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HOLLOW HOPES AND EXAGGERATED FEARS:  
THE CANON/ANTICANON IN CONTEXT

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The conventional constitutional canon and constitutional anticanon promote courts as powerful institutions. Decisions are canonical or anticanonical because they matter. Opinions do not make the constitutional canon simply because they are well written, contain quotable phrases, or are particularly good examples of the legal craft. For all most law professors and practitioners know, some opinion by Justice Samuel Blatchford selected at random from the 125th volume of the United States Reports meets those standards. That decision is nevertheless neither canonical nor, if particularly poorly written, unquotable, or badly reasoned, anticanonical. Justice Blatchford is conspicuously absent from the constitutional canon and anticanon because no opinion he wrote influenced the course of American constitutional development or plays a role in contemporary constitutional understandings.

Law professors and legal activists celebrate canonical judicial decisions and condemn anticanonical judicial decisions for their effect on the American constitutional regime. *Brown v. Board of Education*<sup>1</sup> is routinely given credit for the destruction of Jim Crow. Judge J. Harvie Wilkinson III asserts, “*Brown* may be the most important political, social, and legal event in America’s twentieth-century history. Its greatness lay in the enormity of injustice it condemned, in the entrenched sentiment it challenged, in the immensity of law it both created and overthrew.”<sup>2</sup> *Dred Scott v. Sandford*,<sup>3</sup> “the most disastrous opinion the Supreme Court has ever issued,”<sup>4</sup> is routinely blamed for the secession crisis and the military conflict that killed two percent of the American population. Professor Cass Sunstein states, “the Court’s decision was a disaster, helping to fuel the Civil War.”<sup>5</sup>

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<sup>1</sup> 347 U.S. 483 (1954).

<sup>2</sup> J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE* 6 (1979).

<sup>3</sup> 60 U.S. (19 How.) 393 (1857).

<sup>4</sup> ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 62 (Sanford Levinson rev., 4th ed. 2005).

<sup>5</sup> Cass R. Sunstein, *The Supreme Court, 1995 Term — Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 49 (1996).

Professor Jamal Greene's wonderful article, *The Anticanon*<sup>6</sup> is in this tradition. The essay demonstrates that we condemn "bad" judicial decisions for what we believe they did, not because they were particularly incompetent judicial performances. "[E]ach case" in the anticanon, Greene details, "has come to symbolize a set of generalized ethical propositions that we have collectively renounced."<sup>7</sup> Nevertheless, as do studies of the constitutional canon,<sup>8</sup> Greene confines his anticanon to judicial cases. His interest is in "identifying the Supreme Court's worst decisions."<sup>9</sup> By constructing an anticanon composed entirely of judicial decisions, *The Anticanon* risks contributing toward the conventional understanding that the Supreme Court has power to do great good and great evil.

This brief note calls on students of American constitutionalism to add constitutional decisions made by elected officials to the constitutional canon and the constitutional anticanon. Neither the canonical nor the anticanonical constitutional decisions by the Supreme Court have produced the wonderful results or horrible evils sometimes attributed to them. In many cases, elected officials made contemporaneous constitutional decisions that had as much influence as the celebrated or condemned judicial rulings. More often than not, judicial rulings matter by changing the political dynamics than by directly changing public policy. Law students and others interested in constitutional change, for these reasons, need to explore the interactions between constitutional decisions inside and outside of courts, and not be exposed to a curriculum that consists of little more than good or bad judicial solos.

## I. CANONICAL CASES AND JUDICIAL POWER

The most celebrated and most reviled Supreme Court decisions in American history may have had far less impact on constitutional development than their canonical or anticanonical status might lead one to believe. Professor Gerald Rosenberg in *The Hollow Hope* insists that *Brown* had almost no impact on school desegregation. "[A] closer examination," he details, "reveals that before Congress and the executive branch acted, courts had virtually no direct effect on ending discrimination in the key fields of education, voting, transportation, accommodations and public places, and housing. Courageous and

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<sup>6</sup> Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011).

<sup>7</sup> *Id.* at 384.

<sup>8</sup> See, e.g., Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243 (1998). But see J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 964–68 (1998) (discussing whether Frederick Douglas's speeches belong in the constitutional canon).

<sup>9</sup> Greene, *supra* note 6, at 380.

praiseworthy decisions were rendered, and nothing changed.”<sup>10</sup> *Dred Scott and the Problem of Constitutional Evil* maintains that *Dred Scott*, if anything, made the Civil War less likely. That text claims, “the historical evidence suggests that *Dred Scott* did not further destabilize, and may have temporarily preserved the antebellum political regime. The decisions most responsible for the Civil War were made by those political actors whom institutionalist dogma entrusts with the authority to reach compromises on divisive political issues.”<sup>11</sup>

The impact of other canonical and anticanonical decisions on American constitutional development appears to be similarly exaggerated. Such Warren Court landmarks as *Reynolds v. Sims*<sup>12</sup> and *Mapp v. Ohio*,<sup>13</sup> *The Hollow Hope* documents, had far less influence on electoral and political practices than a close reading of the opinions might indicate.<sup>14</sup> The ink was hardly dry on Chief Justice John Marshall’s opinion in *McCulloch v. Maryland*<sup>15</sup> when a series of presidential vetoes killed the national bank and other related exercises of national power apparently sanctioned by judicial opinion.<sup>16</sup>

If the judicial canon is characterized by “hollow hopes,” the anticanon is distinguished by exaggerated fears. Consider the three judicial rulings that Greene maintains, along with *Dred Scott*, constitute the anticanon. *Lochner v. New York*<sup>17</sup> had only a limited impact on progressive legislation at the turn of the twentieth century. Most state legislative efforts to regulate hours and working conditions survived constitutional attack, including measures quite similar to those at issue in *Lochner*.<sup>18</sup> Professor Robert McCloskey observes, “the actual negative decisions of importance were few, and the march toward regulation [was] at most deflected slightly and, here and there, somewhat delayed.”<sup>19</sup> Immediately after Franklin Roosevelt became President, the Supreme Court more aggressively struck down bolder federal efforts to regulate contractual relationships,<sup>20</sup> but the Justices were

<sup>10</sup> GERALD N. ROSENBERG, *THE HOLLOW HOPE* 70–71 (2d ed. 2008).

<sup>11</sup> MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 39 (2006).

<sup>12</sup> 377 U.S. 533 (1964).

<sup>13</sup> 367 U.S. 643 (1961).

<sup>14</sup> ROSENBERG, *supra* note 10, at 292–302, 316–24.

<sup>15</sup> 17 U.S. (4 Wheat.) 316 (1819).

<sup>16</sup> See James Monroe, Veto Message (May 4, 1822), in 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 711–12 (James D. Richardson ed., 1897); Andrew Jackson, Veto Message (July 10, 1832), in 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, *supra*, at 1139–54.

<sup>17</sup> 198 U.S. 45 (1905).

<sup>18</sup> See, e.g., *Bunting v. Oregon*, 243 U.S. 426 (1917).

<sup>19</sup> MCCLOSKEY, *supra* note 4, at 100–01.

<sup>20</sup> See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

quickly “persuaded” to change course.<sup>21</sup> The significance of *Plessy v. Ferguson*<sup>22</sup> pales by comparison to the congressional failure to pass the Lodge Elections Bill in 1890, which would have dramatically increased federal oversight of Southern elections, the congressional decision after the 1892 national election to repeal many Reconstruction election laws, and the turn of the twentieth century Southern conventions that inscribed white supremacy into state constitutions.<sup>23</sup> The internment of Japanese-Americans came to be regarded as a national embarrassment almost immediately after *Korematsu v. United States*<sup>24</sup> was handed down. Today, that decision is cited only for the proposition that racial classifications must be strictly scrutinized.<sup>25</sup>

Elected officials made the constitutional decisions directly responsible for the beneficent and disastrous results commonly credited to canonical and anticanonical judicial decisions. The Civil Rights Act of 1964 desegregated public education in the Deep South. By cutting off federal funds to segregated school districts and authorizing the Justice Department to challenge segregated schools, Congress provided the civil rights community with the resources and Southern school districts with the incentives necessary to eradicate Jim Crow. Rosenberg declares, “when the federal government made money available to local school districts that desegregated, it loosed a powerful and attractive force on segregated schools.”<sup>26</sup> President Buchanan’s decision to support the pro-slavery Lecompton Constitution was responsible for creating the sectional schism within the Democratic Party that eventually destroyed the Union. By aggressively championing a pro-slavery constitution in a territory with an anti-slavery majority, Buchanan cut the ground underneath those Northern moderates willing to compromise with the South on slavery issues. “The decisions most responsible for the Civil War,” I have detailed elsewhere, “the passage of the Kansas-Nebraska Act, the submission of the Lecompton Constitution, and the demand that the 1860 Democratic national convention endorse territorial slave codes, were all made without judicial participation.”<sup>27</sup>

The impact of canonical and anticanonical decisions is more often indirect and unanticipated. *Brown* did not immediately desegregate schools. Slaveholders did not flood the territories after *Dred Scott*.

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<sup>21</sup> See WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN* 82–179 (1995); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

<sup>22</sup> 163 U.S. 537 (1896).

<sup>23</sup> See generally Michael J. Klarman, *The Plessey Era*, 1998 SUP. CT. REV. 303.

<sup>24</sup> 323 U.S. 273 (1944).

<sup>25</sup> See Mark Tushnet, *Defending Korematsu? Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273, 274 (noting that “*Korematsu* was part of a process of social learning that . . . diminishes contemporary threats to civil liberties”).

<sup>26</sup> ROSENBERG, *supra* note 10, at 97.

<sup>27</sup> Mark A. Graber, *Dred Scott as a Centrist Decision*, 83 N.C. L. REV. 1229, 1241 (2005).

Instead, the course of American constitutional politics reflects the ways in which elected officials and political movements adjust to the possibilities and challenges created by the judicial ruling. Professor Michael Klarman's backlash thesis maintains that *Brown* initially empowered the most reactionary forces in the South and that their repressive behavior, in turn, decisively turned Northern opinion against Jim Crow. Klarman states:

*Brown* was indirectly responsible for the landmark civil rights legislation of the mid-1960s by catalyzing southern resistance to racial change. *Brown* propelled southern politics far to the right, as race was exalted over all other issues. In this political environment, men were elected to all levels of public office who were, both by personal predisposition and political calculation, prepared to use virtually any means of resisting racial change, including blatant defiance of federal authority and brutal suppression of civil rights demonstrations. The predictable consequence was a series of violent confrontations between white supremacist law enforcement officials and generally nonviolent demonstrators, which provoked an outcry from national television audiences, leading Congress and the President to intervene with landmark civil rights legislation.<sup>28</sup>

The Lecompton Constitution caused the schism between Stephen Douglas and most Southern Democrats, but *Dred Scott* influenced how Southern Democrats sought to deny Douglas the Democratic Party presidential nomination in 1860. Southern Jacksonians first insisted that Democrats implement *Dred Scott* by enacting a slave code in the territories and then walked out of the Democratic Party's national convention when that demand was rebuffed.<sup>29</sup>

## II. TOWARD A NEW CONSTITUTIONAL PEDAGOGY

Law professors who place canonical and anticanonical judicial rulings alongside constitutional decisions made by elected officials provide students with a more sophisticated account of how Supreme Court decisions have influenced constitutional development and the structure of contemporary constitutional conflicts. Contrary to much legal orthodoxy, the Supreme Court almost never engages in creation *ex nihilo* or single-handedly destroys entrenched constitutional practices. Some canonical and anticanonical decisions buttress legal foundations constructed by other constitutional decisionmakers. *Plessy v. Ferguson* and *McCulloch v. Maryland* built on the constitutional decisions made outside the Court that promoted white supremacy and in-

<sup>28</sup> Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 85 (1994).

<sup>29</sup> 2 WILLIAM W. FREEHLING, *THE ROAD TO DISUNION* 297–305 (2007).

corporated the National Bank of the United States. Other judicial rulings help demolish constitutional practices already severely weakened by attacks outside of the courts. *Giles v. Harris*<sup>30</sup> brought to an end post-Reconstruction efforts to give freed slaves the ballot. *Lawrence v. Texas*<sup>31</sup> sounded the death knell for contemporary efforts to criminalize homosexuality. More often, judicial decisions alter the terrain on which constitutional struggles are fought without ensuring the ultimate victory of one side or the other. *Brown* and *Dred Scott* foreclosed some political options while opening others. The Civil War and the defeat of Jim Crow were consequences of the contingent choices political actors made in those revised political circumstances, not the inevitable results of judicial decisions.

A constitutional canon and anticanon that emphasize constitutional decisions or events that influenced the course of American constitutional development or shaped contemporary understandings of the constitutional regime must range far beyond Supreme Court rulings. The Civil Rights Act of 1964 and the Voting Rights Act of 1965 ought to share the place of honor in the constitutional canon with *Brown*. The decision to foist a pro-slavery constitution on Kansas is as much a part of the anticanon as *Dred Scott*. Indeed, a properly constructed canon includes constitutional decisions or events that took place almost entirely out of court. The constitutional debates over the Louisiana Purchase and the annexation of Texas are canonical (or anticanonical), even though no Justice handed down a ruling establishing either the conditions under which the United States could acquire new territory or whether Congress by joint resolution could annex a foreign country.

No good reason exists for confining the constitutional canon in law schools to judicial decisions. Lawyers are interested in securing relief for their clients, whether those clients represent individual interests or such broader political causes as racial equality. A constitutional canon that implies that judicial decisions alone have the capacity to cause civil wars or eradicate a racial caste system may cause attorneys to focus exclusively on securing good language in legal opinions rather than on the impact of those decisions on the ground. The struggles over the ratification of the Lecompton Constitution had more impact on the status of slavery in the Kansas Territory than the *Dred Scott* litigation. Desegregating schools proved far more difficult than securing favorable judicial decisions. The constitutional canon and anticanon we teach should also be more sensitive to the likely employment history of many law students. Far more lawyers debated and drafted civil rights statutes or laws concerning the status of slavery in the territories than

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<sup>30</sup> 189 U.S. 475 (1903).

<sup>31</sup> 539 U.S. 558 (2003).

participated in *Brown v. Board of Education* or *Dred Scott v. Sandford*. If one of our students produces a canonical or anticanonical decision in the future, he or she is as likely to do so as a lawyer with the Office of Legal Counsel as he or she is as a Justice on the Supreme Court of the United States.