

HARVARD LAW REVIEW

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ARTICLES

THE ANTICANON

*Jamal Greene*

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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”;<sup>25</sup> a canonical work’s indispensability is ostensibly a measure of quality, not an opportunity to torture students, though it is easy to conflate the two. After all, most teachers believe it is important for most students to know what most teachers know — this approaches tautology — and the remainder will be scolded by parents. Teacher friends tell me that nothing would spark more outrage than to remove *To Kill a Mockingbird*<sup>26</sup> from the curriculum.

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

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<sup>25</sup> HAROLD BLOOM, *THE WESTERN CANON: THE BOOKS AND SCHOOL OF THE AGES* 19 (1994).

<sup>26</sup> HARPER LEE, *TO KILL A MOCKINGBIRD* (1960).

<sup>27</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>28</sup> 17 U.S. (4 Wheat.) 316 (1819).

<sup>29</sup> See Primus, *supra* note 16, at 252.

<sup>30</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

<sup>31</sup> *Marbury*, 5 U.S. at 177.

<sup>32</sup> *McCulloch*, 17 U.S. at 407.

*Virginia State Board of Education v. Barnette*,<sup>33</sup> 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.”<sup>34</sup> To this we should add that judges should specially train on “prejudice against discrete and insular minorities” in the political process.<sup>35</sup> And who can forget that an individual subject to custodial interrogation must be informed of his “right to remain silent?”<sup>36</sup>

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.”<sup>37</sup> Thus, the pedagogical canon is the set of materials that are “important for educating law students”; the academic theory canon constitutes those texts that “serve as benchmarks for testing academic theories about the law”; and the cultural literacy canon “ensure[s] a necessary cultural literacy for citizens in a democracy.”<sup>38</sup> *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.<sup>39</sup>

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

<sup>33</sup> 319 U.S. 624 (1943).

<sup>34</sup> *Id.* at 642.

<sup>35</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

<sup>36</sup> *Miranda v. Arizona*, 384 U.S. 436, 467–68 (1966).

<sup>37</sup> Balkin & Levinson, *supra* note 16, at 970.

<sup>38</sup> *Id.*

<sup>39</sup> *See id.* at 974–75.

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

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

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

<sup>40</sup> *Id.* at 1018.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

TABLE A: LAW REVIEW ARTICLES  
IDENTIFYING CASES AS ANTICANONICAL

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

diate.<sup>63</sup> The confirmation process, moreover, is an opportunity for translation between legal and political forms of argumentation. It is enabled by its trade in symbols, with a nominee's willingness to affirm or deny particular propositions standing in for a wider range of substantive views. Canonical and anticanonical cases, with their out-sized 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."<sup>64</sup> 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."<sup>65</sup>

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

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

<sup>64</sup> Michael C. Dorf, *Whose Ox Is Being Gored? When Attitudinalism Meets Federalism*, 21 ST. JOHN'S J. LEGAL COMMENT. 497, 521-22 (2007).

<sup>65</sup> Strauss, *supra* note 48, at 373.

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

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

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

<sup>67</sup> 261 U.S. 525 (1923) (invalidating a minimum wage law for women and children in the District of Columbia).

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

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

TABLE B: DISAVOWALS IN CONFIRMATION  
HEARING TESTIMONY

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

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

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

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

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

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

<sup>74</sup> *Rehnquist and Powell Hearings*, *supra* note 72, at 159.

<sup>75</sup> *Thomas Hearing*, *supra* note 70, at 202.

<sup>76</sup> *Id.*

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

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

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

<sup>77</sup> Primus, *supra* note 16, at 243–44.

<sup>78</sup> Jerry Goldman, *The Canon of Constitutional Law Revisited*, 15 LAW & POL. BOOK REV. 648, 650 (2005).

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

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

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

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

TABLE C: PRINCIPAL CASES IN SELECTED TEXTBOOKS

	<i>Scott</i>	<i>Plessy</i>	<i>Lochner</i>	<i>Korematsu</i>
SSSTK <sup>82</sup>	✓	✓	✓	✓
C <sup>83</sup>	✓	✓	✓	✓
SG <sup>84</sup>		✓	✓	✓
BLBAS <sup>85</sup>	✓	✓	✓	✓
VCA <sup>86</sup>		✓	✓	✓
CFKS <sup>87</sup>	✓	✓	✓	✓
M <sup>88</sup>		✓	✓	✓
B <sup>89</sup>	✓	✓	✓	✓
FEF <sup>90</sup>	✓	✓	✓	✓
R <sup>91</sup>		✓	✓	

<sup>82</sup> GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW (6th ed. 2009).

<sup>83</sup> ERWIN CHEMERINSKY, CONSTITUTIONAL LAW (3d ed. 2009).

<sup>84</sup> KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW (17th ed. 2010).

<sup>85</sup> BREST ET AL., *supra* note 62.

<sup>86</sup> JONATHAN D. VARAT ET AL., CONSTITUTIONAL LAW (13th ed. 2009).

<sup>87</sup> JESSE H. CHOPER ET AL., CONSTITUTIONAL LAW: CASES, COMMENTS, QUESTIONS (9th ed. 2001).

<sup>88</sup> CALVIN MASSEY, AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES (3d ed. 2009).

<sup>89</sup> RANDY E. BARNETT, CONSTITUTIONAL LAW: CASES IN CONTEXT (2008).

<sup>90</sup> DANIEL A. FARBER ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW (4th ed. 2009).

<sup>91</sup> RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW (9th ed. 2009).

TABLE C (CONTINUED)

	<i>Bradwell</i>	<i>Dennis</i>	<i>Adkins</i>	<i>Buck</i>
SSSTK		✓		
C		✓	✓	✓
SG	✓	✓	✓	
BLBAS	✓		✓	
VCA		✓	✓	
CFKS		✓	✓	
M		✓		
B	✓		✓	
FEF	✓	✓		✓
R		✓	✓	✓

We can now say that *Dred Scott*, *Plessy*, *Lochner*, and *Korematsu* each presents a compelling case for placement within the anticanon. Each decision has been rejected by our legal culture, but all are sufficiently significant that legal academics confer special status upon them within the literature on antiprecedents; Supreme Court nominees believe they will curry favor with senators and the public by declaring them to be reliably bad law; and casebook authors assume that law professors should assign them to students. A handful of additional cases are candidates for similar status, though none are “successful” on all of our criteria. *Adkins v. Children’s Hospital* was specifically disavowed by one Supreme Court nominee<sup>92</sup> and appears frequently as a principal case in constitutional law textbooks but seems never to have been recognized as an antiprecedent in other academic writings. *Dennis v. United States* is mentioned more than once in discussions of antiprecedent within the law reviews<sup>93</sup> 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.<sup>94</sup>

<sup>92</sup> See *supra* p. 393.

<sup>93</sup> See *supra* pp. 388–89.

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

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

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

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

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

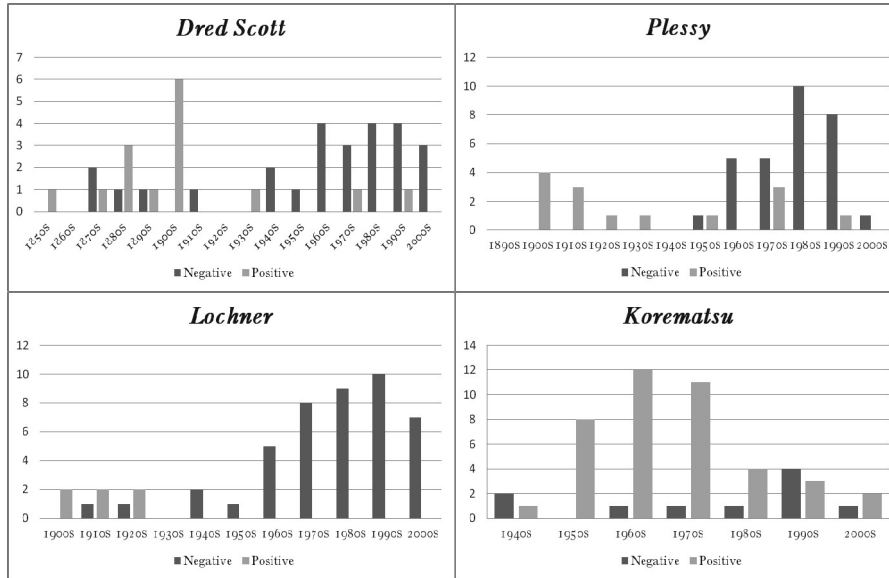
<sup>96</sup> 429 U.S. 190 (1976).

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

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

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

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



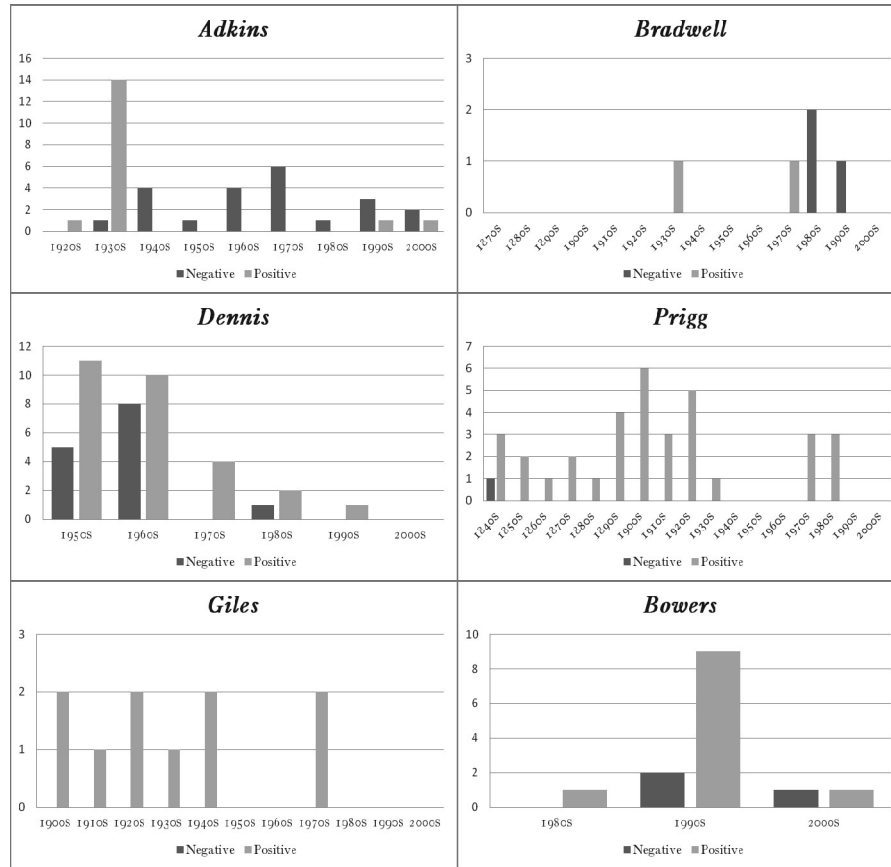
the cited decision. The figure excludes “neutral” citations, defined as those discussions of a case that are meant neither to criticize nor to support any particular claim. Typically, “neutral” citations occur in the course of historical discussion that is tangential to the normative arguments at issue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

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

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

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

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



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

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

<sup>101</sup> *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984).

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

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

<sup>102</sup> *Id.* at 1413.

<sup>103</sup> 18 U.S.C. § 4001(a) (2006); see *Korematsu*, 584 F. Supp. at 1413.

<sup>104</sup> *Korematsu*, 584 F. Supp. at 1417.

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

<sup>106</sup> *Korematsu*, 584 F. Supp. at 1420.

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

<sup>108</sup> 50 U.S.C. app. § 1989b-3 (2006).

<sup>109</sup> 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.”).

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

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

*Rumsfeld*;<sup>112</sup> *Hamdan v. Rumsfeld*;<sup>113</sup> *Bismullah v. Gates*;<sup>114</sup> *Boumediene v. Bush*;<sup>115</sup> *Al-Marri v. Pucciarelli*;<sup>116</sup> *Munaf v. Geren*;<sup>117</sup> *Al Magaleh v. Gates*;<sup>118</sup> and *Al-Bihani v. Obama*.<sup>119</sup>

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

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

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

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

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

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

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

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

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

<sup>120</sup> 542 U.S. 466 (2004).

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

<sup>122</sup> Brief for Respondent at 44 n.33, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (No. 03-1027), 2004 WL 812830, at \*44.

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

against the enemy,”<sup>124</sup> it does not cite *Korematsu*, which is perhaps the most direct precedent for that proposition.

Of all the appellate opinions issued in any of these cases, the only published opinions to refer to *Korematsu* single it out as a case to be avoided. Thus, in dissenting from the denial of rehearing en banc in *Hamdi*, Judge Motz warned of “the lesson of *Korematsu*,” a case whose holding “history has long since rejected.”<sup>125</sup> In reply, Judge Wilkinson asserted that “[t]here is not the slightest resemblance of a foreign battlefield detention to the roundly and properly discredited mass arrest and detention of Japanese-Americans in California in *Korematsu*.”<sup>126</sup> 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*,<sup>127</sup> in which the Court erected constitutional barriers to libel liability, one of the most significant “precedents” discussed was the Sedition Act of 1798,<sup>128</sup> 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.”<sup>129</sup> We can also imagine political documents other than statutes becoming notorious in the style of an anticanonical judicial decision. The Southern Manifesto, a resolution signed by nearly the entire Southern congressional delegation and pledging resistance to the Court’s decision in *Brown*,<sup>130</sup> 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*,<sup>131</sup> *Brown II*,<sup>132</sup> or *Cooper v. Aaron*.<sup>133</sup> Courts have not used the South-

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<sup>124</sup> *Id.* at 38.

<sup>125</sup> 337 F.3d 335, 375 (4th Cir. 2003) (Motz, J., dissenting from denial of rehearing en banc).

<sup>126</sup> *Id.* at 344 (Wilkinson, J., concurring in denial of rehearing en banc).

<sup>127</sup> 376 U.S. 254 (1964).

<sup>128</sup> 1 Stat. 596 (expired 1801).

<sup>129</sup> *Sullivan*, 376 U.S. at 276; *see also id.* at 274–76.

<sup>130</sup> 102 CONG. REC. 4459–60 (1956).

<sup>131</sup> 347 U.S. 483 (1954).

<sup>132</sup> 349 U.S. 294 (1955).

<sup>133</sup> 358 U.S. 1 (1958).

ern Manifesto in this way, however, as only two published federal court decisions have referred to it.<sup>134</sup>

A perhaps more common use of something like an antiprecedent is what Kim Lane Scheppelle calls “aversive” reference to the practices of foreign courts or institutions in the course of constitutional drafting and interpretation.<sup>135</sup> 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*,<sup>136</sup> of government racial assignment with “precedents such as the First Regulation to the Reichs Citizenship Law of November 14, 1935.”<sup>137</sup> 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.<sup>138</sup>

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

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

<sup>135</sup> Kim Lane Scheppelle, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models*, 1 INT’L J. CONST. L. 296, 300–01 (2003).

<sup>136</sup> 448 U.S. 448 (1980).

<sup>137</sup> *Id.* at 534 n.5 (Stevens, J., dissenting).

<sup>138</sup> David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539, 551 n.59 (2001).

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

way, we should want desperately to have a sense of its prevalence, its potential, and its limitations.<sup>140</sup>

## 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.<sup>141</sup> 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.<sup>142</sup> In criticizing Elena Kagan's defense of precedent at her confirmation hearing, Senator Tom Coburn said that if precedent could trump original intent, "then we would have never had [*Brown*], and [*Plessy*] would still be the law."<sup>143</sup> John Roberts suggested something similar at his confirmation hearing in 2005, arguing that *Brown* "is more consistent with the 14th Amendment and the original understanding of the 14th Amendment than [*Plessy*]."<sup>144</sup>

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

<sup>141</sup> See Balkin, *supra* note 16, at 679.

<sup>142</sup> See *supra* note 41.

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

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