, 83 n.12 (1947) (Black, J., dissenting).

²⁸⁰ Justice Douglas is said to have remarked, “You know why Frankfurter didn’t have any children? Because Holmes didn’t.” Roger K. Newman, Book Review, *The Warren Court and American Politics: An Impressionistic Appreciation*, 18 CONST. COMM. 661, 677 (2001).

²⁸¹ Brad Snyder, *The House that Built Holmes* (2010) (unpublished manuscript on file with author); Jeffrey O’Connell & Nancy Dart, *The House of Truth: Home of Young Frankfurter and Lippmann*, 35 CATH. U. L. REV. 79 (1985).

²⁸² FELIX FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 29 (1938).

²⁸³ Felix Frankfurter, *The Constitutional Opinions of Justice Holmes*, 29 HARV. L. REV. 683, 691 (1916); see also Felix Frankfurter, *Hours of Labor and Realism in Constitutional Law*, 29 HARV. L. REV. 353, 359 (1916) (“[T]he opinion of Mr. Holmes [in *Lochner*] pithily and completely puts the other point of view”). 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. 236 U.S. 1, 27 (1915) (Holmes, J., dissenting).

The turning point is the dissent in the *Lochner* case.²⁸⁴ 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 in detail."²⁸⁵ A decade later, in a lecture that would later form part of Frankfurter's idolatrous monograph on Holmes, he told a Cambridge audience that "Mr. Justice Holmes' classic dissent [in *Lochner*] will never lose its relevance."²⁸⁶

True enough, it now seems, but Frankfurter himself was in large measure responsible for that.²⁸⁷ Others have remarked that Frankfurter's "great admiration for Mr. Justice Holmes has led him to overemphasize the latter's influence."²⁸⁸ 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 work). For Progressive intellectuals and politicians searching for the set of arguments that would lead to judicial affirmation of the New Deal, Frankfurter was a kind of guru. Before he even reached the Court, Frankfurter had the ears of Justices Holmes, Brandeis, and Stone, and was a confidant of President Roosevelt's.²⁸⁹ "[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."²⁹⁰

²⁸⁴ *Id.* at 690, 691.

²⁸⁵ FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 192 (1928).

²⁸⁶ FRANKFURTER, *supra* note 282, at 35.

²⁸⁷ Also relevant, perhaps as precedent for Frankfurter's own attentions, was Theodore Roosevelt's denunciation of *Lochner* in a speech in 1910. See Nourse, *supra* note 149, at 779–84.

²⁸⁸ Walter Wheeler Cook, Book Review, *ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE* 228 (1939) (reviewing FELIX FRANKFURTER, *MR. JUSTICE HOLMES AND THE SUPREME COURT* (1938)); see also Snyder, *supra* note 281 ("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.").

²⁸⁹ JOSEPH P. LASH, *FROM THE DIARIES OF FELIX FRANKFURTER* 50 (1974).

²⁹⁰ *Id.*

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, Thomas Corcoran, David Lilienthal, Charles Wyzanski, Nathan Margold, Alger Hiss, and Landis (also a former Harvard Law School dean) were former students and protégées, as was Dean Acheson, 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. Frankfurter placed numerous other renowned professors in clerkships with other Justices, including Paul Freund (Brandeis), Henry Hart (Brandeis), Louis Jaffe (Brandeis), and Arthur Sutherland (Holmes).

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.²⁹¹ 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 comes off quite well by Bickel—had sagaciously warned the *Lochner* Court not to do.²⁹² 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.²⁹³ Charles Fairman, one of the most influential Fourteenth Amendment scholars of the twentieth century, was also Frankfurter's student and mentee.²⁹⁴ Fairman's 1948 *American Constitutional Law Decisions*, designed for undergraduate courses in American government,²⁹⁵ devotes an entire chapter to *Lochner*. Fairman situates *Lochner* as the central case on constitutional limitations between the *Slaughter-house Cases* and *West Coast Hotel*, with Justice Holmes carrying on the noble fight begun by Justice Miller. Eight of the 10 paragraphs of Fairman's commentary on *Lochner* are tributes to Justice Holmes.²⁹⁶ Of the Holmes dissent, he writes:

An entire philosophy is compressed into three paragraphs. Many men know these sentences by heart. A number of Holmes' best

²⁹¹ *Id.* at 54–55.

²⁹² ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 25–28 (1976).

²⁹³ PHILIP B. KURLAND, *MR. JUSTICE FRANKFURTER AND THE CONSTITUTION* 5 (1971).

²⁹⁴ The relationship between Frankfurter and Fairman is explored at some length in Richard L. Aynes, *Charles Fairman, Felix Frankfurter, and the Fourteenth Amendment*, 70 *CHI.-KENT L. REV.* 1197 (1995).

²⁹⁵ CHARLES FAIRMAN, *AMERICAN CONSTITUTIONAL LAW DECISIONS* iii (rev. ed. 1950).

²⁹⁶ *Id.* at 335–37.

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.²⁹⁷

Even those protégées 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 A²⁹⁸—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 18 years) were written by Frankfurter.²⁹⁹ In the first, *Winters v. New York*, Frankfurter dissented from the Court’s invalidation of an obscenity conviction with the tart, “If ‘the Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics,’ neither does it enact the psychological dogmas of the Spencerian era.”³⁰⁰ The following year, in *American Federation of Labor v. American Sash & Door Co.*, 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 Basic human rights expressed by the constitutional conception of “liberty” were equated with theories of *laissez faire*. The result was that economic views of confined validity were treated by lawyers and judges as though the Framers had enshrined them in the Constitution. This misapplication of the notions of the classic economists . . . led to Mr. Justice Holmes’ famous protest in the *Lochner* case against measuring the Fourteenth Amendment by Mr. Herbert Spencer’s Social Statics. 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.”³⁰¹

²⁹⁷ *Id.* at 335.

²⁹⁸ CURRIE, *supra* note 111, at 82.

²⁹⁹ 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 because I am unmindful of Mr. Justice Holmes’ caution that ‘General propositions do not decide concrete cases.’”).

³⁰⁰ 333 U.S. 507, 527 (1948) (Frankfurter, J., dissenting) (internal citation omitted).

³⁰¹ 335 U.S. 538 (1949) (internal citation omitted).

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.³⁰²

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*, the precursor to *Griswold*, wrote, 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."³⁰³ Douglas refused, however, to adopt the absolutist position associated with Holmes and with Frankfurter, who wrote the *Poe* majority opinion holding the challenge non-justiciable. "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. "Social legislation dealing with business and economic matters touches no particularized prohibition of the Constitution," but to say that "whatever the majority 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."³⁰⁴

Douglas was laying a foundation for his majority opinion in *Griswold*, which also confronted *Lochner* directly, distinguishing it as "touch[ing] economic problems, business affairs, [and] social conditions" rather than "an intimate relation of husband and wife."³⁰⁵ Why did Justice Douglas feel the need to address *Lochner*, and not *Coppage* or *Allgeyer*?³⁰⁶ For one thing, Thomas Emerson's petitioner's brief 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, and "legislation which impairs the freedom of the individual to live a fruitful life or to sustain his position as citizen rather than subject," which the Court "has subjected to much more intensive scrutiny."³⁰⁷ 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*]."³⁰⁸

³⁰² See FRANKFURTER, *supra* note 282, at 49–51.

³⁰³ 367 U.S. 497, 517 (1961) (Douglas, J., dissenting).

³⁰⁴ *Id.* at 517–18.

³⁰⁵ 381 U.S. 479, 481–82 (1965).

³⁰⁶ Dissenting, Justice Black mentions *Lochner* most prominently in a string cite along with *Coppage*, *Jay Burns Baking Co.*, and *Adkins*. *Id.* at 514

³⁰⁷ Brief for Appellants, No. 496, at 22–23.

³⁰⁸ *Id.* at 23. Remarkably, the state of Connecticut did not mention *Lochner* (or any other discredited substantive due process case) in its briefing.

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' *Lochner* dissent at far greater length than it does the majority opinion.³⁰⁹ Both the 1953 and the 1961 editions of the Frankfurter-inspired casebook authored by Freund, Sutherland, Howe, and Ernest Brown also quote the Holmes dissent at length.³¹⁰ One could not invalidate legislation under the substantive protections of the due process clause without meeting Holmes's—and the late Frankfurter's³¹¹—challenge.

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.³¹² The introduction to the majority opinion in *Roe v. Wade* contains only one citation: to Justice Holmes's "now-vindicated" dissent in *Lochner*, which Justice Blackmun emphasized the need to "bear in mind."³¹³ 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."³¹⁴ 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 on 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."³¹⁵ 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*.³¹⁶ 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."³¹⁷

³⁰⁹ DOWLING, *supra* note 232, at 739–40.

³¹⁰ FREUND ET AL., CONSTITUTIONAL LAW: CASES AND OTHER PROBLEMS 1309–10 (2d ed. 1961); FREUND ET AL., CONSTITUTIONAL LAW: CASES AND OTHER PROBLEMS 1158–59 (1st ed. 1953).

³¹¹ Frankfurter died weeks before *Griswold* was argued.

³¹² See Bernstein, *supra* note 159, at 1473.

³¹³ 410 U.S. 113, 117 (1973).

³¹⁴ *Id.*

³¹⁵ *Id.* at 174 (Rehnquist, J., dissenting).

³¹⁶ Ely, *supra* note 238, at 937–43.

³¹⁷ *Id.* at 939–40.

Playing defense, Justice Powell’s plurality opinion in *Moore v. City of East Cleveland* acknowledged, while overturning a municipal housing ordinance on substantive due process grounds, “As 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.”³¹⁸ *Moore*, decided in 1977, marks the first time the term “*Lochner* era” appeared in any published opinion of a state or federal court.³¹⁹ The phrase reappeared in the first edition of Laurence Tribe’s constitutional law treatise, published in 1978, after which, according to Bernstein, “use of the phrase ‘*Lochner* era’ in the law review literature skyrocketed.”³²⁰ 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.”³²¹ 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* pincited both *Hirabayashi* and *Korematsu* for the proposition that “[c]lassifications based solely upon race must be scrutinized with particular care,

³¹⁸ 431 U.S. 494, 502 (1977).

³¹⁹ According to Bernstein, the phrase was unknown before it appeared in the Gunther casebook in 1970. See Bernstein, *supra* note 159, 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, 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, Foreword, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 50, 1, 11 (1972); Laurence H. Tribe, Foreword, *Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 12 (1973). Gunther was a protégée and biographer of Learned Hand, who was a longtime friend and intellectual kin of Frankfurter’s.

³²⁰ LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 567–86, 769–72, 1304–05, 1336, 1373–74 (1st ed. 1978); Bernstein, *supra* note 159, at 1520.

³²¹ 539 U.S. 558, 592 (2003) (Scalia, J., dissenting).

since they are contrary to our traditions and hence constitutionally suspect.”³²² Likewise, Justice White’s unanimous opinion in *McLaughlin v. Florida*, 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.’”³²³ And *Loving v. Virginia*, which *McLaughlin* presaged, cited the same passage. Though each of those cases dealt directly with 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. 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 the discredited majority opinion in *Korematsu*, which Douglas joined. Warren was not yet on the Court at the time of *Korematsu*, but as attorney general of California during the War, he had been a vocal supporter of Japanese internment and 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.”³²⁴

Warren wrote *Bolling*, which was the first case to cite *Korematsu* expressly to defend strict scrutiny in race cases.³²⁵ 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 may be 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, or property].”³²⁶ But in race cases, consistently, the Warren Court Justices refused to invoke *Korematsu* for its obvious negative lessons, and instead treated it

³²² 347 U.S. 497, 499 (1954).

³²³ 379 U.S. 184, 192 (1964).

³²⁴ G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE 71 (1982).

³²⁵ In only 2 of the 12 opinions citing *Korematsu* prior to *Bolling* was it cited remotely for that proposition, and one of those was written by Justice Black. *Hurd v. Hodge*, 334 U.S. 24, 30 (1948); *Takahashi v. Fish & Game Comm.*, 334 U.S. 410, 413 (1948) (Black, J.); see *Shaughnessy v. United States*, 345 U.S. 206, 222 (1953) (Jackson, J., dissenting); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 661 (1952); *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); *Takahashi*, 334 U.S. at 423 (Murphy, J., concurring); *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).

³²⁶ 367 U.S. 497, 541 (Harlan, J., dissenting).

unselfconsciously as a precedent to be cited for its positive contributions to the Court's race jurisprudence.

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, that thinking of the “innocent little children who were torn from home” left him “conscience-stricken,”³²⁷ though he refused to acknowledge that regret publicly until 1974.³²⁸ Black defended his opinion until his death, though Roger Newman writes that he was reluctant to discuss the case even with his clerks.³²⁹ Douglas wrote in his memoirs that it was a mistake to affirm the use of internment camps,³³⁰ and his discussion of the case near the end of his tenure on the Court strikes a conspicuously defensive tone. In *DeFunis v. Odegaard*, Douglas dissented from the Court's holding that a challenge to the University of Washington Law School affirmative action program was moot.³³¹ He noted that the Court last sustained a racial classification in *Korematsu* and *Hirabayashi* and appended the following 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

³²⁷ EARL WARREN, *THE MEMOIRS OF EARL WARREN* 149 (1977).

³²⁸ ED CRAY, *CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN* 159, 271, 520 (1997).

³²⁹ ROGER K. NEWMAN, *HUGO BLACK: A BIOGRAPHY* 318–19 (1994).

³³⁰ 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.*

³³¹ 416 U.S. 312 (1974).

of the Americans of Japanese ancestry was allowable under extreme war conditions, their detention after evacuation was not.³³²

One is forgiven the impression that the Justice doth protest too much. There is much to quarrel with in Douglas's legacy-building revisionism, 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."³³³ In *Metro Broadcasting v. FCC*, 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."³³⁴ In *Reno v. Flores*, which upheld an INS policy of juvenile detention, Justice Stevens in dissent appeared to view *Korematsu*'s error less 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."³³⁵

Korematsu's true arrival within the anticanon has perhaps best been signaled by its use by Justice Scalia. He has invoked the decision twice in abortion-related cases, for which he reserves his angriest work product. In *Madsen v. Women's Health Center*, dissenting from a decision upholding an injunction against anti-abortion 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."³³⁶ Then, more stridently, in *Stenberg v. Carhart*, in dissent from a decision invalidating Nebraska's ban on so-called "partial birth"

³³² *Id.* at 339 n.20.

³³³ *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 635 (1989) (emphasis added); see also *Adarand Constructors v. Peña*, 515 U.S. 200, 275 (1995) (Ginsburg, J., dissenting) (arguing that the *Korematsu* Court approved "an odious, gravely injurious racial classification").

³³⁴ 497 U.S. 547, 603 (1990) (O'Connor, J., dissenting).

³³⁵ 507 U.S. 292, 344 n.30 (1993) (Stevens, J., dissenting).

³³⁶ 512 U.S. 753, 814–15.

abortions, Justice Scalia began his dissent, “I am optimistic 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*.”³³⁷ 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 immorality, nor the two in combination. We have also seen that historical accident plays an important role in establishing a case as anticanonical.³³⁸ *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 both sides of modern political and legal controversies. What enables this feature to persist is that the arguments against these cases span the ideological spectrum.³³⁹ *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 excessively 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.

³³⁷ 530 U.S. 914, 953 (2003) (Scalia, J., dissenting).

³³⁸ Cf. Balkin & Levinson, *supra* note 5, at 995 (describing canons as “historical creations in which rational design and precision engineering are wishful thinking”).

³³⁹ Cf. Primus, *supra* note 5, 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.”)

We can restate the pluripotency of the anticanon using the language of incompletely theorized agreements, a concept popularized within law by Cass Sunstein. Sunstein argues that incompletely theorized agreements are means by which a pluralistic society with disparate views produces some semblance of political and legal consensus. The various participants in a legal dispute might agree on an outcome without necessarily agreeing on any underlying principle or explanation.³⁴⁰ Sunstein’s paradigmatic examples describe a policy outcome—protection for endangered species or strict liability for torts, say—and diverse reasons for supporting that outcome.³⁴¹ 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.³⁴²

Incomplete theorization in this sense is an essential feature of anticanonical cases. These cases represent shared reference points not because they signal unanimity or even consensus but because they enable discourse—dialogue would be too strong—amid dissensus. There is something of this explanation in Godwin’s Law of the Internet, that as online discussion grows longer, the probability of a comparison involving Nazis or Hitler approaches 1. Hitler is 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 totalitarianism, of moral relativism or 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 eligible but *competing* ethical commitments.³⁴³ 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.”³⁴⁴ Balkin’s point is that canonical cases serve as something of 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.

³⁴⁰ Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1736 (1995).

³⁴¹ *Id.* at 1739–40.

³⁴² 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 on the outcomes that the principle specifies. *Id.*

³⁴³ See GRABER, *supra* note 94, at 17 et seq.

³⁴⁴ Balkin, *supra* note 5, at 681.

Because they are good law, canonical cases would be relevant to constitutional law even if they were not especially useful to constitutional theory.³⁴⁵ The anticanon, in contrast, has no reason for being except to serve as a test of theories—whether academic or judicial—about legal substance or method. Save as historical footnotes, they 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.D that *Korematsu* is both the least defensible of the anticanon cases and presents the weakest case for anticanonicity, and that these features are related. 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.

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 towards 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*, and to *Roe*, and 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 into 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*—has been used by prominent conservatives to attack *Roe v. Wade*. Argument through

³⁴⁵ And as Balkin and Levinson acknowledge, not all canonical cases are especially useful to modern constitutional theory. See Balkin & Levinson, *supra* note 5, at 974–76 (discussing *McCulloch*).

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.³⁴⁶ 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.”³⁴⁷

As Bobbitt does, it is important here to distinguish ethics from morals, since the anticanon implicates both.³⁴⁸ Ethics refers, or may refer, to the moral principles of a particular community, whereas on my usage morals refers to principles that should be similarly appreciated across a range of communities. The relevant community is the American people, but the relevant ethos assesses their moral principles 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 is unethical—its claims about black citizenship were consistent with much of American legal and political practice deep into the last century. Placing *Dred Scott* within the anticanon contributed to a project of conferring official recognition upon an ethical transformation in regards to race relations. Likewise, many cases besides *Dred Scott* are inarguably immoral, including all of my shadow anticanon. 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. Still, we can identify some features that make it less likely that these cases would 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 *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 Brenner argues, that *Giles* failed to catch on because it was

³⁴⁶ See Balkin, *supra* note 5, at 264, 279; cf. Primus, *supra* note 5, at 258 (“The great canonical dissents concern issues of deep and widespread concern: racial equality, the welfare state, and freedom of speech.”).

³⁴⁷ PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 20 (1991).

³⁴⁸ See *id.* at 21; PHILIP BOBBITT, CONSTITUTIONAL FATE 105 (1982).

“procedurally messy.”³⁴⁹ 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,³⁵⁰ 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 related, its brevity limits points of entry into the majority’s reasoning; it manages to be obscure—Holmes liked his opinions that way³⁵¹—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*,³⁵² and it is easy to regard the case as entirely derivative of *Plessy*’s reasoning. Although I have argued that *Gong Lum* is in some ways more disturbing, it remains difficult to argue for a different result without reconsidering *Plessy*. *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,³⁵³ but for the implications its recent vintage has for the constitutional landscape. It may be that 70 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, simple inertia—are also likely to slow anticanon evolution and reconfiguration. I consider the potential for such change in the next Part.

³⁴⁹ 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).

³⁵⁰ See *Planned Parenthood of Southeastern Pennsylvania v. Casey* 505 U.S. 833, 1002 (1992) (Scalia, J., dissenting in part).

³⁵¹ See Snyder, *supra* note 281, at 54–55.

³⁵² 275 U.S. 78, 86 (1927).

³⁵³ Compare *McDonald v. City of Chicago*, 561 U.S. ____ (2010) (Scalia, J., concurring), *with id.* at 3088 (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).

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. Importantly, each of the cases in the anticanon focuses on individual rights, a category of cases less central to the Supreme 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.

On the other hand, it may be that an anticanon is 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, “[W]hen 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.”³⁵⁴ 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

³⁵⁴ Richard A. Primus, *Judicial Power and Mobilizable History*, 65 MD. L. REV. 171, 174 (2006).

overturn the enactments of popularly elected legislative bodies. In theory, 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 is a fiction, of course, as it is premised on the notion that those instructions are both reasonably clear and in fact reflect values or intentions that are entitled to democratic weight. A very old Constitution that is very difficult to amend and many of whose provisions are stated in very broad terms often cannot satisfy those conditions. And so we are left with four options when adjudicating irreconcilable 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.

All of which raises the significant question of whether the anticanon is a good thing for our constitutional culture. Whether or not 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. It is important, first, to reflect on who I mean by “we.” It is no longer fashionable to suggest that law professors have substantial agency in influencing constitutional content, or even (to a degree) method.³⁵⁵ Popular constitutionalists and scholars of American political development have argued persuasively that constitutional law is fashioned through a complex dialogue between social and political movement participants, elite opinion leaders, political entrepreneurs, and judges.³⁵⁶ 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 in the right sorts of ways.³⁵⁷ I have argued in particular that political and social movement players have worked with conservative elites to emphasize and seek to legitimate originalist approaches to constitutional interpretation.³⁵⁸

³⁵⁵ Cf. Harry T. Edwards, *The Growing Disjuncture Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

³⁵⁶ See BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2010); KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY* (2008); Robert Post, Foreword, *Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4 (2003); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CAL. L. REV. 1323 (2006).

³⁵⁷ Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657 (2008); see also Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008).

³⁵⁸ See Greene, *supra* note 357, at 659–60; Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 13–14, 17 (2009) [hereinafter Greene, *Origins*].

According to Balkin and Levinson, the level of control participants in constitutional discourse—particularly law professors—have over the constitutional canon may be even less 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.”³⁵⁹ 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, though, 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 significant parts of ‘high culture,’” constitutional law professors have much less control over their own academic theory canon. 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.³⁶⁰

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 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 refereed substantially by legal academics and by judges acting in their roles as advocates rather than as decisionmakers. 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.³⁶¹

³⁵⁹ Balkin & Levinson, *supra* note 5, at 995.

³⁶⁰ *Id.* at 1001.

³⁶¹ I do not mean to suggest that elements outside of the legal profession do not make use of the anticanon or advance claims through it. In a 2004 presidential debate, for example, George W. Bush 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 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 chiefly to anti-*Roe* activists, even as they help it to retain that status.

Identifying aspects of constitutional law over which learned professionals, including academics, exert serious leverage may be increasingly important in a world in which intermediaries are in steady and perhaps irreversible decline.³⁶² Tea Party members, for example, frequently both argue in favor of originalist methods of constitutional interpretation and advance substantive claims in the language of constitutional history.³⁶³ These claims can be ill-informed. As the historian Jill Lepore has written, “Set loose in the culture, [originalism] is to history what astrology is to astronomy, what alchemy is to chemistry, what creationism is to evolution.”³⁶⁴ Once we know what the “people out of doors” looks like, we may see value in retaining substantial professional influence (from across the ideological spectrum) over constitutional law.³⁶⁵ 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. That distinction is not only relevant to affirmative action. The recent Arizona immigration law, SB 1070, criminalizes failure to carry immigration documents and authorizes state officers to request such documents based on a “reasonable suspicion” standard.³⁶⁶ Like the Separate Car Act, SB 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 as day. Ceding responsibility for anticanon construction and maintenance cedes a powerful resource in ongoing constitutive arguments.

There is, however, a dark side to the anticanon. Placing a case like *Dred Scott* in the anticanon carries with it the implication that the central problem with the case is bad judging. Roger Taney is cast as a villain, one who ignored the Constitution in order to implement his personal racist preferences. Taney might be perfectly villainous, but this is a distraction from the fact that the Constitution itself enabled Scott to lose. As Graber argues, *Dred Scott*’s status as anticanonical

³⁶² Greene, *supra* note 357, at 704.

³⁶³ Jamal Greene, Nathaniel J. Persily, & Stephen Ansolabehere, *Profiling Originalism*, 111 COLUM. L. REV. 356, 356–58 (2011).

³⁶⁴ JILL LEPORE, THE WHITES OF THEIR EYES: THE TEA PARTY’S REVOLUTION AND THE BATTLE OVER AMERICAN HISTORY 123–24 (2010).

³⁶⁵ See LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).

³⁶⁶ 2010 Ariz. Sess. Laws 0113, amended by 2010 Ariz. Sess. Laws 0211 (H.B. 2162, 49th Leg., 2d Sess. (Ariz. 2010)).

sanitizes the Constitution and prevents us from confronting the problem of “constitutional evil.”³⁶⁷ 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.³⁶⁸

Maintaining an anticanon enables cognitive dissonance about our history, which can be valuable in promoting a sense of possibility about our constitutional culture, but 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.³⁶⁹ Certain uses of the anticanon may impede serious engagement with that generation’s dangerous bargain with slavery interests, and with the ways in which features of that bargain continue to manifest themselves in our constitutional structure.³⁷⁰ Justice Scalia’s and Justice Black’s disproportionate invocation 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.³⁷¹

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

³⁶⁷ See GRABER, *supra* note 94, at 8–12.

³⁶⁸ Balkin, *supra* note 5, at 709–10.

³⁶⁹ Greene, *Origins*, *supra* note 358, at 63–69.

³⁷⁰ E.g., Alexander Tsesis, *Furthering American Freedom: Civil Rights & the Thirteenth Amendment*, 45 B.C. L. REV. 307, 313–23 (2004).

³⁷¹ Henry Paul Monaghan, *Our Perfect Constitution*, 56 NYU L. REV. 353 (1981).

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

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 its 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 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 implies 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 for martyr, *blutzeuge*, is associated with the National Socialist Party, which has used the term to describe those who died for the Nazi cause.³⁷² 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

³⁷² See Elisabeth Däumer, *Blood and Witness: The Reception of Murder in the Cathedral in Postwar Germany*, 43 COMP. LIT. STUD. 79, 94–96 (2006).

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*, not *we*.

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, the very existence of the anticanon, with its glorious and unreflective pluripotency properly understood, 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 an essential element of legal advocacy, and that something vital would be lost were we willingly to let it die.

Appendix

Principal Cases in Selected Textbooks

	<i>Scott</i>	<i>Plessy</i>	<i>Lochner</i>	<i>Korematsu</i>	<i>Bradwell</i>	<i>Dennis</i>	<i>Adkins</i>	<i>Buck</i>
SSTK ³⁷³	✓	✓	✓	✓		✓		
C ³⁷⁴	✓	✓	✓	✓		✓	✓	✓
SG ³⁷⁵		✓	✓	✓		✓	✓	
BLBAS ³⁷⁶	✓	✓	✓	✓	✓		✓	
VCA ³⁷⁷		✓	✓	✓		✓	✓	
CFKS ³⁷⁸	✓	✓	✓	✓		✓	✓	
M ³⁷⁹	✓		✓	✓		✓		
B ³⁸⁰	✓	✓	✓	✓	✓		✓	
FEF ³⁸¹	✓	✓	✓	✓	✓	✓		✓
R ³⁸²		✓	✓			✓	✓	✓

³⁷³ GEOFFREY R. STONE, ET AL., CONSTITUTIONAL LAW (6th ed. 2005).

³⁷⁴ ERWIN CHEMERINSKY, CONSTITUTIONAL LAW (3d ed. 2009).

³⁷⁵ KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW (17th ed. 2010).

³⁷⁶ PAUL BREST, ET. AL, PROCESSES OF CONSTITUTIONAL DECISIONMAKING (5th ed. 2006).

³⁷⁷ WILLIAM COHEN, JONATHAN D. VARAT, & VIKRAM AMAR, CONSTITUTIONAL LAW (13th ed. 2009).

³⁷⁸ JESSE H. CHOPER, ET AL., CONSTITUTIONAL LAW: LEADING CASES (2010).

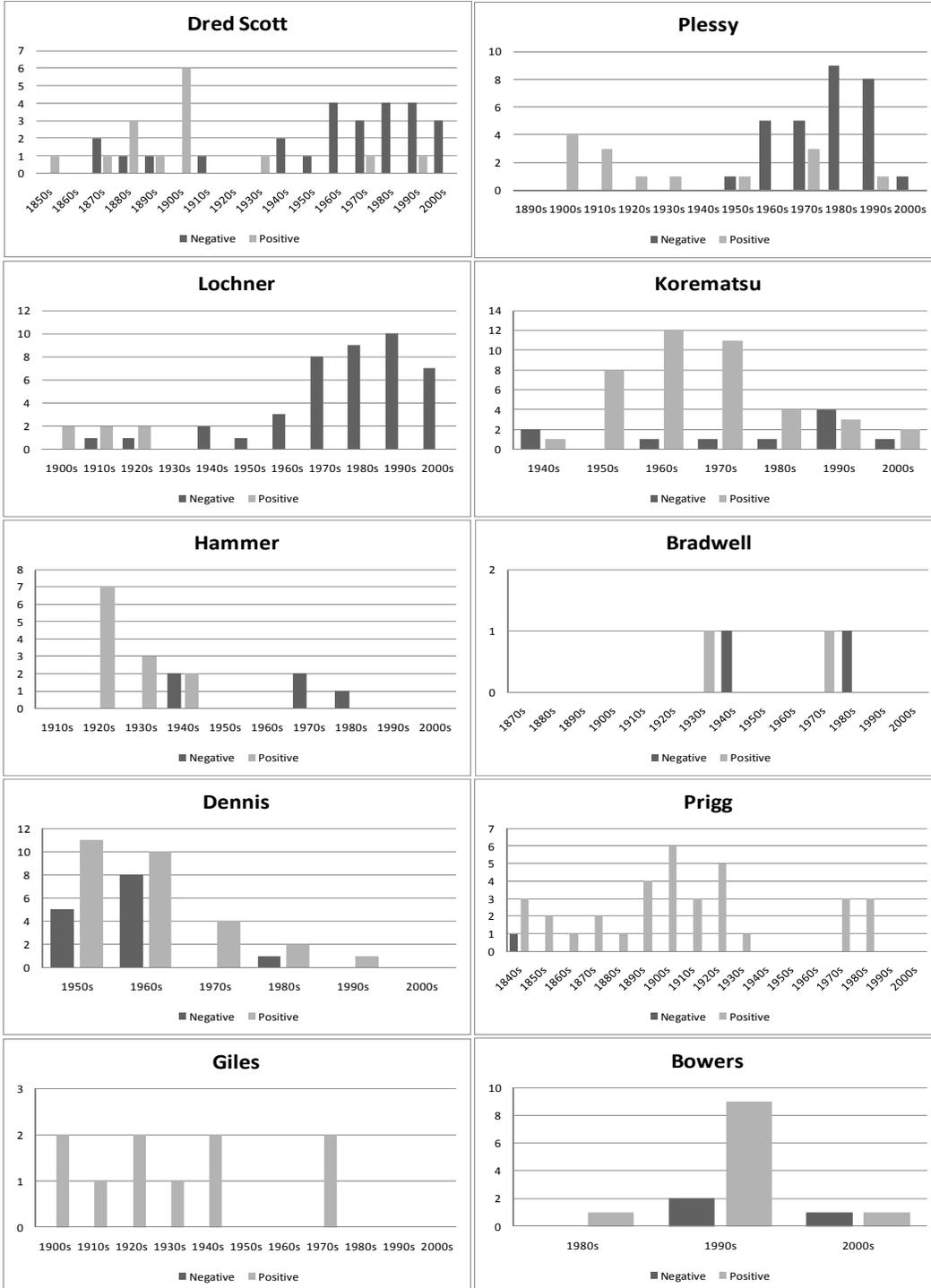
³⁷⁹ CALVIN MASSEY, AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES (3d ed. 2009).

³⁸⁰ RANDY E. BARNETT, CONSTITUTIONAL LAW: CASES IN CONTEXT (2008).

³⁸¹ DANIEL A. FARBER, WILLIAM N. ESKRIDGE, JR., AND PHILIP P. FRICKEY, CASES AND MATERIALS ON CONSTITUTIONAL LAW (4th ed. 2009).

³⁸² JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW (8th ed. 2010).

Positive Versus Negative Supreme Court Citations, Selected Cases



Supreme Court Cases Referring to *Allgeyer*, *Lochner*, and *Coppage*

