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(Anti)Canonizing Courts

Jamal Greene

Abstract: Within U.S. constitutional culture, courts stand curiously apart from the society in which they sit. Among the many purposes this process of alienation serves is to “neutralize” the cognitive dissonance produced by Americans’ current self-conception and the role our forebears’ social and political culture played in producing historic injustice. The legal culture establishes such dissonance in part by structuring American constitutional argument around anticanonical cases: most especially “Dred Scott v. Sandford,” “Plessy v. Ferguson,” and “Lochner v. New York.” The widely held view that these decisions were “wrong the day they were decided” emphasizes the role of independent courts in producing them and diminishes the roles of culture in creating them and of social movements in overcoming them. This essay argues for approaching these decisions as ordinary products of political culture rather than extraordinary products of judicial malfeasance. Doing so honors those who struggled for progress and may invigorate our political imagination in the present.

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Cadiz, Ohio isn’t “the proudest small town in America” for nothing.¹ Cadiz has just 3,500 residents, but it has produced more than its share of American heroes. Edwin Stanton, the former U.S. Attorney General and Abraham Lincoln’s Secretary of War, lived and practiced law in Cadiz. The town was a one-time home to George Custer, who, prior to his infamy at Little Bighorn, helped secure Robert E. Lee’s surrender at Appomattox. And Cadiz was the hometown of John Bingham, the Republican senator, prosecutor of Lincoln’s assassins, and principal drafter of section one of the Fourteenth Amendment. If the Civil War and Reconstruction inaugurated America’s “second founding,”² these sons of Cadiz were among its second founders.

The most popular tourist attraction in Cadiz honors none of these men: it is, rather, a museum of the reconstructed birthplace of Clark Gable. Gable is most famous, of course, for his portrayal of Rhett Butler, the charming, iconoclastic antihero of the film adaptation of Margaret Mitchell’s novel *Gone with the Wind*. It is ironic but not surprising that Cadiz is known and celebrated less for its famous Civil War

and Reconstruction architects than for its connection to the popular literary masterpiece of the Lost Cause movement.

The hold that Lost Cause ideology retains on America's Civil War narrative has been well described by historians like David Blight and Eric Foner.³ It was not until the heyday of the civil rights era that the so-called Dunning School fell out of favor and was replaced by "revisionists": that is, those who refused to defend the Ku Klux Klan or to represent Reconstruction as, in Mitchell's telling, "half a nation attempting, at the point of a bayonet, to force upon the other half the rule of negroes, many of them scarcely one generation out of the African jungle."⁴ As Blight writes in his *Race and Reunion*, "[t]he memory of slavery, emancipation, and the Fourteenth and Fifteenth Amendments never fit well into a developing narrative in which the Old and New South were romanticized and welcomed back to a new nationalism, and in which devotion alone made everyone right, and no one truly wrong, in the remembered Civil War."⁵

Less appreciated is the role that our perception of courts has played and continues to play in the narrative of benign continuity that Blight so carefully reconstructs. Courts hold a high place in American life. The U.S. Supreme Court in particular enjoys what political scientists call "diffuse support" from the American people: a degree of reverence that is relatively insensitive to how people feel about specific decisions.⁶ Thanks to this support, the Court maintains consistently higher approval ratings than Congress and the President, even in the low days after the Court's decision in *Bush v. Gore*.⁷ Constitutional scholars in the United States have long wrestled with what legal scholar Alexander Bickel termed the "countermajoritarian difficulty": the democratic deficit created by an unelected court overturning a legislative decision. The very notion of a counter-

majoritarian difficulty, long disputed by positive political scientists,⁸ presupposes that courts stand courageously (if unaccountably) apart from society, as a "they" rather than a "we."

This tendency to view courts as external to society may be succinctly termed the canonization of courts. There are many explanations for this phenomenon⁹ – and they are not mutually exclusive – but one in particular organizes the remainder of this essay: aggrandizement of courts, both for good and for ill, helps to enable a process of collective neutralization of historic injustice, and racial injustice most particularly. The term *neutralization* comes from the criminological literature and refers to strategies that guilty persons employ to overcome or ameliorate cognitive inconsistency between the norms they believe in and those their actions support.¹⁰ The rhetorical structure of constitutional argument in controversial cases is often organized around what I and others have termed an "anticanon" of cases that both constitutional lawyers and ordinary citizens understand to be wrongly decided;¹¹ *Dred Scott v. Sandford* (1857), *Plessy v. Ferguson* (1896), and *Lochner v. New York* (1905) are easily the most prominent examples.¹² Our collective insistence that these cases were wrong the day they were decided implies that ad hoc decision-making by judges, rather than the culture of which those judges are part, underlies actions we now believe to be unethical or immoral.

This rhetorical practice neutralizes the contribution that culture, and in particular our hydra-headed culture of white supremacy, has made to constitutional law. Within the universe of constitutional rhetoric, the main beneficiary of this process is historical argument proceeding from the authority of the original framers or from deep American traditions. The persuasiveness of this form of argument depends on maintaining an identity between constitu-

tional drafters and the present generation, which – in the absence of a successful neutralization strategy – cognitive dissonance does not permit. Canonization of courts through anticanonization of cases therefore harbors a conservative and jurispathic bias: one that supports a single and deterministic rather than a dynamic and fluid understanding of constitutional meaning.

Opening constitutional law to progressive contestation requires, counterintuitively, that we destabilize the notion that *Dred Scott*, *Plessy*, and *Lochner* were wrong the day they were decided. The possibility that these decisions were wrong because successive generations worked hard to make them wrong renders the judges that made and unmade these decisions neither heroes nor antiheroes, but simply judges.

Constitutional law is haunted by the past, but selectively so. The *Dred Scott*, *Plessy*, and *Lochner* decisions in particular are assumed by opinion-writers and legal audiences to be irredeemably wrong and are cited in modern cases precisely for this reason. Legal scholarship overwhelmingly identifies these cases as belonging to a constitutional law “anticanon”;¹³ constitutional law casebooks tend to give these cases substantial treatment even though they are discredited and no longer good law;¹⁴ and they continue to appear in modern opinions even though they do not contain reliable propositions of law.¹⁵ Nominees to federal courts are unusually candid about their views on these cases, indicating that their negative status is settled law. For example, at his confirmation hearing for Chief Justice, then-Judge John Roberts stated categorically that he would not “agree or disagree with particular decisions,” but then went on to testify over the course of the hearing that he disagreed with four decisions: *Dred Scott*, *Plessy*, *Lochner*, and arguably the other member of the anticanon, *Korematsu v. United States*.¹⁶ The

typical structure of judicial argument from the anticanon is thus: my opponent is wrong because the proposition he or she states is consistent with, as the case may be, *Dred Scott*, *Plessy*, or *Lochner*.

Each of these decisions was supported by general propositions of constitutional law or judicial method, such as textualism, originalism, or *stare decisis*, that are persuasive in other contexts. Indeed, it is their harmony with accepted approaches to constitutional law that enables anticanonical cases to be so consistently invoked against one’s opponents.¹⁷ But each decision is also associated with a concept that the country has since rejected as unethical: chattel slavery (*Dred Scott*), Jim Crow (*Plessy*), or labor exploitation (*Lochner*). What it means, then, for these cases to have been wrong *ab initio* is that the judges who rendered them were rogue or incompetent, and that the norms they enforced in our name were their own corrupt personal norms, not those of the American people or the Constitution. Anticanonicity as a rhetorical exercise casts judges as villainous outsiders rather than as products of a constitutional culture that has since become foreign to us.

Consider, first, *Dred Scott*. In modern discussion, the significant errors of Chief Justice Taney’s opinion for the Court were twofold. First, its holding that black Americans could not be citizens of the United States is said to be both racist and simply wrong as a matter of original understanding.¹⁸ But if the *Dred Scott* decision is wrong for these reasons, then the Fourteenth Amendment – which purported to make citizens of native-born blacks and to confer substantive rights of citizenship upon them – merely restored the Constitution’s original meaning. The notion that Reconstruction was, in Foner’s terms, a *revolution*, rings hollow if its most significant legal developments did little more than correct the pretensions of Roger Taney. If this is

the case, perhaps the Lost Cause movement is right that black emancipation in the South was simply a matter of time, that Southerners would have come to a different and better racial reconciliation had they only been permitted to do so in their own way.

Chief Justice Taney's second significant error is said to be his holding that the Constitution's Fifth Amendment required slavery to be permitted in federal territories, which was unnecessary to decide the case and may have precipitated or accelerated the march to war. But the notion that *Dred Scott* is wrong because it hastened the Civil War implies that the war was unnecessary or should have been delayed. This is not the place to defend the necessity of the Civil War, except to say that its lack of necessity is hardly obvious – no more obvious, it seems, than the rightness of Neville Chamberlain's actions in Munich. The view that the war's onset was lamentable is consistent with the Lost Cause view that "everyone was right, and no one truly wrong" in the conflict. That *Dred Scott* is wrong feels self-evident from the perspective of black freedom, but the more we argue that Taney made a major legal error in departing from the Constitution, the more we diminish the emancipatory achievements of the Reconstruction generation.

The anticanonicity of *Plessy* and *Lochner* similarly places the American people and their collective attitudes and norms at the margins rather than at the center of unethical behavior. There is debate as to whether *Plessy v. Ferguson*, which upheld the "separate but equal" racial segregation of rail cars in Louisiana, is consistent with the original understanding of the Fourteenth Amendment. But *Plessy* is easily accommodated within the settlement over Reconstruction symbolized by the Compromise of 1877. Under that agreement, House Democrats handed the disputed 1876 presidential election to Republican Rutherford B.

Hayes in exchange for the withdrawal of the remaining federal troops from southern states and the de facto end to Reconstruction. After 1877, Southern states were typically ruled by so-called Redeemer governments free from northern oversight or concern – which eventually instituted Jim Crow laws, such as the 1890 Separate Car Act at issue in *Plessy*. *Plessy*'s overwhelming 7–1 margin reflected an emerging consensus among large segments of the white population that Reconstruction was a misstep, or at least should be so regarded under the terms of reconciliation. "It was quite common in the 'eighties and 'nineties," historian C. Vann Woodward reports in *The Strange Case of Jim Crow*, "to find in *The Nation*, *Harper's Weekly*, the *North American Review*, or the *Atlantic Monthly* Northern liberals and former abolitionists mounting the shibboleths of white supremacy regarding the Negro's innate inferiority, shiftlessness, and hopeless unfitnes for full participation in the white man's civilization."¹⁹ Woodward writes that these attitudes "doubtless did much to add to the reconciliation of North and South."²⁰ Viewing *Plessy* instead as a detour by the Court in the steady march to racial justice absolves the post-Reconstruction generation of responsibility for its regressive racial politics.

The history of Alabama's anti-miscegenation laws is illustrative. Under section 3602 of the Alabama Code of 1867, blacks and whites were prohibited from intermarriage, adultery, or fornication. The penal code also punished fornication or adultery between people of the same race,²¹ but it prescribed a lighter punishment. In *Ellis v. State* (1868), the Alabama Supreme Court upheld section 3602 as consistent with the Civil Rights Act of 1866, a statutory precursor to the Fourteenth Amendment, notwithstanding its differential punishment scheme.²² The author of that opinion, Chief Justice Abram Joseph Walk-

er, was elected to Alabama's high court by a Confederate legislature at the end of the war and was head of the committee that drafted the Code of 1867. Reconstruction produced a new Alabama Constitution in 1868, resulting in a new slate of justices popularly elected under universal male suffrage. Those justices overruled *Ellis* in an 1872 case called *Burns v. State*.²³ But Alabama Democrats retook the statehouse in 1874 through a combination of old-fashioned political violence against blacks and scalawags and a state Republican party splintered by divisions over issues of "social equality."²⁴ The 1874 election led to a new Constitution, a new penal code that reinstated the law invalidated in *Burns*, and three new Democratic justices on the Alabama Supreme Court. Those justices overruled *Burns* in 1877.²⁵

Six years later, the U.S. Supreme Court itself upheld the state's interracial adultery punishment scheme in *Pace v. Alabama*, using the same formalist logic as *Plessy*: a law punishing interracial adultery more harshly did not violate the Equal Protection Clause so long as it punished whites and blacks equally. *Pace* was a unanimous decision joined even by the sainted John Marshall Harlan, who dissented so famously in *Plessy*. *Pace* was less the result of rogue judges than of a rogue nation, unable to summon the political will necessary to preserve the gains of Reconstruction in the Deep South. So, too, *Plessy*, which would have been a far more remarkable decision at the time had it come out the other way. Tellingly, the headline in the *New Orleans Daily Picayune* on May 19, 1896, the day after the *Plessy* decision, read: "Equality, but not Socialism."

Which brings us to *Lochner*. The *Lochner* decision overturned a New York law passed unanimously in both chambers of the legislature that regulated the hours of bakery workers. It did so on the grounds that the state had not sufficiently demonstrated that

bakers' work was so unhealthy or that bakers were so in need of legislative protection as to reasonably justify state intervention into the labor market. *Lochner* bespeaks the startling speed with which the Fourteenth Amendment was transformed from a provision primarily protective of freed slaves to one primarily protective of corporations seeking to avoid state regulation. The *Slaughter-House Cases*, decided in 1873 (five years after the Fourteenth Amendment was ratified), rejected a claim that the Amendment prevented the state from regulating the market for butchers, and in so doing stated the indispensable purpose of the Reconstruction Amendments to be "the freedom of the slave race . . . and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."²⁶ *Plessy* symbolized a collective abandonment of that lofty goal, and *Lochner* represented a commitment to a new one entirely.

Judges and lawyers overuse *Lochner*, however, and in the process obscure the fact that the case represents the triumph of a distinctive political ideology but only a pedestrian judicial one. The main criticism from the right is that *Lochner* wrongly protected unenumerated constitutional rights; that it specially protected the right to contract is incidental to its broader misstep. The main criticism from the left is that *Lochner* protected the wrong unenumerated constitutional rights: the right to contract rather than, say, the rights to privacy, family autonomy, or sexual freedom. This set of criticisms leaves the irreducible sin of *Lochner*, the error that underwrites its anticanonicity, as its recognition of the right to contract. The New Deal Settlement that abandoned *Lochner* places this right under the banner of "social and economic" rights, to be judicially recognized only if infringed through completely irrational laws.²⁷

This is a deeply conservative outcome. The failure of American courts, particularly at the federal level, to entertain the justiciability of social and economic rights leaves core questions of economic justice entirely to political processes ill-suited to protect the interests of the poor. Rights to education, health, welfare, and housing that are recognized with various degrees of vigor in other Western democracies are typically relegated to the margins, or worse, of U.S. constitutional protection.

Anticanonicity is path-dependent, and *Lochner's* particular path to infamy shapes its rhetorical meaning. As legal scholar David Bernstein has shown, *Lochner* did not speak for its era until the 1960s and 1970s, when conservatives used the case to attack *Griswold v. Connecticut* and its progeny.²⁸ Liberals distinguished *Lochner* as protecting economic rights because at that historical moment, the rights they sought to defend concerned private decision-making and were decidedly non-economic. The distinction, for example, between use and sale of contraceptives, later abandoned as constitutionally irrelevant, was vitally important to the rhetorical mission of the right-to-privacy cases: they were precisely *not* about those arm's-length transactions that are the bread and butter of government social policy.²⁹

Other strategies were available, if less obvious. Rather than viewing *Lochner* as a case about the perils of judicial protection for economic rights, one might instead view it as a case about a judicial preference for the economic rights of the strong over those of the weak. Recall that both sides in *Lochner* sought to protect economic rights. The bakeries wished to protect their rights to enter into coercive labor contracts, and the government wished to protect the rights of bakers to reasonable living standards. Likewise, minimum wage laws (such as those invalidated in *Lochner*-era decisions, including *Adkins v. Children's Hos-*

pital [1923] and *Moorehead v. New York ex rel. Tipaldo* [1936]) are directed at the economic rights of workers to fair pay. Cases like *Coppage v. Kansas* (1915) and *Adair v. United States* (1908), which protected the right of employers to enter into yellow-dog contracts with workers, overturned government policies that sought to protect collective bargaining rights.³⁰ From a progressive perspective, the problem with the *Lochner* opinion is not that it protected the wrong liberty rights – liberty of contract rather than privacy – but that it protected the wrong *economic* rights.

The alternate universe in which *Lochner's* social meaning is fully consistent with the justiciability of economic rights is one in which judges may address claims of health or housing or education rights on their merits rather than reject them at the threshold. In *Dandridge v. Williams* (1970), for example, in which the Court rejected a Fourteenth Amendment challenge to Maryland's cap on welfare benefits, Justice Stewart wrote for the Court: "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect."³¹ Astute observers will recognize in this formulation the continuing *in terrorem* effect of *Lochner* and the generation of cases it represents. But if we view *Lochner* as wrong but not anticanonical, our rejection of *Lochner* may be consistent with our *dissent* from *Dandridge*. The New York bakers' law sought to realize a protestant conception of economic rights as proceeding from popular and legislative as well as judicial understandings. *Lochner* is not, in this view, a case about arrogant judges finding rights where none exist; it is rather a case about politically attuned judges using the courts to enforce the rights of some against the rights of others.

The outcome of that contest in *Lochner* reflected the might of a laissez-faire political culture that is no less a part of our his-

tory for our having renounced it. And viewing the renunciation of *Lochner* in *West Coast Hotel v. Parrish* (1937) and subsequent cases not as the inevitable regression of law to its proper, sublimated place but rather as the triumph of a particular political project, contingent on the efforts of social movements to capture political and legal elites, respects rather than ignores the role of popular agency in constructing legal meaning.

The modern view of *Dred Scott*, *Plessy*, and *Lochner* as both wrong the day they were decided and uniquely instructive for constitutional judges abides a process of neutralization that is far bigger than the Court and its docket. The concept of neutralization finds its roots in social psychologist Leon Festinger's work on cognitive dissonance.³² Festinger's two-pronged hypothesis, which we now take to be nearly axiomatic, was as follows. First, inconsistency within a person's normative universe or between his views and his actions is "psychologically uncomfortable" and "motivate[s] the person to try to reduce the dissonance and achieve consonance."³³ Second, individuals do not merely reduce dissonance but also "actively avoid situations and information which would likely increase the dissonance."³⁴ Strategies for reducing dissonance include, for example, changing one of the dissonant beliefs by seeking out others who can affirm one's disagreement with it, soliciting additional information that reduces the dissonance, and avoiding information that enlarges it.³⁵

Writing contemporaneously with Festinger, criminologists Gresham Sykes and David Matza studied the ways in which juvenile delinquents deflect or overcome internal and social disapproval. Sykes and Matza outlined five "techniques of neutralization," but we need only concern ourselves here with their first: "denial of responsibility." As Sykes and Matza described: "In effect, the delinquent approaches

a 'billiard ball' conception of himself in which he sees himself as helplessly propelled into new situations." The deviant, they argued, "learn[s] to view himself as more acted upon than acting."³⁶ Viewing the protection and abetting of slavery, Jim Crow, and labor exploitation as the work of rogue or countermajoritarian courts fits a similar pattern of collective self-alienation. As legal scholar Jack Balkin has written, "We say that a case like *Plessy* was wrong the day it was decided in order to avoid concluding that we are the type of people whose Constitution would say such a thing. The case does not reflect our nature or who we are."³⁷

I do not mean to ascribe delinquency or social deviance to those who deploy the rhetoric of anticanonicity. Indeed, it is the opposite. My suggestion is that the inconsistency between modern legal and ethical assumptions and past collective behavior creates a collective sense of dissonance that is normal rather than exceptional. Based on study of young, liberal Germans in the 1990s coping with the Holocaust, criminologist Moshe Hazani concluded that techniques of neutralization, including denial of responsibility, are not just the tools of delinquents but "universal modes of resolving cognitive inconsistency."³⁸ This kind of group neutralization is not the same as revisionism; it need not involve a conscious, reflective reevaluation of the past. The idea, rather, is that the subconscious need to reduce cognitive dissonance – reflected in Blight's work on the Civil War's aftermath – precedes and motivates elements of legal culture, including the social meaning of anticanonical cases. We enlarge the role of courts in part to deny our collective moral responsibility.

Other distinctive features of American constitutional law could not exist in their current form without the neutralization of past injustice that court canonization helps enable. The persistence of ethical-histor-

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ical approaches to constitutional argument is one such feature. An ethical-historical constitutional argument is one that advances a proposition of constitutional significance by reference to historical figures or traditions that “vouch” for the proposition. (“Ethical” is thus used here in the classical sense of an appeal to the character of the speaker, a definition consistent with scholar Philip Bobbitt’s work on constitutional argument.³⁹) The argument, for example, that the Establishment Clause was originally understood to forbid government funding of religion because Madison’s “Memorial and Remonstrance” was directed at this practice is a form of ethical-historical argument.⁴⁰ It recruits a prominent Framers in order to defend and legitimate a proposition regarding the history of the First Amendment.

Ethical-historical argument overlaps, but is not coextensive with, the family of interpretive theories known to constitutional scholars as originalism. Originalism is the view that a constitutional provision has what its drafters or ratifiers took to be its meaning or scope at the time of enactment. Originalism is a theory of interpretation, whereas ethical-historical argument is a rhetoric of justification. Except to the degree of its overlap with ethical-historical argument, originalism does not significantly drive the work of U.S. federal courts. (Anyone with any doubt on this score might note that in the blockbuster 2012 term of the Supreme Court, a faithful originalist would likely have upheld both section four of the Voting Rights Act and section three of the Defense of Marriage Act, an outcome not favored by a single Justice.) By contrast, ethical-historical argument has substantial purchase both within and outside of judicial practice. Arguments that use the Framers or their traditions to grant authority to modern practices and limitations hold a central place within the constitutional culture of the United States.

This is a contingent phenomenon. Consider the case of South Africa. One of the most recognized influences on the government of apartheid-era South Africa is the work of the British theorist A. V. Dicey. Dicey is famous for his aggressive defense of parliamentary sovereignty, a concept invested with white-supremacist character in an apartheid state in which only whites may vote. In particular, as the post-apartheid Truth and Reconciliation Commission Report found, South African lawyers and judges relied on Diceyan principles to defend practices of legislative deference during the apartheid era.⁴¹ In the South African constitutional law and culture of today, citing Dicey to defend acquiescence to parliamentary authority would be viewed with considerable suspicion, even as Dicey’s skill as a theoretician remains unquestioned.⁴²

We do not regard Jefferson, Madison, and Washington in this way. All were Virginian slaveholders instrumental in creating a brutal slavocracy and yet all are recruited to speak for constitutional propositions far more readily than Bingham, Charles Sumner, Jacob Howard, or other heroes of the second founding. South Africans view their renunciation of apartheid as a genuine rupture. The preamble to the Interim Constitution refers directly to “a need to create a new order,” and no one believes that the terms of reconciliation permit the suggestion that the pre-1994 order was anything other than indefensibly illegitimate. This fact, more than any other, precludes a strong role for ethical-historical argument in the constitutional law and culture of South Africa. Multiple, inter-related, and largely successful strategies of neutralization help to preserve a role for such arguments in the United States.

Ethical-historical argument, although it is partly external to constitutional law, is nonetheless potent enough to impose a soft limitation on constitutional evolution.

As legal scholar Robert Post has detailed at some length, constitutional law proceeds in continuous dialogue with the values and beliefs of non-judicial actors.⁴³ Constitutional law both regulates constitutional culture,⁴⁴ as when judges and lawyers help to determine the social meaning of *Dred Scott*, *Plessy*, and *Lochner*; and is bound by that culture, as when interpreters understand certain social and economic rights as matters of political discretion. It is difficult not to notice that social and economic rights receive explicit judicial protection in South Africa.⁴⁵

Would a constitutional culture that understands Reconstruction in revolutionary terms permit the Supreme Court to invalidate a federal voting rights law on account of its extraordinary success in enfranchising black Americans? Would a constitutional culture that has internalized the costs of our departure from Jim Crow produce a Court that challenges the University of Texas – the defendant in *Sweatt v. Painter*⁴⁶ – for discriminating against white applicants? Would a constitutional culture that regards *Lochner*'s repudiation as a triumph for economic rights be consonant with a Court that scolds Congress for seeking to guarantee health insurance to every American? These questions nearly answer themselves. Deflecting responsibility for *Dred Scott*, *Plessy*, and *Lochner* onto the Courts that decided those cases is integral to a legal narrative that helps construct a very different constitutional culture than the one described above.

It has become a favorite criticism of Supreme Court – centered scholarship to note that the nine Justices are a they rather than an it. The numerous inconsistencies in the Court's jurisprudence, so easily identified as to be uninteresting, are often attributable to a single swing Justice, or else to an eclectic coalition whose incomplete overlap of views constitute a "holding" that

none agreed to individually. More should be made of the fact that the Supreme Court, and judges more generally, are a "we" rather than a "they." Judges may not be like us, but they are *of* us. They live – in a thick sense – in the world they help to govern, their views about that world evolve and regress as all of ours do, and they adopt ideologies and accept social meanings that they do not themselves generate. As legal scholar Robert Cover reminded us, judges can be powerful instruments of social control, but they do not create law: *we* do.⁴⁷

We have good, if not noble, reasons to forget that. If we the people are a coherent (though pluralistic) constitutional subject – a view we might reject but rarely do – then we are authors of great injustices tolerated and facilitated by law. *Dred Scott*, *Plessy*, and *Lochner* are said to be anticanonical in part so that we do not forget what we once were, but the way they operate within the constitutional culture accomplishes quite the opposite. Professional discourse identifies their unforgivable errors as obvious legal mistakes, the result of judges reading their own immoral politics into the law. In this conception the Court sits at the center of great wrongs, awaiting a bold overruling that will place the law back on its proper course.

Claiming ownership over our history requires deconstruction all the way down. We must accept *Dred Scott* and *Plessy* and *Lochner* as we accept a chromosomal condition. Seeing these cases as part of who we are is psychologically difficult, but it enables us to recognize our agency in overcoming the limitations they place on our normative priors. We owe it to Mr. Bingham, and to ourselves, to internalize the real lesson of anticanonical cases, which, after all, is that they may have been right.

- 1 The “proudest small town” title was conferred upon Cadiz following a newspaper contest in the 1930s. See Tyler Reynard, “Small-Town Cadiz Produced Big-Time Residents,” *The Intelligencer/Wheeling News-Register*, March 26, 2013, <http://www.theintelligencer.net/page/content.detail/id/583125/Small-Town-Cadiz-Produced-Big-Time-Residents.html?nav=6312>, accessed July 29, 2013.
- 2 Barry Friedman, “Reconstructing Reconstruction: Some Problems for Originalists (And Everyone Else, Too),” *University of Pennsylvania Journal of Constitutional Law* 11 (2009): 1205.
- 3 David W. Blight, *Race and Reunion: The Civil War in American Memory* (Cambridge, Mass.: Harvard University Press, 2001); and Eric Foner, *Reconstruction: America’s Unfinished Revolution, 1863–1877* (New York: Harper & Row, 1988).
- 4 Margaret Mitchell, *Gone with the Wind* (New York: Macmillan, 1936), 914.
- 5 Blight, *Race and Reunion*, 4.
- 6 Gregory A. Caldeira and James L. Gibson, “The Etiology of Public Support for the Supreme Court,” *American Journal of Political Science* 36 (1992).
- 7 James L. Gibson, Gregory A. Caldeira, and Lester K. Spence, “The Supreme Court and the U.S. Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?” *British Journal of Political Science* 33 (2003): 555.
- 8 Robert A. Dahl, “Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker,” *Journal of Public Law* 6 (1957).
- 9 For an excellent treatment in the new institutionalist tradition in political science, see Keith E. Whittington, *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* (Princeton, N.J.: Princeton University Press, 2007).
- 10 Gresham M. Sykes and David Matza, “Techniques of Neutralization: A Theory of Delinquency,” *American Sociological Review* 22 (1957): 667.
- 11 Jamal Greene, “The Anticanon,” *Harvard Law Review* 125 (2011); and J. M. Balkin and Sanford Levinson, “The Canons of Constitutional Law,” *Harvard Law Review* 111 (1998): 1018–1019.
- 12 *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857); *Plessy v. Ferguson*, 163 U.S. 537 (1896); and *Lochner v. New York*, 198 U.S. 45 (1905).
- 13 Greene, “Anticanon,” 391.
- 14 *Ibid.*, 395–396.
- 15 *Ibid.*, 397–398.
- 16 *Korematsu v. United States*, 323 U.S. 214 (1944); and Greene, “Anticanon,” 392 n. 66.
- 17 *Ibid.*, 463.
- 18 Jack M. Balkin and Sanford Levinson, “Thirteen Ways of Looking at Dred Scott,” *Chicago-Kent Law Review* 82 (2007): 70–71.
- 19 C. Vann Woodward, *The Strange Career of Jim Crow* (New York: Oxford University Press, 1955), 70.
- 20 *Ibid.*
- 21 Alabama Code, sec. 3599 (1867).
- 22 *Ellis v. State*, 42 Ala. 525 (1868).
- 23 *Burns v. State*, 48 Ala. 195 (1872).
- 24 Foner, *Reconstruction*, 552–553.

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- ²⁷ *United States v. Carolene Products*, 304 U.S. 144 (1938): 152.
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- ²⁹ See *Carey v. Population Services International*, 431 U.S. 678 (1977): 687–688.
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- ³⁴ *Ibid.*
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- ⁴⁷ Robert M. Cover, “The Supreme Court, 1982 Term – Foreword: *Nomos* and Narrative,” *Harvard Law Review* 97 (1983).