

## Essay

# CANON, ANTI-CANON, AND JUDICIAL DISSENT

RICHARD A. PRIMUS†

Several legal theorists have recently explored the idea that constitutional law has a canon, a set of greatly authoritative texts that above all others shape the nature and development of constitutional law.<sup>1</sup> In a piece published earlier this year in the *Harvard Law Review*, Jack Balkin and Sanford Levinson enter that discussion and argue that the constitutional canon has heretofore laid too much emphasis on court cases in general and on opinions of the Supreme Court in particular.<sup>2</sup> In the course of their argument, they cite an earlier study of constitutional law casebooks currently in use to show that certain cases are, by consensus, indispensable to a knowledge of constitutional law.<sup>3</sup> In parallel to the function that anthologies of literature perform in fields like English, Balkin and Levinson note, casebooks play a large role in the construction of the constitutional canon.<sup>4</sup> According to the study they cite, ten Supreme Court cases appear in every one of the eleven major casebooks included in the survey.<sup>5</sup> The list of ten is largely intuitive to anyone familiar with

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† Law clerk to Judge Guido Calabresi, United States Court of Appeals for the Second Circuit. I thank Bruce Ackerman, Ariela Dubler, Paul Kahn, Anita Krishnakumar, Sarah Levine, Dan Libenson, Laura McGrane, and Kevin Stack for their assistance.

1. See, e.g., BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS*, 359, 362-66, 368-77 (1998) (discussing the “transformative opinions” of the New Deal era); PAUL W. KAHN, *THE REIGN OF LAW* 106 (1997); Symposium, *Do We Have a Legal Canon?*, 43 J. LEGAL EDUC. 1 (1993) (contrasting canon development in history, literature, and law); Judith Resnik, *Constructing the Canon*, 2 YALE J.L. & HUMAN. 221 (1990).

2. See J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 984-95, 1014-17 (1998).

3. See *id.* at 974 n.43 (citing Jerry Goldman, *Is There a Canon of Constitutional Law?*, AM. POL. SCI. ASS’N. NEWSL. (Law and Courts Section of the Am. Political Science Ass’n), Spring 1993, at 2-4).

4. See *id.* at 970-73.

5. See *id.* at 971-72.

constitutional law. No one, I suspect, would be surprised to learn that *Marbury v. Madison*,<sup>6</sup> *McCulloch v. Maryland*,<sup>7</sup> and *Brown v. Board of Education*<sup>8</sup> appear in every major constitutional law casebook now on the market.<sup>9</sup> Each of those cases is the *locus classicus* of a major doctrine of constitutional law. Indeed, the Court's decisions in nine of the ten cases listed established propositions that continue to shape the law today. Lawyers and courts continue to cite those nine decisions for their legal authority, and many of the cases carry symbolic value as high moments in the exposition of constitutional law.<sup>10</sup>

The tenth case is different. It is *Lochner v. New York*,<sup>11</sup> the infamous case in which the Supreme Court struck down a New York health and labor regulation limiting bakers' workweeks to sixty hours.<sup>12</sup> Unlike the other nine universally anthologized cases, *Lochner* is never cited for its legal authority. Although it has never been formally overruled, it is well understood among constitutional lawyers that relying on *Lochner* would be a pointless, if not a self-destructive, endeavor.

*Lochner* is not the only repudiated case to be a legitimate candidate for inclusion in the constitutional canon. In the casebook study that Balkin and Levinson cite, the list of the ten universally anthologized cases is followed by a list of eight more cases that appear in all but one of the eleven major casebooks, and that list

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6. 5 U.S. (1 Cranch) 137 (1803).

7. 17 U.S. (4 Wheat.) 316 (1819).

8. 347 U.S. 483 (1954).

9. The other seven universally reproduced cases are *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), *Griswold v. Connecticut*, 381 U.S. 479 (1965), *New York Times Co. v. United States*, 403 U.S. 713 (1971), *Roe v. Wade*, 410 U.S. 113 (1973), *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), and, as I will argue is most significant, *Lochner v. New York*, 198 U.S. 45 (1905).

10. Of those nine cases, the two whose merits are most heavily contested are also the two most recently decided: *Garcia* and *Roe*. Because the notion of canonicity can include normative evaluations as well as assessments of importance, the many constitutional theorists who disapprove of the holdings in *Garcia* and *Roe* might not describe those cases as canonical. See *infra* notes 35-37 and accompanying text (describing the controversy over the status of *Roe*). They might not dispute the importance of those cases, but they would present those cases as negative reference points, as leading examples of the law gone bad. I will argue below that highly important but normatively undesirable texts comprise a constitutional "anti-canon" that is in some senses a mirror image of the constitutional canon. Inclusion in all or almost all casebooks indicates that a decision is either canonical or anti-canonical but does not indicate into which of those categories it falls. Whether such a decision is canonical or anti-canonical depends on the classifier's view of the decision's substantive merits.

11. 198 U.S. 45 (1905).

12. See *id.* at 64-65.

includes a case whose infamy rivals that of *Lochner*: *Plessy v. Ferguson*.<sup>13</sup>

The Supreme Court's positions in *Lochner* and *Plessy* are paradigmatic examples of what is *not* the law, but learning *Lochner* and *Plessy* is as much a part of the process of becoming educated in constitutional law as is learning *Marbury* and *McCulloch*. *Lochner* and *Plessy* are taught as negative reference points. They inhabit the same level of symbolic importance as *Marbury* and *McCulloch*, but they are cautionary tales rather than heroic ones.

The inclusion of *Lochner* and *Plessy* among the most anthologized cases and therefore, implicitly, among the cases that people who wish to be knowledgeable in constitutional law must learn, suggests that the constitutional canon has a dual structure. Unlike a literary or a religious canon, the constitutional canon preserves examples of the worst errors in its field as well as the finest moments. This dual structure could be described, terminologically, in either of two ways. One is to refer to all of the component texts involved as "canonical" and to subdivide them into "approved canonical cases" and "disapproved canonical cases." The other is to reserve the term "canon" to refer to the set of texts that are not only important but normatively approved, and to refer to the twin set, the set of texts that are important but normatively disapproved, as the "anti-canon." I adopt the second set of terms. Constitutional law, I suggest, has not only a canon composed of the most revered constitutional texts but also an anti-canon composed of the most reviled ones. *Lochner* and *Plessy* are anti-canonical cases.

When a modern lawyer thinks of *Lochner* or *Plessy*, however, he does not think only of their majority opinions. Each of those cases also contains a famous dissent, and those dissents have in some respects eclipsed the majority opinions. Most judges and law professors could probably quote more language from Justice Holmes's dissent in *Lochner* and Justice Harlan's dissent in *Plessy* than from the majority opinions in those cases or, for that matter, from the majority opinions in many other landmark cases. Indeed, the dissents of Justice Holmes in *Lochner* and Justice Harlan in *Plessy* are canonical texts in their own right,<sup>14</sup> and modern courts

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13. 163 U.S. 537, 551-52 (1896) (upholding "separate but equal" as a valid model of racial segregation).

14. On the canonicity of Harlan's *Plessy* dissent, see Bruce ACKERMAN, WE THE PEOPLE: FOUNDATIONS 146 (1991) [hereinafter ACKERMAN, FOUNDATIONS]; ALAN BARTH, PROPHETS WITH

sometimes treat those opinions as if they were legally authoritative precedents. For example, in the recent landmark case of *Romer v. Evans*,<sup>15</sup> Justice Kennedy began his opinion for the Court by citing to Justice Harlan's dissent in *Plessy*.<sup>16</sup> If some Supreme Court majority in the hundred years between *Plessy* and *Romer* had handed down a ruling which included the declaration that "the opinion of Justice Harlan in *Plessy v. Ferguson* is hereby adopted as an authoritative statement of law," then Justice Kennedy's citation would have been a straightforward deployment of precedent. It should be noted, however, that the Harlan dissent was never explicitly adopted as authoritative by a later Court.<sup>17</sup> Nevertheless, nothing seemed out of

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HONOR: GREAT DISSENTS AND GREAT DISSENTERS IN THE SUPREME COURT 22-53 (1974); ANDREW KULL, THE COLOR-BLIND CONSTITUTION 113, 118-19 (1992); T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1076 (1991); William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 431-32 (1986); Karl M. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L.Q. 186, 199-201 (1959). On the canonicity of Holmes's *Lochner* dissent, see BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 79-80 (1921) ("It is the dissenting opinion of Justice Holmes, which men will turn to in the future as the beginning of an era."); RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 285-86 (1988) (referring to Holmes's *Lochner* dissent as "the greatest judicial opinion of the last hundred years"); Felix Frankfurter, *The Constitutional Opinions of Justice Holmes*, 29 HARV. L. REV. 683, 691 (1915) (describing Holmes's *Lochner* dissent as a "turning point" in constitutional history). As I illustrate in Part III, *infra*, the writings of people like Cardozo and Frankfurter help to create, rather than merely to recognize, the canonicity of the dissent.

15. 517 U.S. 620 (1996).

16. *See id.* at 623.

17. The *Brown* Court avoided any mention of the *Plessy* dissent even as it overruled *Plessy*, probably because it knew itself to be making a large statement and wanted, for pragmatic and prudential reasons, to appear to be making a narrow one. *See Brown v. Board of Ed.*, 347 U.S. 483, 490-95 (1954) (discussing *Plessy*, but failing to mention the dissent). Harlan's expansive language was not compatible with that goal, so Chief Justice Warren did not invoke Harlan's dissent. (When I refer to Harlan's language as expansive, I mean that Harlan's language was viewed as expansive by the time of *Brown*; as I argue in Part III, *infra*, the broad reading of Harlan that the *Brown* court ducked is in fact a substantial misreading of the *Plessy* dissent's original and narrower meaning.) No Supreme Court opinion cited the Harlan dissent's color-blind formula until Justice Douglas's concurrence in *Garner v. Louisiana*, 368 U.S. 157, 185 (1961), a case involving racially segregated lunch counters. By that time, seven years after *Brown*, the Court's racial program was clear, and the Harlan dissent was a natural rallying cry for liberal Justices. But the merger of the color-blind ideal with the Court's post-*Brown* jurisprudence was not stable.

In *North Carolina State Board of Education v. Swann*, 402 U.S. 43 (1971), the Court struck down an anti-busing statute requiring "color-blind" assignment of students on the ground that it impermissibly restricted the implementation of *Brown*, thus signalling that the law of *Brown* was not equivalent to Harlan's pronouncement in *Plessy*. *See id.* at 45-46. In affirmative action cases, liberal Justices made sure to emphasize that distinction. In *Bakke*, for example, Justice Brennan protested for himself and Justices White, Marshall, and Blackmun that "no decision of this Court has ever adopted the proposition that the Constitution must be colorblind." *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 336 (1978) (Brennan, J., concurring in part and dissenting in part). After *Bakke*, Justices espousing the conservative position on affirmative action questions marshalled the *Plessy* dissent in

place about Kennedy's invocation of Harlan's *Plessy* dissent. Dissenting in *Romer*, Justice Scalia contested the majority's interpretation of Harlan, but he did not attack the pedigree of the *Plessy* dissent.<sup>18</sup> He did not argue that the majority had cited a nonauthoritative text as if it were authority. Instead, he contested the substance of the text that the majority cited. In so doing, he implicitly acknowledged that the opinion has an authoritative cast.<sup>19</sup>

The use of a dissenting opinion as if it were a canonical authority indicates that the constitutional canon must be open to revision. After all, dissenting opinions could not possibly always have been authoritative. They must have been rejected positions at first and then at some later point found their way into a revisable canon. The fact that positions once rejected can sometimes become canonical raises the question of what distinguishes redeemed and redeemable rejected positions from rejected positions that never become authoritative. That question has been a popular one, and there is a profusion of literature on how and why certain dissents have become canonical.<sup>20</sup> Most of those writings seek to identify formal, procedural, or circumstantial factors that contribute to the redemption and canonization of dissents. Moreover, they seek those factors in the texts or circumstances of the dissents themselves, assuming them to be properties of their language, immanent ideas, or circumstances of authorship.

I suggest, however, that the reasons why certain dissents become canonical are of a different kind. The canonicity of a dissent is not a function of the dissent itself but of the later court or courts that redeem it and make it canonical. Earlier, I distinguished between canon and anti-canon on the straightforward grounds of normative approval: the difference between canonical constitutional texts and anti-canonical ones is that the former are applauded and the latter rejected. That principle encompasses dissents as well as majority

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their own favor. For example, in *Fullilove v. Klutznik*, 448 U.S. 448 (1980), in which the Court upheld a spending set-aside program for racial minorities, Potter Stewart opened his dissent by quoting Harlan and arguing that the majority was wrong for the same reasons that the *Plessy* Court was wrong. *See id.* at 522-23 (Stewart, J., dissenting). Douglas's early invocation of Harlan's dissent was part of that opinion's canonization, and Stewart's use reflected and reinforced its canonical status. Brennan's *Bakke* opinion, however, may be an even more powerful indicator that the *Plessy* dissent is canonical, because he felt the need to engage that text even though it did not support his position. *See infra* Part III.A.

18. *See Romer*, 517 U.S. at 650 (Scalia, J., dissenting).

19. *See id.*

20. *See infra* Part II.

opinions.<sup>21</sup> The canonization of dissent is largely a product of later courts' normative approval; the courts that revise the canon by redeeming dissents do so chiefly on the basis of their view of the substantive merits of those dissents. The more interesting question to ask, therefore, is not what it is about certain dissents that makes them redeemable but what it is that redeeming courts do when they make dissenting opinions into canonical authority.

Examining the process by which later courts canonize dissents provides a window on the relationship between the constitutional canon and the constitutional anti-canon and the way that particular texts sometimes move from one to the other. Canon and anti-canon, I suggest, are interdependent. Each canonical text is yoked to an anti-canonical text, and the canon and the anti-canon are composed of members of these yoked pairs. *Lochner* and *Plessy* provide two easy examples of yoked pairings: each is an anti-canonical case, and each is yoked to a canonical dissent. Moreover, the status of each half of the pair as canonical or anti-canonical is often unstable. Periodically, a constitutional actor like the Supreme Court rewrites the constitutional canon by reversing a yoked pair. The canonization (or, conceivably, de-canonization<sup>22</sup>) of dissents offers the clearest example of how the process operates. The canonization of Harlan's *Plessy* dissent, for example, illustrates the reversal of a yoked pair and a change in canon and anti-canon: the dissent gained authority and became canonical, and the majority opinion in *Plessy* was transformed from an authoritative statement of law into not just a dead letter but an anti-canonical text, a negative reference point from which later decisions would have to distance themselves.<sup>23</sup>

This Essay, then, uses the phenomenon of redeemed dissents to explore the structure of the constitutional canon. I suggest that the canon should be conceived of as a two-track organization of texts ordered above all by their substance. The two tracks are the canon and the anti-canon, and each canonical text is paired with an anti-

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21. It also applies to nonjudicial texts that qualify for the constitutional canon. See *infra* note 24.

22. It is possible for a once-canonized dissent to fall out of favor with the Court and to cease to be canonical.

23. Thus, Justice Brennan found it necessary to begin his argument for race-conscious decisionmaking in the *Bakke* case with a denunciation of *Plessy*. He knew that to argue for race-conscious decisionmaking was to risk association with *Plessy*, and he knew that being associated with an anti-canonical case like *Plessy* would condemn his own opinion. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 326-27 (1978) (Brennan, J., concurring in part and dissenting in part). Note, however, that Brennan also rejected the "color-blind" approach of Justice Harlan's dissent in *Plessy*. See *id.* at 336.

canonical one.<sup>24</sup> The text that a canonical text rejects does not necessarily disappear from the constitutional tradition, because the anti-canon, like the canon, is a set of texts that shape constitutional development.<sup>25</sup> If a yoked pair is reversed, an anti-canonical text can become a canonical one. Because every dissent announces a view rejected by and opposed to an authoritative statement of law, dissents are natural candidates for anti-canonical status and then, perhaps, for redemption through the reversal of yoked pairs.<sup>26</sup>

To illuminate that process, this Essay first explores the architecture of the constitutional canon to show its dual structure. The canon is composed not of a linear series of texts but of a series of

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24. As Balkin and Levinson stress, not every canonical or anti-canonical text is an opinion of the Supreme Court. See Balkin & Levinson, *supra* note 2, at 984-95, 1014-16. Whether or not all of the examples that Balkin and Levinson propose should actually be regarded as canonical, the basic point that certain nonjudicial texts are sufficiently important in the constitutional tradition to be called canonical is surely correct. For example, *The Federalist No. 10* is a canonical constitutional text. This point is important because it would be difficult to find anti-canonical partners for some canonical Supreme Court decisions if one only looked in the United States Reports. *Marbury* itself, a unanimous decision, has no obvious opposite number among Supreme Court opinions. It is, however, common for casebook editors to oppose *Marbury's* view of the role of the judiciary to that articulated in non-Supreme Court cases such as *Eakin v. Raub*, 12 Serg. & Rawle 330, 335 (Pa. 1825) (finding that a judge's oath to uphold the Constitution applies "only as far as that may be involved in his official duty"), as well as with Learned Hand's famous quip about finding it "most irksome" to be governed by "a bevy of Platonic Guardians," LEARNED HAND, THE BILL OF RIGHTS 73 (1958). See, e.g., GERALD GUNTHER, CONSTITUTIONAL LAW 16-18 (12th ed. 1991) (reprinting excerpts from Justice Gibson's dissent in *Eakin*); *id.* at 18-19 (describing the "Hand-Wechsler debate" on the legitimacy of judicial interpretation); STONE ET AL., CONSTITUTIONAL LAW 33 (2nd ed. 1991) (using *Eakin's* statement on judicial oaths to question Marshall's *Marbury* reasoning). To the extent that its counterforces are relatively weak, *Marbury* is more stable as a canonical text than decisions with more powerful anti-canonical partners.

A second point of clarification is also in order. The pairing of canonical with anti-canonical texts is a function of conceptual propositions rather than whole texts. A canonical text that contains more than one important proposition could, in principle, be paired with not just one anti-canonical text but with several, each pairing mapping a particular contest. Opinions can have multiple aspects, and the map of all pairings is not just a one-to-one function. Each individual pairing, however, can be thought of as an element in a dual canon whose component elements are text-pairings rather than entire paired texts.

25. One commentator recently pronounced that "[c]ontemporary constitutional theory rests on three premises. *Brown v. Board of Education* was correct, *Lochner v. New York* was wrong, and *Dred Scott v. Sandford* was also wrong." Mark A. Graber, *Desperately Ducking Slavery: Dred Scott and Contemporary Constitutional Theory*, 14 CONST. COMMENTARY 271, 271 (1997). That two of Graber's three premises are about repudiation rather than affirmation of major cases suggests the importance of anti-canonical texts as negative reference points shaping constitutional thought.

26. In a world that Balkin and Levinson might prefer, namely a world in which Supreme Court decisions played a smaller role in the composition of the constitutional canon, this natural candidacy of judicial dissents would be accordingly diminished. Under current conditions, Supreme Court dissents are easy candidates for the canon because they are printed in the United States Reports, the place from which most canonical texts are recruited.

yoked pairs of texts, and several of those texts are dissents. On that model, theories about how dissents are redeemed and become authoritative statements of the law attempt to explain how the pairs get reversed. The Essay next examines several such theories in order to show the inadequacies of the leading theories about why certain dissents are canonical. The major reason why those theories fall short, I suggest, is that they treat redeemability as if it were a property of the dissenting opinions themselves instead of a status conferred retrospectively by the later courts that reverse the yoked pairs. Existing theories try to explain the redeemability of certain dissents on the basis of the identity of their authors,<sup>27</sup> the number of Justices who joined them,<sup>28</sup> their literary merits,<sup>29</sup> the general philosophy they espouse,<sup>30</sup> or the issues upon which they were written.<sup>31</sup> All of these attempts seek to limit the class of redeemable dissents on the basis of some characteristic of the dissent identifiable at the moment it is written. I do not think that any of those theories is adequate. I will not, however, propose a rival limiting theory. Instead, I suggest that no such limiting theory explains which dissents can potentially be redeemed and which cannot.

The tendency to offer limiting theories about redeemable dissents may stem, in part, from the fact that there are relatively few points of data that such theories must be able to map, tempting theorists to think that a satisfactory theory should be easily achievable. Those few indispensable points of data, however, actually dispel most of the attempts made thus far. Any theory of canonical dissent must account for Holmes's dissent in *Lochner* and Harlan's dissent in *Plessy*. To those two I would add the set of free speech dissents by Justices Holmes and Brandeis.<sup>32</sup> There are other famous

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27. See *infra* text accompanying notes 95-97.

28. See *infra* notes 71-81 and accompanying text.

29. See *infra* notes 82-94 and accompanying text.

30. See *infra* Part II.B.

31. See *infra* Part II.C.

32. See *Gitlow v. New York*, 268 U.S. 652, 672-673 (1925) (Holmes, J., joined by Brandeis, J., dissenting) (rejecting the Court's judgment in upholding the defendant's conviction for criminal anarchy under New York law because the defendant's conduct failed the "clear and present danger" test); *Abrams v. United States*, 250 U.S. 616, 624-31 (1919) (Holmes, J., joined by Brandeis, J., dissenting) (disapproving of the defendants' convictions under the Espionage Act because their conduct failed to satisfy the Act's intent requirement); see also *Whitney v. California*, 274 U.S. 357, 372-80, 374 (1927) (Brandeis, J., joined by Holmes, J., concurring) (approving the judgment of the Court in affirming the defendant's conviction for criminal syndicalism under California law but noting that the "court has not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present; and what degree of evil shall be



and important dissents, but none of them rises to the level of those dissents.<sup>33</sup> Many of the extant theories of redeemed dissent cannot adequately explain those three indispensable dissents, or sets of dissents, and if they cannot explain those three, they certainly cannot supply satisfactory explanations for canonical dissent in general. That is the subject of Part II, which concludes not with a proposal for a better limiting theory about the redeemability of dissents, but rather with the claim that dissents become canonical as a function of later courts' estimations of the substantive merits of the dissenters' positions. That may seem like an embarrassing conclusion, both for the courts and for the academic mini-industry of theorizing the redemption of dissents, but it does seem to be the case. Canonization is above all else about substance, and that is true for dissents as well as other kinds of text.<sup>34</sup>

Limiting theories that seek to identify which dissents can become canonical by reference to some formal characteristic of the dissent err not only by underestimating the importance of substance but also by treating redeemability as a property of the dissent, present in that

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deemed sufficiently substantial to justify resort to abridgment of free speech"), *overruled in part by* *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (disagreeing with *Whitney's* conclusion that abstract advocacy of violence can be proscribed by law). The term "set of free speech dissents" is somewhat of a misnomer, as Brandeis's famed *Whitney* opinion is actually a concurrence. A number of commentators have affirmed the exalted status of these opinions. *See, e.g.*, PHILIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 365 (1984) (noting the fame of Holmes and Brandeis dissents); Yosai Rogat & James M. O'Fallon, *Mr. Justice Holmes: A Dissenting Opinion—The Speech Cases*, 36 STAN. L. REV. 1349, 1387 (1984) (noting that parts of the *Abrams* dissent have been characterized as "the greatest utterance of intellectual freedom by an American" (citing THE MIND AND FAITH OF JUSTICE HOLMES 306 (M. Lerner ed. 1943))). For more on the canonization of these opinions, see *infra* Part III.B.

33. Those three dissents, or, more precisely, sets of dissents, are the only major dissents that have obvious opposite numbers on the list of universally or nearly universally anthologized cases. In addition to the now anti-canonical majority opinions in *Plessy* and *Lochner*, that list also contains another case which stands for the repression of free speech, *Dennis v. United States*, 341 U.S. 494 (1951), which upheld convictions for subversive advocacy. *Dennis* appears in ten of the eleven casebooks surveyed, the same number as *Plessy*. *See* Balkin & Levinson, *supra* note 2, at 974 n.43. *Dennis*, *Lochner*, and *Plessy* are the only repudiated cases on Balkin and Levinson's list. *See id.*

34. Indeed, one criterion that does seem to limit which opinions can become canonical only underscores the preeminence of substance in that process. As I discuss at the end of Part II, the possibility that an opinion will become canonical is limited by the canon's structural need, or lack of need, for a canonical text. Where a yoked pair of canon and anti-canon have already been established on a given issue, there is less need for some other text to stand for one of those positions. *See infra* text accompanying notes 148-51. For example: *Dred Scott* is a reviled case, but the canon does not need Justice Curtis's dissent to play the role of canonical counterpart to the *Dred Scott* majority because another even more powerful constitutional text—the Fourteenth Amendment—already plays that role. This facet of canonization, of course, is all about the substance of the opinions in question. *See infra* Part II.D.

text at the moment it was written. Redeemability is better understood as a status conferred retrospectively by the later courts that restructure the constitutional canon by reversing yoked pairs. The yoked-pairs model implies that the possibility of redemption is built into the structure of dissents and of the constitutional canon. Reversing a set of yoked pairs involves a reimagining of the constitutional tradition. When such a reversal involves the redemption and canonization of a dissent, it often involves the reimagining of dissenting opinions and of the Justices who authored them. By reimagining a dissenting Justice and presenting him as a heroic figure, and by simultaneously reimagining the meaning of that Justice's dissenting opinions, courts reshape the constitutional canon and construct authorities on which they can then rely in cases before them. As I will illustrate in the third Part of this Essay, that is the process by which the Supreme Court in earlier decades established the authority of the great dissents of Justices Harlan, Brandeis, and Holmes.

### I. THE DUAL CANON

The content of the American constitutional canon is contested.<sup>35</sup> Some texts—like *Marbury*, *McCulloch*, and *Brown*—are canonical on virtually any understanding of the canon. Whether a still-controversial decision like *Roe v. Wade*<sup>36</sup> is part of the canon, however, is a question that different people will answer differently. Indeed, people are likely to answer differently based not only on their theoretical approach to canonicity but also on their substantive views on the merits of that decision, which in turn may be influenced by their political opinions on the question of abortion. Many

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35. At first glance, the idea that a canon can be contested seems internally contradictory, because one of the properties of a canon is that it is agreed upon. Really, however, there is no contradiction. The contest over the canon exists precisely because people know that canonical status commands wide assent for a given text, and the attempt to classify an opinion as inside or outside the canon is an attempt to give or deny it a privileged normative status. Rather than saying that the content of the canon is contested, perhaps one could say that *what the content of the canon should be* is contested, reserving the privileged adjective “canonical” for those cases whose status is beyond contest. But the lawyers, judges, and professors whose writings help decide whether a particular text will or will not be canonical do not usually speak in terms of whether cases should or should not be included in the canon. Instead, they write as if the canon is in fact a certain way, and the measure of their success is whether others adopt their position and thus help to realize their preferred view of the canon.

36. 410 U.S. 113 (1973) (holding that the right to privacy extends to a woman's right to seek an abortion during the first trimester of her pregnancy).

supporters of abortion rights consider *Roe* canonical, but the sitting Chief Justice writes of *Roe* as an anti-canonical case.<sup>37</sup>

Some contests over the content of the canon concern not only which opinions will be included but also the extent to which genres of text other than judicial opinions belong in the canon. The thrust of Balkin and Levinson's argument, for example, is that the canon is too heavily composed of Supreme Court opinions, that it should include more documents of other genres, and indeed that it should include certain things that are not documents at all.<sup>38</sup> These different ways of contesting the content of the canon raise different questions. Whether *Roe* is in the canon is (assuming that canonicity in the relevant sense entails normative approval) a question about the merits of *Roe*; whether Frederick Douglass's *Glasgow Address* on the United States Constitution and slavery should be part of the canon, as Balkin and Levinson suggest, is a question about how far the inclusion of non-traditional materials should go.<sup>39</sup>

No matter how people disagree as to the substantive content of the canon, however, they are likely to share an image of its form. Whether or not the canon includes *Roe* or the *Glasgow Address*, it is imagined as a collection, or better yet a concatenation, of individual texts arranged chronologically to reveal the development of American constitutionalism. The development might not be linear in a substantive sense—American constitutionalism has not consisted of a regular march from some starting point toward some single and ultimate end—but the “arrangement” of canonical texts does appear linear in a chronological sense. This image of the canon envisions texts hung along a timeline: 1776, 1789, 1791, 1803, and so on through a series of dates of texts whose canonical status is more or less contested. Each individual text bears some relation to its

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37. Chief Justice Rehnquist, who dissented in *Roe*, see 410 U.S. 113, 171-78, has compared *Roe* to *Plessy* and *Lochner*:

The “separate but equal” doctrine lasted 58 years after *Plessy*, and *Lochner*'s protection of contractual freedom lasted 32 years. However, the simple fact that a generation or more had grown used to these major decisions did not prevent the Court from correcting its errors in those cases, nor should it prevent us from correctly interpreting the Constitution here.

*Planned Parenthood v. Casey*, 505 U.S. 833, 957 (1992) (Rehnquist, C.J., concurring in the judgement in part and dissenting in part). By aligning *Roe* with *Plessy* and *Lochner*, Rehnquist seeks to present *Roe* as anti-canonical.

38. See Balkin & Levinson, *supra* note 2, at 984-94 (describing not just documents but also kinds of arguments, problems, narratives, and discursive examples as “canonical”).

39. See *id.* at 966.

predecessors, and each text is therefore linked along the continuum both forward and backward in time.

What is less obvious, however, is that each member of the canon is also linked to a text that stands *outside* the canonical set. Cases at law are always, or almost always, clashes between two opposing litigants, each urging the court to do a different thing, and every decision of a court is not just a decision to do X but a decision to do X *and not Y*. Every judicial holding implicitly makes us aware of the existence of an argument for the opposite holding. The argument that the court adopted and the argument that it rejected are bound together as what I am calling a “yoked pair,” and the judicial canon is composed not just of a series of free-standing texts but of a series of members of yoked pairs, each canonical text dragging its partner along with it. If the judicial canon is, in some sense, a linear concatenation of texts, then we can imagine the relationship between each canonical text and its opposing partner text as a lateral one.<sup>40</sup> The arguments that the canonical judicial opinions rejected comprise a set of texts, which we can imagine as parallel to (and as the mirror image of) the canonical texts themselves. Let us call that set the “anti-canon.”<sup>41</sup>

The most straightforward example of an anti-canonical text would be a famous dissent in a canonical case, a dissent that articulates a view that the Supreme Court rejected when it issued a canonical opinion.<sup>42</sup> In practice, this most straightforward example does not always exist. Many of the leading canonical opinions were issued without dissent, as *Marbury*, *McCulloch*, and *Brown* all illustrate. This does not mean that the canonical opinions in those cases are not members of yoked pairs: it merely means that the relevant partnership does not take the most obvious form. Given the

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40. This does not imply that a given text can appear only once, paired with only one opposing text. If a text has more than one constitutionally significant aspect, it could, in principle, be paired with more than one anti-canonical opposing text. *See supra* note 24.

41. There is a second possible sense of “anti-canon,” i.e., the set of the most important constitutional texts that we, the retrospective constructors of constitutional history, regard as normatively repulsive. It is possible, however, that the two senses are actually one and that the content of the constitutional anti-canon is the same no matter which definition we use. After all, the canon and the anti-canon are mutually constructing, so cases that would be anti-canonical in this second sense might call into being their canonical opposite numbers. It might then be difficult to know whether a particular text was anti-canonical because it is opposed to an antecedently canonical text or because it was sufficiently repulsive on its own merits to canonize its partner.

42. Such dissents are the mirror image of the dissents in *Lochner* and *Plessy*, which are straightforward examples of *canonical* texts articulating views that the Court rejected when it issued *anti-canonical* opinions.

adversarial nature of common-law adjudication, it is always possible to identify a rejected argument in a court's opinion. Moreover, it should not be necessary to hunt through obscure tracts to find the anti-canonical partner for a unanimous canonical decision. Canonical opinions are canonical partly because of the importance of the issues they decide, and the more important the issue, the more likely it is that the opinion's opposite number can be found in a prestigious form. For example, the Supreme Court's opinion in *Brown* is easily paired with the majority opinion in *Plessy*, the opinion that the *Brown* court knew itself to be rejecting. The significance of *Brown* is tied to the significance of *Plessy*; the two opinions are a yoked pair, one canonical and one anti-canonical.

The fact that *Brown* and *Plessy* are paired immediately raises four points about the construction of yoked pairs. First, there is not necessarily a one-to-one correspondence between anti-canonical texts and canonical ones. The Court's opinion in *Plessy*, for example, could be paired with two different texts: *Brown* is one, and Justice Harlan's dissent in *Plessy* is the other. This is a variation on the idea, mentioned earlier, that a single text can have multiple partners if it has more than one constitutionally significant dimension.<sup>43</sup> There, different aspects of the same text are paired with appropriate partners; here, the same aspect of a text is paired with multiple appropriate partners.

Second, yoking is a function of the broad significance that later readers impute to a pair of texts and is not confined by the narrowly-crafted holdings that opinions themselves state. In one sense, and by its own terms, *Brown* rejected the doctrine of separate-but-equal only in the context of public schooling and rejected *Plessy* only to the extent that the earlier decision contained language contrary to the specific findings of *Brown*.<sup>44</sup> But every modern lawyer knows that the significance of *Brown* is the complete repudiation of *Plessy*, as the Supreme Court has consistently acknowledged in later cases that describe *Brown* as having overruled *Plessy simpliciter*.<sup>45</sup> It is that revised understanding that defines the relationship between *Plessy* and *Brown* and makes them a yoked pair.

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43. See *supra* note 24.

44. See *Brown v. Board of Educ.*, 347 U.S. 483, 494-95 (1954).

45. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 864 (1992); *Patterson v. McLean Credit Union*, 491 U.S. 164, 191 (1989) (Brennan, J., concurring and dissenting); *Oregon v. Mitchell*, 400 U.S. 112, 133 (1970) (Black, J., announcing the judgements of the Court and presenting a separate opinion with respect to those judgements).

Third, the two texts in a yoked pair need not have been written at the same time. There is, to be sure, some sort of temporal link between them, but that link is in the moment when they were set against each other, not necessarily in the moment when they were written. Texts are paired not because each was written for the express purpose of opposing the other but because there exists a clear dialectic of opposition between them and because the Court (or some other constitutional actor) judged the contest between their rival positions, blessing one and rejecting the other in a single action. Yoking, like canonicity, is a function of later readers of the judicial tradition. The institutional coupling of majority and dissenting opinions in a single case would seem to create a yoke that would be very hard to unmake subsequently, but the power of later reconstructions of the judicial tradition to rearrange the pattern of yokings is sometimes so strong that it decouples majorities from their own dissents. *Dred Scott v. Sanford*<sup>46</sup> provides a good illustration: the majority opinion is surely anti-canonical,<sup>47</sup> but Justice Curtis's dissent in that case is largely forgotten.<sup>48</sup>

Fourth, yoked pairs are reversible. *Plessy* began life not as an anti-canonical text but as an authoritative statement of the law, the very opposite of an anti-canonical text. In 1896, *Plessy* was a decision

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46. 60 U.S. 393 (1857).

47. See, e.g., Balkin & Levinson, *supra* note 2, at 976 (stating that *Dred Scott* has little continuing significance except as “a symbol continually to be vilified”); PAUL W. KAHN, LEGITIMACY AND HISTORY 46 (1992) (“In the history of constitutional law, *Dred Scott v. Sanford* is at least as infamous as *Marbury* is famous.”). In explaining *Dred Scott*'s status by comparison to *Marbury*'s, Kahn's comment suggests the dual structure of the constitutional canon. Moreover, his intimation that *Dred Scott* may be *more* infamous than *Marbury* is famous raises the possibility that the anti-canon may sometimes be even more powerful than the canon as a force shaping constitutional law. Cf. *supra* note 25. Thus, Balkin and Levinson's comment should not be taken to mean that the significance remaining to *Dred Scott* is trivial. On the contrary, a “vilified” symbol—i.e., a member of the anti-canon—can be an important influence upon the development of constitutional law.

48. Some commentators do place Justice Curtis's dissent in *Dred Scott* among the great dissents. See, e.g., Akhil Reed Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 MICH. L. REV. 203, 216 (1996) (citing the Curtis dissent as authoritative); Earl M. Maltz, *The Unlikely Hero of Dred Scott: Benjamin Robbins Curtis and the Constitutional Law of Slavery*, 17 CARDOZO L. REV. 1995 (1996); ZoBell, *supra* note 14, at 198. Nevertheless, Curtis's dissent does not really have the stature of Holmes's, Harlan's, or Brandeis's. Curtis is not one of the great figures of the constitutional tradition, and most well-read constitutional lawyers would be hard pressed to quote a single sentence from his *Dred Scott* dissent. Except for Justice Scalia's reference to the *Dred Scott* dissent in his separate opinion in *Casey*, see 505 U.S. 833, 984 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part), no Supreme Court opinion has cited that dissent in nearly fifty years: the preceding reference occurred in the obscure case of *American Fire and Casualty Co. v. Finn*, 341 U.S. 6, 18 n.17 (1951). The heyday of the Warren Court's rulings on race issues and the contentious years thereafter passed without a single mention of Justice Curtis.

of the majority of the Supreme Court, and it remained authoritative for more than fifty years. By rejecting *Plessy*, *Brown* stripped *Plessy* of its authoritative status. But it also did more than that. Because *Brown* is a canonical decision, it transformed *Plessy* into an anti-canonical text: it made *Plessy* into a negative reference point rather than a mere irrelevance. In so doing, it reversed the yoked pair of *Plessy*'s majority and dissent, made the authoritative anti-authoritative and set the stage for Harlan's opinion to become canonical.<sup>49</sup> The *Brown* opinion did not refer to Harlan's dissent, but *Brown*'s transformation of *Plessy* into an anti-canonical opinion made it likely, if not inevitable, that Harlan's dissent would come to attain the canonical status that Kennedy traded on in *Romer*.<sup>50</sup> One half of a yoked pair is authoritative and one is not; if the issue addressed is sufficiently important and the case sufficiently central to how later lawyers understand the issue, one half is canonical and the other is anti-canonical. But which is which is not necessarily stable. Courts can restructure the shape of the law that preceded them by reversing the halves of a yoked pair, making the canonical anti-canonical and vice versa.

Because every dissent comes as part of a bundle, attached to the majority opinion with which it disagrees, dissents are presumptively

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49. If, prior to 1954, *Plessy* was important and authoritative enough to be considered canonical, then *Brown*, by rejecting *Plessy*, reversed canon and anti-canon by demoting *Plessy* and setting the stage for the elevation of Harlan. Alternatively, if *Plessy* was not canonical before 1954, *Brown* still reversed a yoked pair, just not one that was important enough to have been canonical. And, in that case, it did something else as well: it elevated the yoked pair of *Plessy* and Harlan to the level of canon and anti-canon. As a yoked pair, the two opposing texts rise and fall together on the scale of importance. If Harlan's dissent is among the most significant texts in the constitutional tradition, it is in part because the position with which it struggled—the *Plessy* position—was also extremely significant.

Whether *Plessy* can be said to have been canonical before 1954 depends not upon its authority—it was clearly authoritative—but upon the importance it held, because a canonical text must be not only authoritative but also of the first order of importance. It is probably safe to say that *Plessy* was not considered important enough to be canonical in 1896: for all its later notoriety, *Plessy* attracted relatively little attention when it was handed down. The *New York Times* report on the *Plessy* decision was printed on an inside page, as part of its regular column on news about railroads. The *Times* account, which was no more muted than that of most other newspapers other than those with specifically black readerships, “sandwiched [*Plessy*] between reports of another Supreme Court railway decision, which overturned an Illinois law ordering minor re-routing of interstate passenger trains, and a request by the receivers of the Baltimore and Ohio for authority to issue new improvement bonds.” CHARLES A. LOFGREN, *THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION* 197 (1987). The fact that *Plessy* was not important enough to be canonical in 1896, however, does not mean that it could not have become canonical by 1930 or 1950.

50. See *Romer v. Evans*, 517 U.S. 620, 623 (1996).

members of yoked pairs.<sup>51</sup> Once we see the reversal of yoked pairs as a way that the canon of authority is revised and reconstructed, it becomes easy to see dissents as natural candidates for being made authoritative and even canonical. But not every yoked pair can be reversed with equal ease. Perhaps the easiest pairs to reverse are those that address relatively unimportant issues. If the Supreme Court rules 5-4 that a given question should be resolved with resolution A and then a short time later rules 5-4 in favor of resolution not-A, we may regret and even criticize the inconsistency, but as long as the difference between A and not-A is not of deep interest to most people, the reversal can be achieved with relatively little fuss. Reversals like these, however, are unlikely to canonize dissents—or any other texts—precisely because they are of only peripheral interest. The great canonical dissents concern issues of deep and widespread concern: racial equality,<sup>52</sup> the welfare state,<sup>53</sup> and freedom of speech.<sup>54</sup> A court's ability cavalierly to reverse a yoked pair decreases as the issues involved become more weighty. That is why people who have sought to explain the redemption of certain great dissents have tried to find some special element in those dissents that makes them especially redeemable. After all, the assumption goes, a later court cannot simply redeem any dissent it chooses. There must therefore be something about certain dissents which makes them and not others the ones to be redeemed.

Many theories have been offered for what that special quality might be, and I will discuss several of them in Part II, below. For

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51. Contrast Kahn's statement that "[t]he dissent is tacked on to the report of the case: it appears after the opinion and after the judgment has been rendered." KAHN, *supra* note 1, at 114. Rather than conceiving of "the opinion" as the majority opinion and the dissent as something that is tacked on afterwards, after the real work is done, the yoked pairs model presumptively sees the majority and dissenting opinions as parts of a single text—the whole opinion—and as transmitted together. That presumption is, of course, overcome in extreme cases like that of Curtis's *Dred Scott* dissent, in which larger forces in the construction of the canon strip away the dissent and yoke a majority opinion to a wholly new partner.

I ignore for the moment the complications involved in cases in which a court produces more than two opinions. I will state briefly, however, why I believe it safe to do so. It is true that in a formal sense a dissenting opinion is not uncomplicatedly "paired" with the majority opinion if there are other dissents or concurrences, because there exists not just a bipolarity but a multitude of texts. In most cases, however, the text with which a separate opinion most importantly contrasts is the opinion of the court. That is especially so with regard to cases that are later overruled and their dissents made authoritative, and that reversal is the process with which I am here most concerned.

52. See *Plessy v. Ferguson*, 163 U.S. 537, 552-64 (1896) (Harlan, J., dissenting).

53. See *Lochner v. New York*, 198 U.S. 45, 74-76 (1905) (Holmes, J., dissenting).

54. See, e.g., *Abrams v. United States*, 250 U.S. 616, 624-31 (1919) (Holmes, J., dissenting); *Gitlow v. New York*, 268 U.S. 652, 672-73 (1925) (Holmes and Brandeis, JJ., dissenting).



now, I will briefly mention one such theory that, though not ultimately a satisfactory explanation, seems particularly compelling, and I will suggest that its limits point to something important about the way that the redemption of dissents actually does function. The theory I have in mind is the theory of the Heroic Justice as Great Dissenter. A great dissent, this approach holds, is a dissent by a great Justice, and the redemption and canonization of a dissent relies upon the special status of the Justice who was its author.<sup>55</sup> The great Justice hypothesis has initial plausibility. Harlan, Holmes, and Brandeis were great Justices, and, in their opinions, authorship often seems to become authority. A question immediately arises, however, as to why those Justices are considered great in the first place. Is it not at least partly because they wrote great opinions, including, and perhaps especially, great dissents? If that is so, as it surely is, then the great Justice theory risks circularity.

Or perhaps not exactly circularity. Perhaps instead the heroism of the dissenting judge and the greatness of his dissenting opinion are constructed in tandem, each supporting the other. After all, the role of the dissenter is conducive to heroism. Heroes have adversaries; it is in the struggle with adversity that their heroism is established. Every dissent comes packaged with—yoked to—a specific adversary, which supplies it with the raw materials of heroic struggle. To be sure, not every exchange between a majority and a dissent is heroic or even interesting. But when the question at stake is important and the exchange of arguments cogent, the opportunity is available for the kind of struggle out of which heroes are made. A Justice who dissents thereby makes himself eligible to become a hero.<sup>56</sup> It is true, of course, that this observation moves us no closer, or virtually no closer, to identifying certain dissents as more likely than others to be redeemed. Because the elements conducive to heroism are built into the role of dissenter, they apply more or less as well to every instance of dissent. Noting the relationship among dissent, adversity, and heroism does, however, advance our understanding of how and why dissents can be redeemed and made authoritative. Building on the idea that great dissents are written by heroic Justices, we note that every dissenter has what every hero needs: an adversary.

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55. See KAHN, *supra* note 1, at 106 (noting that the authority of a dissent is tied to the reputation of the judge and that a judge's reputation can strengthen from writing powerful dissents).

56. See BERNARD SCHWARTZ, *THE SUPREME COURT: CONSTITUTIONAL REVOLUTION IN RETROSPECT* 359 (1975) (arguing that since Holmes successfully built a heroic reputation on dissents, a great many later judges write dissents because they want to attain that heroic status).

The adversarial relationship between dissenter and majority also helps place dissenting opinions in casebooks, a vitally important forum for potentially canonical legal texts. Thus, Balkin and Levinson speak of a “pedagogical canon” created by casebook editors as one of three kinds of constitutional canon, and at least implicitly they recognize the role that adversity between paired texts plays in the formation of that canon.<sup>57</sup> A case in which different opinions state opposing points of view generally makes better teaching material than a case in which only one point of view is stated because the rival opinions highlight the contested issues and show what is at stake in the case or what is not obvious about the resolution. The struggle between majority and dissent is replayed each time a student confronts the two opposing texts and is challenged to decide which argument is the better one. Moreover, the fact that cases with dissents make good teaching material can help to canonize majority opinions in cases with dissents as easily as it can help to canonize the dissents in those cases.<sup>58</sup> Part of the fame of

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57. Consider their treatment of Douglass’s *Glasgow Address*, their leading example of a text not now considered canonical but which they suggest should be included in the constitutional canon. See Balkin & Levinson, *supra* note 2, at 1021. Douglass’s argument about the relationship between slavery and the Constitution, they say, should be included in the pedagogical canon in “juxtaposition” to Chief Justice Taney’s opinion for the Court in *Dred Scott*. See *id.* at 966, 1021. Balkin and Levinson use the appropriate and telling term “juxtaposition” at both of the pages cited, alluding to the yoked-pair relationship between canon and anti-canon. In proposing to include Douglass in the canon, they are searching for a canonical text to pair with the anti-canonical *Dred Scott* opinion. Presumably, they are not satisfied with Justice Curtis’s dissent in the very case at issue and seek some stronger text to play the role.

Balkin and Levinson distinguish the pedagogical canon from two other kinds of canon, which they call the “cultural literacy canon” and the “academic theory canon.” The pedagogical canon is composed of the materials that should be taught in constitutional law courses, the cultural literacy canon is composed of the materials that “any educated person should be aware of in order to participate in serious discussions about American constitutional development,” and the academic theory canon is composed of those materials with which serious legal academics must be conversant and which their theories must take into account. See *id.* at 975-76. Notably, they do not include a “legal authority canon” composed of those texts which exercise the greatest influence over the decisions of courts applying constitutional law. According to Balkin and Levinson, pedagogical canons in the liberal arts are closely tied to academic theory canons in the same fields, but that link is not as strong in the law. See *id.* at 981. Without implying that law students should not learn the materials in the academic theory canon, I suggest that the canon to which the pedagogical canon in law is, or ought to be, closely tied is the one that Balkin and Levinson neglect: the canon of legal authority.

58. Consider, for example, the different statuses that *Lochner*, *Plessy*, and *Dred Scott* hold within the pedagogical canon as reflected by inclusion in casebooks. Those cases are all normatively reviled, and it is unlikely that *Dred Scott* is the least hated of the three. See *supra* note 47. But *Lochner* and *Plessy* appear on the list of the most anthologized cases, and *Dred Scott* does not. See Balkin & Levinson, *supra* note 2, at 974 n.43. I suspect that that difference exists in part because the decision to

Judge Cardozo's majority opinion in *Palsgraf v. Long Island Railroad Company*,<sup>59</sup> to use an example not drawn from constitutional law, may be traceable to the fact that the case also contains a cogent statement of an opposing view in a dissent by Judge Andrews. That juxtaposition makes *Palsgraf* a good vehicle for presenting proximate cause as not just a doctrine but an issue.<sup>60</sup> But the two opinions are a yoked pair and are, in principle, reversible. As we know them, Cardozo's opinion is canonical and Andrews's anti-canonical, but a regime that adopted Andrews's position on the issue of proximate cause could reverse their statuses, making Andrews into a heroic dissenter. The relevant texts are already present as judicial canon and anti-canon, and the continued teaching of the two as a pair preserves the possibility of their inversion.

What links the Cardozo and Andrews opinions in *Palsgraf* is what links the two halves of any yoked pair of judicial texts: the substance of the issue they address. Where the members of a yoked pair are the majority and the dissent in a single case, the substantive connection is obvious, because the two texts address similar issues and the same set of facts. Where the members of a yoked pair are the majority opinions of two separate cases—as is the case with *Brown* and *Plessy*—they address different sets of facts, but we can capture the relationship between them by saying that the two opinions have opposite holdings. We do not usually think of dissents as having holdings, but it might help to understand the process of redeeming dissents and inverting yoked pairs to see what would happen if we applied the terminology of holdings to dissents as well as majority opinions. Generally, we consider a dissent to be no holding and all dicta, and we think that precisely because a dissent governs no outcome. Like dicta, it has persuasive authority only. But when a dissent is redeemed and made into an authoritative statement of the law, perhaps we can begin to speak of it as having a holding.

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print certain anti-canonical texts is driven by the printing of their canonical partners. Casebook editors overwhelmingly wish to print the Holmes and Harlan dissents, and once they are going to print the dissents, they find it natural to include the majority opinions as well. The dissent in *Dred Scott*, however, is not of sufficient stature that its omission would give a casebook editor pause. This is not to say that *Dred Scott* is not an anti-canonical case. It is only to suggest that the slight difference which exists in the anthologization rates of those three great anti-canonical cases is due to the difference in the statuses of their dissents. In casebooks, the yoking of majority and dissent in a single case creates a stronger pairing than some other kinds of yoked pairs.

59. 162 N.E. 99 (N.Y. 1928).

60. See RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 46 (1990).

There are at least two possibilities for what that holding might be. The first is that the holding is the mirror image of the holding of the majority opinion from which it dissented. If the majority held X, then this model would take the holding of the dissent to be not-X. Another possibility, however, is that the holding of a dissent is determined by the use to which it is put in the case in which it is redeemed. The holding of the majority may have been X, but the holding of the dissent is Y, because later cases arising in later circumstances will see Y as the significant aspect of the dissent or will cite the dissent for the proposition Y.

These two possible holdings—not-X on one hand, and Y on the other—will sometimes be coextensive, but they need not always be. Indeed, it is precisely because not-X and Y are not always the same that courts sometimes continue to cite dissents even after the case in which the dissent was originally written has been overruled. Harlan's *Plessy* dissent provides one example: modern courts sometimes cite the *Plessy* dissent even though *Brown* exists and could be cited, because the holding of *Brown* is not the same as the "holding" of Harlan's *Plessy* dissent.<sup>61</sup> For another example, consider the modern Supreme Court's treatment of Justice Brandeis's famous dissent in *Olmstead v. United States*,<sup>62</sup> in which the Court held that wiretapping was not within the coverage of the Fourth Amendment.<sup>63</sup> For many years, the Court cited the *Olmstead* dissent for the broad proposition that the Constitution conferred what Brandeis called "the right to be let alone."<sup>64</sup> Then, in *Katz v. United States*, the Court expressly overruled *Olmstead*.<sup>65</sup> If the holding of a dissent were confined to the negation of the majority from which it dissented, then the explicit overruling of *Olmstead* might end the usefulness of citing Brandeis's dissent. At the very least, later courts should cite *Katz* for the same

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61. See *supra* note 17.

62. See *Olmstead v. United States*, 277 U.S. 438, 471-85 (1928) (Brandeis, J., dissenting).

63. See *id.* at 466.

64. See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 479-80 (1966) (quoting *Olmstead*, 277 U.S. at 485 (Brandeis, J., dissenting)); *Griswold v. Connecticut*, 381 U.S. 479, 494 (1965) (quoting *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting)).

65. See *Katz v. United States*, 389 U.S. 347, 353 (1967) (establishing the "reasonable expectation of privacy" test for the Fourth Amendment). I note here that the law journal practice of providing parenthetical explanations of the holdings of cases itself exemplifies the retrospective construction of holdings: the preceding parenthetical explanation of *Katz* is entirely standard, but the "reasonable expectation test" actually appeared only in Justice Harlan's concurring opinion in that case. See *id.* at 361 (Harlan, J., concurring). That test is the holding of *Katz*, and the one-line redaction of its significance, because it is for that proposition that later cases have cited it.

proposition for which they could (superfluously) cite Brandeis. In fact, however, the Court since *Katz* has not only continued to cite Brandeis's *Olmstead* dissent but routinely cites that opinion for a much broader proposition than that established by *Katz*. The *Katz* Court explicitly declined to hold that the Fourth Amendment confers a general right to privacy,<sup>66</sup> but the *Olmstead* dissent continues to be cited in support of such a broader right.<sup>67</sup> The holding of the *Olmstead* dissent is not confined by the holding of *Katz*.

That a dissent can be cited for a proposition other than that which would simply reverse its accompanying majority opinion suggests that redeeming courts can construct the holdings of the dissents they redeem. The holdings are not confined by the facts of the cases in which the dissents were first written. Moreover, redeeming courts sometimes affirmatively "misread" dissents, using them to support meanings not foreclosed by their texts but also not intended by their authors.<sup>68</sup> Holdings, I suggest, are retrospectively constructed. This may be true of all holdings, not just the holdings of dissents, but it seems especially true in the case of dissents because dissents have no holdings at all until they are redeemed.<sup>69</sup> Indeed, it is not only the holdings of dissents that are retrospectively constructed. Within broad limits, the greatness of a dissent, the heroism of its author, and finally the status of a dissent as canonical or anti-canonical are all retrospectively constructed by the courts that read and misread the judicial tradition that preceded them. And whether later courts reverse earlier yoked pairs, making heroes out of

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66. See *Katz*, 389 U.S. at 350 ("[T]he Fourth Amendment cannot be translated into a general constitutional 'right to privacy.'").

67. See, e.g., *Roe v. Wade*, 410 U.S. 113, 152 (1973) (citing *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting)); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (quoting *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting)). I am indebted to Anita Krishnakumar for this point.

68. The idea of "misreading" or "strongly misreading" a text, or a previous author, belongs originally to Harold Bloom and literary theory. See generally HAROLD BLOOM, *A MAP OF MISREADING* (1975). According to Bloom, readers can never fully know the true meaning of a text; the murkiness and complexity of authorial intent, the shifting prism of historical circumstance, the inevitability of a reader's reading his or her own idiosyncracies into the text, and other factors as well preclude the possibility of a full true reading. See *id.* at 3-4. Therefore, every reading is a "misreading." See *id.* Some misreadings, however, are better than others. Bloom especially admires what he calls a "strong misreading," in which a later author overcomes his "anxiety of influence," that is, his feeling of being authored by his predecessors, by surpassing the predecessors and giving his meaning to a previous text. See HAROLD BLOOM, *THE ANXIETY OF INFLUENCE: A THEORY OF POETRY* 5, 14-15 (1973). Other authors have appropriated Bloom's idea and applied it to philosophy and politics. See, e.g., RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* 20-43 (1989).

69. See *infra* notes 152-57 and accompanying text.

dissenters and canonical texts out of dissents, has a great deal to do with the same element of those dissents that pairs them with particular adversaries in the first place: their substance, the substance that can be made into a holding.

## II. THE MANY THEORIES OF REDEEMED DISSENT

Many people have tried to account for the redemption of dissents based on criteria other than their holdings. I will here discuss three kinds of theories of the redeemed dissent and explain briefly what their weaknesses are, and then I will discuss two approaches that find the key to redeemed dissent in the substance of the opinions. I will call the first three kinds of theories “formal theories,” “theory theories,” and “issue theories.” By “formal theories,” I mean theories that try to account for the greatness and redemption of dissents without reference to the content of those dissents. By “theory theories,” I mean theories that present the redeemed dissenters as having espoused some general abstract philosophy that accorded with the ethos of a later time—the time when they were redeemed. By “issue theories,” I mean theories that hold that not all judicial issues lend themselves equally well to great dissents and that the greatest of the redeemed dissents were written about issues that lend themselves best to that role. Finally, I will consider two types of “substance theories.” The first suggests that dissents written on the political left of an issue are more likely to be redeemed than those written on the political right. That version maps the greatest redeemed dissents in the judicial canon as it currently exists, but I believe that to be largely a matter of coincidence. In principle, redeemed dissents could argue for the right or the left side of a question. A better version of the substance theory, I think, is much more bare: dissents are redeemed for their particular holdings.<sup>70</sup>

### *A. Formal Theories*

Justice Scalia has described a formal theory of redeemed dissent according to which the most likely kind of dissent to be vindicated is

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70. The differences between “issue theories” and “substance theories” as I am using those terms is comparable to the difference in First Amendment law between the concept of “content” and the concept of “viewpoint.” The former refers to the subject matter being discussed, and the latter refers to the position that a speaker takes on the subject in question.

a dissent in a case in which the Court divides 5-4.<sup>71</sup> One recent example of such a vindication might be found in *Adarand Constructors, Inc. v. Peña*.<sup>72</sup> The Court's decision in that case to sustain an equal protection challenge to a minority-preference program in government contracting substantially overturned *Metro Broadcasting, Inc., v. FCC*,<sup>73</sup> a case in which the Court had upheld such a program 5-4. This theory, however, does not prove very much. Scalia's contention about 5-4 cases is surely correct if we count as a vindication any occasion on which the Court espouses a position previously announced in dissent, but the reason why 5-4 dissents are often "vindicated" is not at all obscure. Overruling a 5-4 decision requires less change on the Court than does overruling any other kind of decision. One changed mind or one new appointment is all that is necessary.<sup>74</sup> It does not seem terribly illuminating to answer the question, "when is the Court most likely to change its mind?" with the reply, "when the vote is closest to begin with." To present such changes of mind as a theory about the role of dissents might be to overestimate the importance of dissents in that process of change. It is necessarily the case that a dissent will appear to be vindicated whenever the Court overrules a 5-4 decision, assuming that the four minority Justices in that decision wrote at least one dissenting opinion. But the fact that 5-4 decisions are the most likely to be overruled does not tell us much about the role of redeemed dissent in the overruling.

Perhaps a more important weakness in the 5-4 theory, for present purposes, is that it does not distinguish between dissents that are vindicated and dissents that are not only vindicated but also canonized. The vindication of a dissent or the overruling of a Supreme Court decision constitutes the reversal of a yoked pair of judicial texts, but not every yoked pair is on the level of canon and anti-canon. Indeed, many kinds of cases in which the 5-4 overruling scenario is most likely to occur are among the least likely to rise to

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71. See Antonin Scalia, *The Dissenting Opinion*, 1994 J. SUP. CT. HIST. 33, 39.

72. 515 U.S. 200 (1995).

73. 497 U.S. 547 (1990).

74. Thus, *Adarand* is due not to the power of the *Metro Broadcasting* dissent but to the appointment of Clarence Thomas to replace Thurgood Marshall. The *Adarand* majority is simply the *Metro Broadcasting* minority—Rehnquist, O'Connor, Scalia, and Kennedy—with Thomas added. Of course, that makes *Adarand* itself a 5-4 decision, a fact that might give its dissenters some comfort. If it does, however, it is surely because they hope that a new appointment or a changed mind could make the pendulum swing back, not because 5-4 dissents have any special intrinsic power.

the level of canonicity because a simple change of mind on the Court is more likely on issues of little importance than it is on fundamental ones: it is easier to flip-flop when less is at stake. To evaluate whether the 5-4 hypothesis works not just to explain reversals but also to explain canonical reversals, we should ask not whether dissents that initially garnered four votes are more or less likely than others to be vindicated but whether the most clearly canonical dissents were issued in 5-4 decisions. The answer to that question makes the hypothesis look weak. *Lochner*, to be sure, was a 5-4 decision.<sup>75</sup> But Harlan's opinion in *Plessy* was a solo dissent,<sup>76</sup> the farthest possible from the 5-4 scenario, and the Holmes and Brandeis dissents in the free speech cases do not fit a 5-4 pattern either.<sup>77</sup> A theory that explained why some dissents become canonical would certainly have to explain these three dissents (or, to cover the free speech cases, sets of dissents), and the 5-4 hypothesis does not.

If the 5-4 hypothesis does not work, one might wonder about the opposite idea: that the dissents most likely to become canonized are solo dissents. Harlan's *Plessy* dissent fits this model.<sup>78</sup> Four Justices voted against the majority in *Lochner*, but Holmes's dissent was for himself alone; Justices White and Day joined the less famous dissent of Justice Harlan.<sup>79</sup> One could even argue that there is a special appeal to the solo dissent, because the heroism of the dissenter is at its greatest when the dissenter stands alone.<sup>80</sup> This explanation, however, is simplistic. The Holmes and Brandeis dissents in the free speech cases were not solo dissents,<sup>81</sup> and it seems unlikely that the New Deal Court would not have celebrated the Holmes dissent in

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75. See *Lochner v. New York*, 198 U.S. 45 (1905); *id.* at 65-74 (Harlan, J., joined by White & Day, JJ., dissenting); *id.* at 74-76 (Holmes, J., dissenting).

76. See *Plessy v. Ferguson*, 163 U.S. 537 (1891) (Brown, J., joined by Fuller, Field, Gray, Shiras, White, & Peckham, JJ.); *id.* at 552-64 (Harlan, J. dissenting).

77. See *Abrams v. United States*, 250 U.S. 616 (1919) (Clarke, J., joined by White, McKenna, Day, Devanter, Pitney & McReynolds, JJ.) (upholding convictions of anarchists for publishing subversive materials); *id.* at 624-31 (Holmes, J., joined by Brandeis, J., dissenting); *Gitlow v. New York*, 268 U.S. 652 (1925) (Sanford, J., joined by Taft, Devanter, McReynolds, Sutherland, Butler & Stone, JJ.); *id.* at 672-73 (Holmes, J., joined by Brandeis, J., dissenting).

78. See *supra* note 76.

79. See *supra* note 75.

80. In an image that surely trades on the image of the heroic dissenter as standing alone, Cardozo compared the dissenting judge to a "gladiator making a last stand against the lions." BENJAMIN N. CARDOZO, *Law and Literature*, in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* 338, 353 (Margaret E. Hall ed., 1947).

81. See *supra* note 77.



*Lochner* if either of the two more obscure Justices who joined with Harlan had cast his vote with Holmes instead.

A more interesting set of contentions focuses not on the number of Justices who subscribed to a given dissent but on the literary qualities of the dissenting opinion's text.<sup>82</sup> There seems to be a general consensus that dissents are more given to rhetorical and literary performances than are majority opinions: Cardozo wrote that judges writing majority opinions tend to be cautious, forever fearing the consequences of an ill-advised turn of phrase that some later court may read as a careful statement of law. Dissenters have no such worries. What the dissenting judge writes, Cardozo explains, is not the law, so he can give himself more latitude when writing.<sup>83</sup>

The conventional wisdom about dissents being more literary than majority opinions may nevertheless be overstated.<sup>84</sup> Part of the reason why we think of dissents as being well written is that we only read the good ones. Because dissents do not state the law, it is unnecessary to read or remember the dissents in most of the cases that one reads. Our impressions of dissents as a genre are disproportionately influenced by a small number of opinions and, to the extent that those opinions do display literary qualities surpassing those of the average majority opinion, we tend to think of dissents as particularly literary forms.

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82. See, e.g., Sanford Levinson, *The Rhetoric of the Judicial Opinion*, in *LAW'S STORIES* 187 (Peter Brooks & Paul Gewirtz eds., 1996) (stressing the importance of rhetoric in law and in legal opinions).

83. See CARDOZO, *Law and Literature*, *supra* note 80, at 353. Of course, the intended status of a dissent as "not the law" is more complex than Cardozo's dictum indicates. A judge writing a dissent often hopes that his text will indeed become the law one day, and such a judge is every bit as concerned with how later judges will read his opinion as is a judge who writes a cautious decision for the majority of a court. The difference is that the judge who writes for a majority fears his successors, and a dissenter hopes to be redeemed by his. The majority judge whom Cardozo describes hopes to limit what can be done with his text, closing off many possible variations, misreadings, and new lines of development; the dissenter hopes to provoke exactly those kinds of instability. To modify Robert Cover's typology, majority opinions tend to be jurispathic but dissents attempt to be jurigenerative. Cf. Robert M. Cover, *The Supreme Court 1982—Term Foreword: Nomos and Narrative*, 97 *HARV. L. REV.* 4, 40 (1983) (positing that social and collective change are jurigenerative, i.e. create new legal meanings, while courts and the state tend to be jurispathic, i.e., to destroy possible legal meanings). Nevertheless, Cardozo's conclusion that dissents would tend to be less guarded, less qualified, and more literary still seems sound, albeit on partly different grounds than the ones Cardozo gave. The dissenting judge is partly making a last stand, but he is also attempting to be provocative, to keep an issue alive, so that some audience of later judges may redeem him.

84. Indeed, Cardozo's own career provides a counterexample to his theory. Cardozo was a most literary judge, see POSNER, *CARDOZO*, *supra* note 60, at 43, but his greatest opinions were written for the majority of his court. There are no canonical Cardozo dissents.

Unsurprisingly, however, the small number of dissents that are read and remembered overlap substantially with the set of redeemed and canonical dissents, which means that the dissents in which we are most interested may very well be literarily noteworthy irrespective of whether dissents in general are better written than most majority opinions. There is certainly a long tradition of praising the literary virtues of the canonical dissents, particularly those of Justice Holmes. Cardozo himself is a prominent early member of that tradition, having described Holmes as a master of aphorism and having quoted at length from Holmes's *Lochner* and *Abrams* dissents to illustrate judicial rhetoric at its best.<sup>85</sup> Speaking of the genre more generally, Justice Brennan wrote that the canonical dissents "straddle the worlds of literature and law."<sup>86</sup>

Nevertheless, literary merit is a slim reed on which to rest a theory of redeemed dissent. Lawyers are notoriously unable to judge even the analytic cogency of rival opinions without being swayed by what Alexander Bickel labeled the "moral approval of the lines";<sup>87</sup> distinguishing aesthetic appreciation from moral approval must be still more elusive. A hard case, I suppose, would be one of the Holmes or Brandeis dissents that do seem to make good reading for those who enjoy, respectively, modernist or romantic styles. People could reasonably argue that the dissenting and concurring opinions in *Lochner*,<sup>88</sup> *Abrams*,<sup>89</sup> and *Whitney*<sup>90</sup> are excellent prose for reasons independent of moral approval. But do we really believe that the power of Harlan's *Plessy* dissent is its literary strength? It contains, to be sure, one immensely stirring sentence: "Our Constitution is color-

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85. See BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 79-80 (1921) (discussing the *Lochner* dissent); CARDOZO, *Law and Literature*, *supra* note 80, at 347-48 (discussing the *Abrams* dissent). The tradition of praising Holmes's prose continues. Robert Ferguson has recently opined that "Holmes's mastery of the judicial opinion as literary genre is unmatched in the twentieth century," Robert A. Ferguson, *Holmes and the Judicial Figure*, in THE LEGACY OF OLIVER WENDELL HOLMES, JR. 155, 155 (Robert W. Gordon ed., 1992), and has claimed that the key to Holmes's great dissents is their literary style, *see id.* at 177.

86. Brennan, *supra* note 14, at 431.

87. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 2 (1962) (quoting JAMES B. THAYER, JOHN MARSHALL 84 (1901)).

88. *Lochner v. New York*, 198 U.S. 45, 74-76 (1905) (Holmes, J., dissenting).

89. *Abrams v. United States*, 250 U.S. 616, 624-31 (1919) (Holmes, J., joined by Brandeis, J., dissenting).

90. *Whitney v. California*, 274 U.S. 357, 372-80 (1927) (Brandeis, J., joined by Holmes, J., concurring).

blind, and neither knows nor tolerates classes among citizens.”<sup>91</sup> Other noteworthy selections from the opinion, however, are not as elegantly phrased. For example, Harlan drew a direct parallel between the majority’s decision and *Dred Scott*, and that parallel was very helpful for those who would redeem Harlan’s dissent.<sup>92</sup> The announcement, however, is hardly a literary tour de force. “In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case.”<sup>93</sup> The sentence hedges twice, employs the passive voice, and diminishes its most accusatory word, “pernicious,” by prefacing it with an unnecessary “quite.” What is powerful about the indictment Harlan brought in that sentence is its substantive claim, not its style of delivery.<sup>94</sup>

There is one other aspect of dissents unrelated to their substance that has attracted attention as explanatory of their redemption: their authors. Great dissents are written by great Justices.<sup>95</sup> There are, however, some basic problems with this insight as an explanation for why some dissents and not others should have been redeemed and made canonical. First, many dissents by great Justices, including those of Holmes himself, have never been redeemed.<sup>96</sup> Second, the greatness of the dissenting Justices partly relies on the greatness of the dissents, which makes it difficult to cite the greatness of a Justice

91. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). *See also* KULL, *supra* note 14, at 113, 118-19 (discussing the importance of the rhetorical force of Harlan’s opinion and the resonance of the phrase “color-blind” in particular).

92. After all, that inversion aligned *Plessy* with *Dred Scott* as anti-canonical opinions, and it can only have helped that such an alignment was announced in the text that is yoked to *Plessy* and that became canonical at the moment of inversion.

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

94. Furthermore, the modern remembrance of Harlan’s dissent tends to strip away so much of the original opinion that there may not be enough left to make it possible to speak of the literary qualities of the text in an integrated way. *See infra* notes 174-96 and accompanying text.

95. *See* KAHN, *supra* note 1, at 106; *see supra* text accompanying note 58.

96. *See, e.g., Coolidge v. Long*, 282 U.S. 582, 606-38 (1931) (Roberts, J., dissenting) (arguing that a state imposed tax does not impair the obligations of a private contract); *New Jersey Bell Tel. Co. v. State Bd. of Taxes & Assessments*, 280 U.S. 338, 349-51 (1930) (Holmes, J., dissenting) (arguing that New Jersey’s license tax did not interfere with interstate commerce and was therefore constitutionally permissible); *Farmers Loan & Trust Co. v. Minnesota*, 280 U.S. 204, 216-18 (1930) (Holmes, J., dissenting) (arguing that it is constitutionally permissible for Minnesota to tax certain bonds though testator died domiciled in New York); *Myers v. United States*, 272 U.S. 52, 177 (1926) (Holmes, J., dissenting) (arguing that Congress has the power to prescribe a term of life for offices created by Congress itself, and that the President may not interfere with such power); *Craig v. Hecht*, 263 U.S. 255, 280-82 (1923) (Holmes, J., dissenting) (arguing that United States Circuit Court judges, acting as such, may issue writs of habeas corpus, though contra the Judiciary Act of 1911).

as prior to and causative of the greatness of a dissent.<sup>97</sup> Indeed, the recognition that canonical dissents all seem to have been written by great Justices should encourage us to ask whether the Justices might have been elevated to greatness by later generations partly in order that their dissents might be redeemed.

### *B. Theory Theories*

In a recent article, Edward White explored why later generations would have wanted to make great Justices out of Holmes and Brandeis.<sup>98</sup> White offered two reasons more abstract and general than a simple desire to rehabilitate the dissenting position on a small number of issues, and his two ideas are actually both versions of a single theoretical approach. White argued that Holmes and Brandeis were lionized because their broad philosophies of jurisprudence, unlike those of their contemporary and predecessor Justices, matched those of the generation that followed them. According to one version of this claim, the key was that Holmes and Brandeis were “modernists”;<sup>99</sup> according to a slightly different version, the key to Brandeis’s rise was that he was a “sociologist.”<sup>100</sup> Each of these approaches, which I will call “theory theories,” probably contains a bit of truth. White’s argument, however, is too simplistic. It fails to acknowledge certain complexities in the jurisprudential thought of the generation after Holmes and Brandeis, and it underestimates the power of practical politics as opposed to more abstract theory in the construction of judicial heroes.

While acknowledging that the later judges and professors who revered Holmes and Brandeis misread their heroes in some important ways,<sup>101</sup> White argues that their most important impression

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97. See *supra* text accompanying notes 55-56.

98. See G. Edward White, *The Canonization of Holmes and Brandeis: Epistemology and Judicial Reputations*, 70 N.Y.U. L. REV. 576 (1995).

99. *Id.* at 580-85.

100. See *id.* at 604-05.

101. For example, Brandeis’s vision of states as laboratories for conducting “novel social and economic experiments,” see *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), put him at odds with the centralizing program of the New Deal, but after his death he came to be reimagined as a “spiritual father of the New Deal.” White, *supra* note 98, at 606 (quoting Warren H. Pierce, *Shaper of Economic Thought*, CHI. DAILY TIMES, OCT. 7, 1941, reprinted in MR. JUSTICE BRANDEIS: GREAT AMERICAN 58 (Irving Dillard ed., 1941)). Holmes’s status vis-à-vis the centralizing vision of the New Deal was complex. Although he sometimes echoed Brandeis’s regard for states as laboratories, see *Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting), he also believed that the Court should show more deference to national legislation than to state

of Holmes and Brandeis was perfectly accurate. They understood, White claims, that Holmes and Brandeis held “modernist” epistemologies, meaning that they believed human beings to be the architects of the universe, free and rational and capable of knowing truth.<sup>102</sup> Before the middle of the twentieth century, judicial orthodoxy was “premodernist,” holding the opposite epistemological viewpoints.<sup>103</sup> As America became modernist, Holmes and Brandeis became its seers.<sup>104</sup>

This view of why Holmes and Brandeis became canonical relies, however, on an oversimplified presentation of American judicial philosophies both before and after Holmes and Brandeis. American legal and political epistemology in the late eighteenth century already had a strong rationalist bent,<sup>105</sup> albeit not a worldmaking one. The only element of what White identifies as “modernist” epistemology that arguably differentiates Holmes and Brandeis from their predecessors is the idea that people are the architects of the universe, which, in the legal context, means that people make rather than find the law.<sup>106</sup> But as applied to constitutional law, this idea was surely present in American jurisprudence long before Holmes and Brandeis.<sup>107</sup> Conversely, many leading constitutional thinkers in the

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legislation: “I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States.” OLIVER WENDELL HOLMES, *Law and the Court*, in COLLECTED LEGAL PAPERS 291, 295-96 (1920). Judicial restraint, especially as applied to national legislation, was quite compatible with the New Deal.

102. See White, *supra* note 98, at 579-80.

103. See *id.* at 581-82.

104. See *id.* at 585.

105. See, e.g., BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 26-30 (1967); KAHN, *LEGITIMACY AND HISTORY*, *supra* note 47, at 9-30; Hendrik Hartog, *Pigs and Positivism*, 1985 WIS. L. REV. 899, 915; H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 892 (1985); John Veilleux, Note, *The Scientific Model in Law*, 75 GEO. L.J. 1967, 1974-75 (1987).

106. The distinction between law-making and law-finding is both basic and old. See, e.g., 2 MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 653-54 (Guenther Roth & Claus Wittich eds. & Ephraim Fischhoff et al. trans., 1978) (noting that the “distinction [between law-making and law-finding] . . . has . . . prevailed, either in its pure or some modified form, throughout all history in all parts of the world”). While the distinction persists, see, e.g., Frank Michelman, *Law’s Republic*, 97 YALE L.J. 1493, 1498 (1988) (recognizing this dichotomy as “familiar constitutional dogma”), some recent scholarship has attempted to collapse the distinction, see, e.g., RONALD DWORKIN, *LAW’S EMPIRE* 225 (1986) (“[W]e understand legal reasoning . . . only by seeing the sense in which [judges] do both and neither.”).

107. For example, Justice John Marshall posited in 1821 that “The people made the constitution, and the people can unmake it. It is the creature of their will, and lives only by their will.” *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 389 (1821). In a slightly different vein, Justice Iredell rejected a

decades after Holmes and Brandeis have balked at the idea that there is no fixed universe of legal norms beyond what people chose to make and unmake. The foundationalist turn<sup>108</sup> represented by judges like William Douglas<sup>109</sup> and academics like Ronald Dworkin<sup>110</sup> suggests that many who came after and even revered Holmes and Brandeis were unsympathetic to the rejection of the “premodernist” idea of law-finding. Even Bickel, the outstanding constitutional theorist of the post-*Brown* generation and a champion of the Holmes-Brandeis school, shied away from Holmes’s modernism at its most robust, because he was unwilling to abandon all substantive constraints on what the law might be made to permit. In cautionary critiques of Holmes’s dissents in *Gitlow* and *Abrams*, Bickel argued that the “total relativism” that Holmes displayed in announcing that any political doctrine should be permitted to triumph if it could gain acceptance in the market of ideas “cannot be the theory of our Constitution.”<sup>111</sup> Some external limits must be placed on what people might make of the law. Thus, to speak of “premodernist” and

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strong law-finding model of constitutional law in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 398-400 (1798) (recognizing the courts’ limited role in restraining the legislative power).

108. The foundationalist school of constitutional theory, above all else, advocates an inalienable commitment to fundamental rights. See, e.g., Bruce Ackerman, *Constitutional Politics / Constitutional Law*, 99 YALE L.J. 453, 466 (1989) (“Whatever rights are Right, members of this [foundationalist] school agree that the American Constitution is concerned, first and foremost, with their protection. Indeed, the whole point of having rights is to trump decisions rendered by democratic institutions that otherwise have the legitimate authority to define the collective welfare.”).

109. See, e.g., *Papachristou v. Jacksonville*, 405 U.S. 156 (1972) (striking down a vagrancy ordinance as void for vagueness); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (invoking evolving notions of fundamental rights to strike down a poll tax); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (announcing the existence of fundamental rights within penumbras of the Bill of Rights). All of these decisions rely on a notion of foundational justice that overrides majority rule even though its tenets are not expressly codified in the text of the Constitution.

110. See, e.g., DWORKIN, *LAW’S EMPIRE*, *supra* note 106, at 93; RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 176-77 (1977). A phenomenon related to the foundationalist theory is the idea, raised by constitutional scholars, that certain constitutional provisions are unamendable and that certain legal norms may not be departed from even if supermajorities of the population wanted to do so. See, e.g., ACKERMAN, *FOUNDATIONS*, *supra* note 14, at 320.

111. ALEXANDER BICKEL, *THE MORALITY OF CONSENT* 77 (1975). *The Morality of Consent* was Bickel’s last book, written at the end of a career during which he moved from a more foundationalist view of constitutional law, see BICKEL, *THE LEAST DANGEROUS BRANCH*, *supra* note 87, at 236 (claiming that judges must “extract ‘fundamental presuppositions’”), to a more skeptical, process-oriented one, see ALEXANDER BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 99 (1970) (expressing doubt about the Supreme Court’s “capacity to develop ‘durable principles’”). *But see* Anthony T. Kronman, *Alexander Bickel’s Philosophy of Prudence*, 94 YALE L.J. 1567 (1985) (arguing that Bickel’s jurisprudence was essentially consistent throughout his career). Bickel’s reservations in *The Morality of Consent* about Holmesian relativism suggest that Bickel’s willingness to accept people as architects of the universe was bounded even at his most skeptical.

“modernist” epistemologies as the mutually exclusive approaches of the pre- and post-Holmes eras denies the more complex reality of both eras, in which the two ideas were mixed.<sup>112</sup>

The second version of White’s theory focuses on Brandeis, arguing that Brandeis became a judicial hero because of his “sociological” approach to jurisprudence.<sup>113</sup> In this context, calling Brandeis a judicial “sociologist” means only that he “openly declared that judges should take the social and economic context of cases into account.”<sup>114</sup> Unlike the classical formalists, for whom the social and economic consequences of legal rules were irrelevant as a matter of principle,<sup>115</sup> Brandeis believed that judges should consider the practical consequences of their decisions.<sup>116</sup> White’s claim that this sociological approach is what made Brandeis attractive to commentators in the 1930s and thereafter is, however, both under- and over-inclusive. It is underinclusive because it cannot account for the popularity of Holmes, whose standing as a sociological jurist is at least contestable. He was no classical formalist, but the greatest of his redeemed dissents—*Lochner*—presents itself as the very opposite of an opinion grounded in the practical consequences it would engender.<sup>117</sup> On the contrary, it denounces the majority for being sociologists: the majority, not Holmes, has decided the case “upon an economic theory.”<sup>118</sup> Those who redeemed the *Lochner* dissent approved of the economic consequences that Holmes’s

112. Moreover, many who saw Holmes and Brandeis as heroes were not thoroughgoing judicial modernists. Justice Brennan, for example, was a liberal foundationalist of the Warren Court school. It is thus doubtful that Holmes and Brandeis’s modernism was the key to their canonicity.

113. See White, *supra* note 98, at 599-600. This use of the term “sociological” as applied to law derives from Roscoe Pound’s *The Need of a Sociological Jurisprudence*, 31 A.B.A. REP. 911 (1907). “Sociological jurisprudence” should not be confused with the “sociology of law.” The former is an approach to jurisprudence that takes social and economic factors into account, while the latter is the study of the legal culture as a society or, alternatively, of the role of law in society generally.

114. White, *supra* note 98, at 599-600.

115. See, e.g., Thomas C. Grey, *Modern American Legal Thought*, 106 YALE L.J. 493, 495-97 (1996) (describing the legal approach of classical formalism).

116. See generally White, *supra* note 98, at 600-06 (discussing Brandeis’s approach in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 280 (1932) (Brandeis, J., dissenting)). Of course, this approach to jurisprudence was not new with Brandeis. As Morton Horwitz has demonstrated, American lawyers and judges regularly and openly reasoned about the “sociological” consequences of decisions and rules of law as early as the end of the eighteenth century. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 2 (1977). Brandeis, however, having reasserted this tradition after the classical formalist period, could be seen as a seminal sociologist, even though not the originator of that approach.

117. See *Lochner v. New York*, 198 U.S. 45, 74-76 (1905) (Holmes, J., dissenting).

118. *Id.* at 75 (Holmes, J., dissenting).

opinion would have fostered had his opinion governed the case, but the theory upon which Holmes reached his result was not itself a result-oriented theory.<sup>119</sup> Accordingly, White's argument that Brandeis's sociological approach was the key to his popularity would have difficulty accounting for the popularity of the Justice whose popularity is most closely intertwined with Brandeis's.<sup>120</sup>

With respect to the problem of overinclusivity, the hypothesis that sociological jurisprudence made Brandeis popular fails to differentiate between sociological jurists of different political stripes. After all, the fact that a judge believes that he should consider the social or economic consequences of his decisions does not mean that the opinions he issues will be progressive ones, as Brandeis's were. We can easily imagine a judge in the 1920s and 1930s who would have been just as much a sociologist as Brandeis but who would have avowedly endorsed, on social and economic grounds, legal decisions that favored capital at the expense of labor, the rich at the expense of the poor, and so on.<sup>121</sup> Richard Posner could easily be considered a sociological judge,<sup>122</sup> but the sociological judge whom the commentators of the 1930s would have made canonical could not have been *that kind* of sociological judge. He had to be a judge who took social and economic factors into account in the right way, where the "right way" was defined by the social and economic views of the commentators. A sociological judge who reached the "wrong" results

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119. *See id.* at 74-76 (Holmes, J., dissenting). Indeed, Holmes probably would have approved of the majority's result in *Lochner* had he been permitted to choose on substantive political grounds. If so, his formalist position in *Lochner* cannot have been a case of a judge's hiding a result-oriented decision behind formal procedural arguments.

120. Brandeis's "sociologism" also had limits. Consider, for example, his dissent in *International News Service v. Associated Press*, 248 U.S. 215, 248 (1918), in which he argued, much as Holmes argued in *Lochner*, that the majority of the Court had simply made a policy choice and that such things should be left to legislation. *See id.* at 262-67 (Brandeis, J., dissenting).

121. This was in fact one view that progressives took toward the *Lochner* court. *See, e.g.*, LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 360, 362 (2d ed. 1985) (describing the perception of *Lochner*-era courts as "fortresses of dark and deep reaction" which "[i]n some blatant cases . . . used constitutional doctrine to strengthen the hand of big business at the expense of labor").

122. Paul Kahn has noted that the law and economics movement, which I use Posner to represent, is the contemporary counterpart of early twentieth-century sociological jurisprudence. *See* KAHN, *LEGITIMACY AND HISTORY*, *supra* note 47, at 125. On the other hand, it is not clear that Posner would accept a description of himself as a sociological judge in the early twentieth-century sense. *See* Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827 (1988) (setting forth a judicial approach that considers the practical consequences of decisions but does not let policy preferences govern the disposition of cases).



would not have become canonical: if anything, he might have risked becoming anti-canonical.<sup>123</sup>

### C. Issue Theories

It is sometimes suggested that the propensity of a dissent to be redeemed and to become canonical is partly a function of the issue that it contests. The most common version of this claim relates to the Holmes and Brandeis dissents in the free speech cases, as commentators point out that there is an affinity between the act of judicial dissent and the expressive acts for which defendants like Abrams and Gitlow were prosecuted.<sup>124</sup> The First Amendment's right of free speech is, after all, about the rights of dissenters.<sup>125</sup> This idea can be expanded in several ways. For example, Justice Brennan saw a connection between judicial dissent and the right of free speech, at least on the theory of that right that had come down to him from Holmes and Brandeis: because writing dissents permits later readers to judge the question for themselves, the act of dissenting is tied to "the conviction that the best way to find the truth is to go looking for it in the marketplace of ideas."<sup>126</sup> But these affinities between judicial dissent and the issue of free speech cannot supply a general theory of redeemed dissents. Unless a broader version of the insight can be made to capture the *Lochner* and *Plessy* dissents as well as the free speech dissents, the commentators who note the parallel between the dissenting Justice and the dissenting defendant have spotted at most

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123. It is possible, of course, that the limitations of White's theory that I discuss here are not inherent in any "theory theory" but merely show that his version of such a theory is inadequate. I therefore do not preclude, as a conceptual matter, the possibility that a more subtle version of such a theory might help to explain the popularity of Holmes and Brandeis. The attempt to formulate such an improved theory could be both interesting and valuable, but it cannot be adequately undertaken here.

124. See, e.g., David Cole, *Agon at Agora: Creative Misreadings in the First Amendment Tradition*, 95 YALE L.J. 857, 861 n.13 (1986) (noting that the First Amendment is about the rights of minority dissenters and that "[t]he doctrinal context of a First Amendment case may therefore inspire the Justice disposed to antithetical struggle, and may also add subtle reflexive weight to the persuasive effect of dissenting rhetoric"); Robert M. Cover, *The Left, the Right, and the First Amendment: 1918–1928*, 40 MD. L. REV. 349, 373 (1981) ("By dissenting in *Abrams*, then, Holmes not only argued that the Constitution tolerated dissent, he also exemplified the dissent.") (emphasis in original).

125. This is true under at least one prominent understanding of the First Amendment exemplified in *Texas v. Johnson*, 491 U.S. 397 (1989) (upholding the right to disrespect a national symbol), *Cohen v. California*, 403 U.S. 15 (1971) (upholding the right to express strong opposition to a central government policy), and *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (upholding the right not to join in a dominant national ideology).

126. Brennan, *supra* note 14, at 430.

a subtle facet of one line of dissents and perhaps no more than a provocative coincidence.

The broader version might be that great dissents are possible on issues that pit an individual against the community or a downtrodden party against a more powerful one. Those relationships mirror the relationship between the dissenter and the majority of the Court, albeit not with the specific parallel of authority and dissent. Brennan's own list of great dissents is almost entirely composed of opinions dealing with such issues.<sup>127</sup> The great dissents, according to Brennan,<sup>128</sup> are Harlan in *Plessy*,<sup>129</sup> Holmes in *Abrams*,<sup>130</sup> Brandeis in *Olmstead*,<sup>131</sup> Stone in *Gobitis*,<sup>132</sup> Jackson in *Korematsu*,<sup>133</sup> and the second Harlan in *Poe v. Ullman*.<sup>134</sup> Brennan proposes that the proper question to ask about dissenting Justices is this: "From what source did [they] derive the right to stand against the collective judgment . . . ?"<sup>135</sup> Several of the dissents he names are precisely about standing against the collective judgment. The others, though, are describable as other forms of conflict between community and individual or between downtrodden parties and powerful ones (e.g., *Plessy* and *Korematsu*, as well as *Lochner*, which somehow did not make Brennan's list<sup>136</sup>). Robert Jackson recognized the appeal of that last

127. *See id.* at 432.

128. *See id.*

129. *Plessy v. Ferguson*, 163 U.S. 537, 552-64 (1896) (Harlan, J., dissenting). *See supra* text accompanying notes 14-19. Brennan includes Harlan's *Plessy* opinion among the canonical dissents despite his protest eight years before, in *Regents of University of California v. Bakke*, 438 U.S. 265, 336 (1978), that the Court had never adopted and should not adopt the "color blind" vision Harlan articulated. *See supra* note 17.

130. *Abrams v. United States*, 250 U.S. 616, 624-31 (1919) (Holmes, J., dissenting).

131. *Olmstead v. United States*, 277 U.S. 438, 471-85 (1928) (Brandeis, J., dissenting). *See supra* text accompanying notes 62-67.

132. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 601-07, 606 (1940) (Stone, J., dissenting) (arguing that proper application of "careful scrutiny" would have struck down a law requiring Jehovah's Witnesses in public schools to salute the American flag and to recite the pledge of allegiance in spite of their religious objections).

133. *Korematsu v. United States*, 323 U.S. 214, 242-48, 247 (1944) (Jackson, J., dissenting) (criticizing the courts' enforcement of the detention of Japanese-Americans on the grounds that "a civil court cannot be made to enforce an order which violates constitutional limitations even if it is a reasonable exercise of military authority").

134. 367 U.S. 497, 522-55, 523 (1961) (Harlan, J., dissenting) (arguing that a "threat of unconstitutional prosecution" under a challenged statute should suffice for justiciability purposes).

135. Brennan, *supra* note 14, at 432.

136. That omission itself suggests a shortcoming in his approach, at least if we suppose that his project really was about finding a theory of dissent. No theory of great dissents can ignore *Lochner*. Perhaps, however, a comprehensive theory of dissents was not really what Brennan was aiming at when he listed and characterized the opinions mentioned above. Perhaps instead he was seeking to

kind of dissent, describing it as “an underdog judge pleading for an underdog litigant.”<sup>137</sup>

Even this broader version of the theory, however, is insufficient to explain why certain dissents and not others become great, redeemed, and canonical. Like the theory that focuses on the literary qualities of dissents,<sup>138</sup> it focuses on something that makes the dissent attractive but does not adequately explain why some dissents become canonical and others do not. Many are the cases that could be classified as conflicts between individuals and communities or between downtrodden parties and powerful ones, but the list of great dissents is relatively short. Moreover, our notions of who is an oppressed underdog are not independent of our notions of right and wrong in a case. Virtually all modern Americans would agree that the oppressed underdog in *Plessy v. Ferguson* was Homer Plessy, the passenger forced to ride in a separate colored car. Given prevailing views about the evil of racial discrimination, we could hardly think otherwise. In other cases with canonical dissents, however, alternative perspectives are more imaginable: from one point of view, the underdog in *Lochner* is the baker forced by market pressures to work more than sixty hours a week, but from another point of view, the underdog is the employer, perhaps a small entrepreneur, trying to assert his liberties in the face of overpowering state regulation.<sup>139</sup> Without more, the theory that great dissents are written on behalf of underdog litigants may not even be able to say, in a given case, for which side such a dissent could be written.

#### *D. Substance Theories*

In another sense, however, the list of redeemed dissents does display a pattern that suggests which “side” of a case is likely to be a candidate for redemption. All of the great dissents listed above articulate the left-liberal position in the case. Perhaps, then, a dissent is more likely to be redeemed if it expresses the substantive positions

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create a canonical tradition supportive of a particular view of individual rights against the community. That reading makes more sense of his selections, and that kind of retrospective creation of meaning and tradition is the standard practice of judges who canonize earlier dissents.

137. ROBERT H. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 18 (1955).

138. *See supra* text accompanying notes 82-94.

139. *See Lochner v. New York*, 198 U.S. 45 (1905). The latter situation has more grounding in the actual case: the petitioner in the Supreme Court was an employer convicted by the state, not an employee baker. *See id.* at 45-47.

of the political left than if it expresses the substantive positions of the political right. There is even an initially plausible explanation for why, in principle, dissents on the left should be more likely than dissents on the right to be redeemed. Redemption and canonization of dissent is the work not of the author of the dissent but of a later court, or courts, that repudiates an earlier case and makes its dissent authoritative. The court that redeems a left-leaning dissent is likely to be left-leaning itself, and the court that redeems a right-leaning dissent is likely to be right-leaning. As a general matter, the left-liberal strand in American jurisprudence has been more oriented toward the notion of progress than the conservative strand has, and the conservative strand has had a stronger notion of fidelity to the American past.<sup>140</sup> The stronger one's affinity for the past, and for past law, the stronger one's commitment to *stare decisis* is likely to be, in which case it is more difficult to overturn the received judicial tradition and make dissenting opinions into authoritative ones. If, however, one has a view of legal development as progress, it is natural to expect that old orthodoxies will periodically be overthrown. When they are, dissenting judges who foresaw the overthrow will come to appear prophetic<sup>141</sup> and their dissents, redeemed, may achieve canonical status.

Prophecy, however, comes in a backward-looking form as well as a forward-looking one. One kind of prophet announces a vision of the future, and the other recalls a people to its foundations, chastising them for having strayed from the true path where they or their ancestors once walked. Even if the first form of prophecy is usually the province of the political left, the second form is entirely open to the political right, suggesting that a right-leaning Justice could write

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140. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 3-6 (1992) (contrasting left-leaning "Progressive Legal Thought" with "Classical Legal Thought" and identifying "Classical Legal Thought" with an "'old conservative' world view"). See also ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 13-14 (1970) (identifying the notion of progress as the guiding principle of the liberal Warren Court).

141. There is a common tendency to describe the great dissenters as prophets. See, e.g., ALAN BARTH, *PROPHETS WITH HONOR: GREAT DISSENTS AND GREAT DISSENTERS IN THE SUPREME COURT* (1974); White, *supra* note 98, at 577 (referring to Holmes and Brandeis as "prophets"). Perhaps not by coincidence, Brandeis was frequently called "Isaiah"—partly in derision—even when he was still on the Court. See ROBERT A. BURT, *TWO JEWISH JUSTICES: OUTCASTS IN THE PROMISED LAND* 62 (1988); Harvey J. Bresler, *Brandeis, Epitome of Democracy*, N.Y. TIMES, Sept. 22, 1946, § 7 (Book Review), at 4. Because the nickname preceded the redemption, it cannot be the case that he was called Isaiah because his opinions would one day be regarded as prophetic in the forward-looking sense. When his opinions were vindicated, however, his association with the name of Isaiah could only have reinforced his standing as a judicial prophet.

in a prophetic mode as easily as a left-leaning one. Moreover, the dissents of conservative Justices have been vindicated by later courts at certain points in American history: the decisions of the Supreme Court in the *Lochner* era, for example, made the nineteenth-century dissents of Justices Joseph Bradley and Stephen Field appear prophetic,<sup>142</sup> and only the subsequent repudiation of the *Lochner* court—the re-reversing of the yoked pairs of which Bradley’s and Field’s dissents were a part—removed their prophetic status. Today, Justice Scalia is keenly aware of the power of the backward-looking mode of prophecy. His separate opinion in *Adarand*, for example, aims to recall America to an earlier righteousness by pointing us backward to the ethos of Harlan’s now-canonical *Plessy* dissent.<sup>143</sup> No matter what the politics of Harlan’s dissent originally were, Scalia’s use of the color-blind ideal is distinctly conservative, demonstrating that the redemption of dissent can be useful on either side of the political spectrum.

That brings us, then, to a yet more bare version of the relationship between the substance of a dissent and the likelihood that it will be redeemed and made canonical. Dissents, I suggest, are redeemed for their holdings. Other elements, such as outstanding literary style or a similarity of epistemological underpinnings with a later audience, are happy coincidences when they work to the advantage of the redeeming judge. But they are essentially secondary to the basic substance of the dissent. Holmes’s *Lochner* dissent was redeemed less for its prose or its modernism than for its “holding”

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142. See, e.g., *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 83-111 (1872) (Field, J., dissenting) (opposing majority’s validation of a Louisiana statute and arguing that the statute abridges the privileges and immunities of U.S. citizens); *id.* at 111-24 (Bradley, J., dissenting) (describing the right of a U.S. citizen to follow whatever employment they choose as a valuable right protected by the Constitution). These dissents were later redeemed. See, e.g., *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897).

143. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in the judgment) (“In the eyes of government, we are just one race here.”). Scalia also makes another use of the prophecy motif for the same substantive purpose. In *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), a case in which the Court struck down a municipal set-aside for minority contractors and, as such, a close predecessor of *Adarand*, Scalia quoted at length from Alexander Bickel’s attack on affirmative action and called Bickel’s view “prophetic.” See *Croson*, 488 U.S. at 527 (Scalia, J., concurring) (quoting ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT*, *supra* note 111, at 133). Obviously, for Bickel’s view to be prophetic, his position about affirmative action must have come to be seen as correct. By retrospectively depicting Bickel as a prophet, Scalia creates support for his own position in *Croson* and *Adarand*; simultaneously, it is the result in those cases that redeems the claim that Bickel is a prophet.

that state economic regulation was constitutional.<sup>144</sup> The Holmes and Brandeis dissents in the free speech cases were redeemed for their thick defense of free expression.<sup>145</sup> Harlan's *Plessy* dissent was redeemed for its "holding" that the Constitution is "color-blind."<sup>146</sup> The various theories that try to ground the canonical status of those dissents in other aspects of the opinions, I suggest, overtheorize what

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144. It is tempting to present a reason one degree more abstract and say that the *Lochner* dissent was redeemed not because it "held" economic regulation constitutional but because it was a strong statement of judicial restraint, which, at the time when the dissent was redeemed, was necessary to permit New Deal economic regulation to stand. I suggest, however, that the less abstract version captures the appeal of *Lochner* more precisely.

Even at the time of the New Deal, not all judicial restraint, or even all judicial restraint favored by Justice Holmes, was popular. Consider, for example, that Holmes dissented in *Meyer v. Nebraska*, 262 U.S. 390 (1923), a case in which the Court struck down a law prohibiting the teaching of foreign languages to young children. *Meyer*, like *Lochner*, was a Fourteenth Amendment substantive due process case, and a simple application of Holmes's *Lochner* rationale would indeed lead him to dissent in *Meyer*. *Meyer*, however, was a popular decision among political liberals, many of whom saw no need to maintain fidelity to the principles of judicial restraint that Holmes articulated in *Lochner* when the substantive issue was different. More recently, the Holmes position on judicial restraint was essentially repeated by Justices Black and Stewart. See *Griswold v. Connecticut*, 381 U.S. 479, 507 (1965) (Black, J., dissenting) (agreeing that the law in question is offensive, but finding this inadequate to declare the law unconstitutional). See *id.* at 527 (Stewart, J., dissenting) (disagreeing with the majority that a "right to privacy" exists in the Constitution). But most modern commentators who celebrate Holmes's *Lochner* dissent would place the *Griswold* majority, not the dissent, in the constitutional canon.

That dynamic was played out again in *Bowers v. Hardwick*, 478 U.S. 186 (1986), another case that has become a shibboleth of judicial politics. In that case, the Court followed the path of judicial restraint and let stand a Georgia statute banning sodomy. Writing for the majority, Justice White evoked the ghost of *Lochner* and aligned himself with Holmes by recalling the Court's humiliation at the hands of the executive in the 1930s, when it was forced to "repudiat[e] . . . much of the substantive gloss that the Court had placed on the Due Process Clauses." *Id.* at 194-95. In dissent, Justice Blackmun countered White's Holmesian move by citing to the *Lochner* dissent himself, albeit for the slightly different proposition that judges should not decide cases on the basis of what opinions they find natural and familiar. See *id.* at 199 (Blackmun, J., dissenting). He further buttressed his attempt to claim Holmes for his side of the dispute by including a quotation from Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897), and, for good measure, from the most famous dissent of Holmes's alter ego, Brandeis, see *Olmstead v. United States*, 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting). See *Bowers*, 478 U.S. at 199 (Blackmun, J., dissenting). Whether the *Bowers* majority was as sincere in its Holmesian approach toward judicial restraint as the *Griswold* dissenters is open to question: unlike Black and Stewart in *Griswold*, White in *Bowers* did not profess any substantive disgust for the law that he said institutional concerns of deference obliged him to let stand. See *id.* at 194-96. (I am indebted to Sarah Levine for these notes on *Bowers*.) In any case, however, two points emerge. First, the substance for which dissents are celebrated may be measured by the political valence of a case rather than the juridical principles they announce. Second, once a dissent becomes sufficiently canonical, both sides of controversial positions will try to shape its holding to give themselves support.

145. See *supra* text accompanying notes 124-26.

146. Cf. *supra* text accompanying notes 91-94 (arguing that Harlan's dissent was not redeemed for its literary merits).

is actually a very simple criterion. Because there are only three indispensable points of data that a “general theory” of canonical dissent must map—*Plessy*, *Lochner*, and the free speech cases—it is tempting, because presumptively easy, to discover common elements in redeemed dissents and to avoid the conclusion that the most important factor in the potential redemption of a dissent is whether later courts agree with its substance. After all, that conclusion might seem embarrassing. It raises the possibility that courts sometimes make decisions by consulting their preferences rather than judicial precedent and then choosing their “authorities,” whether found in majority opinions or in dissents, to suit their desired outcomes.<sup>147</sup> There is accordingly a strong incentive, for someone who resists that conclusion, to discover a limiting theory of redeemable dissent. However comprehensible the motive, however, the proposed theories fall short. The most important element of the redeemed and canonized dissents is their substance.

One further criterion supplements this bare vision, and it has to do with the dual structure of the canon itself. The possibility that a dissent will become canonical is limited by the canon’s structural need, or lack of need, for a canonical text. *Lochner* is anti-canonical, and the dual structure of the canon suggests that somewhere there must be a canonical text to oppose it. Holmes’s dissent plays that role. But *Dred Scott* is also a reviled case, and Justice Curtis’s dissent in that case has not become canonical.<sup>148</sup> The reason why the Curtis dissent is not canonical even though *Dred Scott* is anti-canonical has much to do with the flexible structure of the yoked pairs that comprise the canon. *Dred Scott* is paired with an extremely powerful text other than Curtis’s dissent: the Fourteenth Amendment. Because the Fourteenth Amendment is canonical, it is not necessary for the Curtis dissent to be canonical in order to make *Dred Scott* anti-

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147. That this possibility has been realized is the accusation of one prominent dissenter—Scalia—and the avowed belief of another—Holmes. Dissenting alone in *United States v. Virginia*, 518 U.S. 515, 566 (1995), Scalia charged that the Court had reached its decision to desegregate VMI by consulting its preferences and by ignoring precedential authority. *See id.* at 566. He also predicted that the Court would not feel itself bound to apply even the rationale it had articulated in the VMI case when asked to decide future cases in which the Justices wished to reach results not reachable on that rationale. *See id.* at 600. Ironically, the Great Dissenter himself took an opposite view of the same phenomenon, writing that “[i]t is the *merit* of the common law that it decides the case first and determines the principle afterwards.” Oliver Wendell Holmes, Jr., *Codes, and the Arrangement of the Law*, 5 AM. L. REV. 1 (1870), reprinted in 44 HARV. L. REV. 725 (1931) (emphasis added).

148. *See supra* notes 34 and 47. *But see supra* note 48 (listing commentators who regard the Curtis dissent as canonical).

canonical. To be sure, they could both be canonical, just as *Brown v. Board of Education* and Harlan's *Plessy* dissent are both canonical texts twinned with *Plessy*. But they need not be, and the power of the Fourteenth Amendment eclipses the Curtis dissent and make its canonization unnecessary. The same may be true of Justice Iredell's dissent in *Chisholm v. Georgia*,<sup>149</sup> which was both redeemed and eclipsed by the Eleventh Amendment,<sup>150</sup> and of Justice Harlan's dissent in *Pollock v. Farmers' Loan & Trust Co.*,<sup>151</sup> which was redeemed and eclipsed by the Sixteenth Amendment. Where powerful texts like constitutional amendments enter the canon and balance anti-canonical judicial opinions, they tend to occupy the field. There is then less need for dissents to play the balancing canonical role.

This structural requirement deepens rather than mitigates the status of an opinion's substance as the critical element in determining its potential for canonicity. After all, whether an opinion fits into a certain position in the yoked-pairs model is a function not of its authorship or of its literary merits but of its substance, because it is the substance of the issues addressed that determines which opinions are paired together.

### III. RETROSPECTIVE CONSTRUCTION: CREATING THE SUBSTANCE OF A DISSENT

If the most important thing about a redeemed dissent is its substance, we need some account of how dissents come to stand for particular substantive propositions. Most of the literature on dissents focuses on the moment of dissent, examining the judge who writes

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149. 2 U.S. (2 Dall.) 419, 429-50 (1793) (Iredell, J., dissenting) (rejecting the majority's conclusion that Article III permits citizens of one state to sue another state in federal court).

150. The Court's own articulated view of the relationship between *Chisholm* and the Eleventh Amendment supports the proposition that those two texts constitute a yoked pair in precisely the way that *Brown* and *Plessy* do. In *Hans v. Louisiana*, 134 U.S. 1 (1890), the definitive nineteenth-century case on interpreting the Eleventh Amendment, the Court explained that that Amendment "actually reversed the decision of the Supreme Court" in *Chisholm*. *See id.* at 11. It is ironic that the most famous dissenter on the *Hans* Court, Justice Harlan, refused to join the Court's opinion in *Hans* for the sole reason that he, unlike the majority, would not associate himself with Iredell's dissent in *Chisholm*. *See id.* at 21 (Harlan, J., dissenting). *Chisholm*, he maintained, was rightly decided under the law at that time. *See id.* Harlan thus could not join in the Court's valorization of Iredell's retrospectively vindicated dissent.

151. 158 U.S. 601, 638-86 (1895) (Harlan, J. dissenting) (opposing the majority's invalidation of an income tax because it was a direct tax not apportioned among the states disallowed under Article I, section 2 of the Constitution).



the dissenting opinion, the case before the court, and so on. That approach would suggest that the substance of a dissent is a function of what its author argued, and that is certainly true to some extent. Nevertheless, that approach underestimates the degree to which the meaning of a judicial opinion is determined by its later construction.<sup>152</sup> To some extent, precedential meaning is retrospectively created for majority opinions as well as dissents. Probably every law student knows the phenomenon of reading a case in a casebook, struggling through facts, dicta, and argument for many pages, and understanding the disposition of the case, but not being able to state succinctly the holding of the case. Often, the holding becomes crystallized in the student's mind not after he painstakingly rereads the case but after he reads the next few cases in the casebook, cases decided after the first case and which cite the first case for some proposition. Then the holding is clear: the proposition for which later courts cite the original case is, or becomes, that case's holding.<sup>153</sup>

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152. Texts in general—not just judicial opinions—are often given meanings by later interpreters who intentionally or unintentionally misread the earlier texts. See BLOOM, *THE ANXIETY OF INFLUENCE*, *supra* note 68, at 139-56 (discussing the “revisionary ratio” of “apophrades,” by which a later poet makes himself the only route of access to the meaning of an earlier poet). Paul Gewirtz has argued that when the texts in question are judicial opinions, the later text's construction of the earlier text is an authoritative interpretation in a way that literary constructions cannot be, because the judicial opinion is a binding precedent. See Paul Gewirtz, *Narrative and Rhetoric in the Law*, in *LAW'S STORIES* 1, 10 (Peter Brooks & Paul Gewirtz eds., 1996). Gewirtz's argument, however, should be extended to account for the possibility that a still later judicial interpreter will “misread” the tradition handed down to him, overthrowing the interpretation proffered by the preceding judge whose interpretation Gewirtz takes to be “binding.”

153. Given the central role that precedent plays in common law adjudication and the manifold complexities involved when later readers give authoritative construction to purportedly authoritative texts, it should not be surprising that the phenomenon of retrospectively constructed precedent has been explored by many legal theorists. H.L.A. Hart, for example, doubted that a case could establish a single correct precedential rule to be followed in later cases, but he believed that some cases could be legitimately governed by precedents. See H.L.A. HART, *THE CONCEPT OF LAW* 134 (2d ed. 1994). On Hart's understanding, it is only when the earlier case is applied to the later case that the bearing of the earlier case becomes clear, and even then one should not speak of a “rule of the case,” because the precedential “rule” cannot be applied mechanically to still later cases. See *id.* at 134-35. The analysis must again proceed case by case to see what significance the earlier case should have for each later one. See *id.*

In an all-but-impenetrable article, Jan Deutsch explored the prospective and retrospective faces of precedent through a fable involving Felix Frankfurter, risen from the dead to counsel the Supreme Court on the practically unforeseeable precedential import of its decision in the obscure case of *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963). See Jan G. Deutsch, *Precedent and Adjudication*, 83 *YALE L.J.* 1553 (1974). Frankfurter, who in the fable can see the future, tells the Court that ten years after the *Paul* decision, Justice Douglas will write a decision in a different case, *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973), that will “bear on the meaning of what is now being discussed.” See Deutsch, *supra*, at 1570-71. Unbeknownst to the *Paul* Court—until Frankfurter informs them—the *Snyder* decision will

If that pattern describes the way meaning sometimes attaches to majority opinions, the meaning of an opinion that has no holding—in the narrow sense that it does not dispose of any concrete case—must be even more open to retrospective creation. When a later court construes the meaning of an earlier majority opinion, the range of meanings it can impute to the earlier opinion is constrained, if not narrowly determined, by the disposition of the earlier case. A court construing a dissent is less constrained. We know one result that the opinion does *not* support, but there is a whole world of other possible results that it *might* support. Even more so than with majority opinions, then, the substance of a dissent can be the creation not of the dissenting judge but of the redeeming judge, and the critical moment for understanding the substance of dissent is the moment of redemption. Earlier, I suggested that we should apply the terminology of “holdings” to dissents as well as majority opinions, and I pointed out that the “holding” of a dissent might be either of two things.<sup>154</sup> One possibility is that the holding of a dissent is the inverse of the holding of the majority opinion in the case in which the dissent was written, and the other is that the holding of a dissent is the proposition for which the dissent is later cited. The latter version is, I believe, the better one: the holding of a dissent is retrospectively created.

And the holding is not the only retrospectively created element. As discussed earlier, great dissents are written by great Justices, and the greatness of the judge and the greatness of the dissent are mutually reinforcing.<sup>155</sup> If the holding of a great dissent is retrospectively created, then the heroic image of the dissenter may be retrospectively created as well. Harlan’s status as a great Justice

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reinterpret *Paul* to give it a meaning that was not theretofore intended. Part of the lesson of Deutsch’s fable is that courts must guess at the future relevance of their decisions in order to understand the precedents they are creating. In the case at hand, Deutsch demonstrated that the same case could be read to create precedent in areas as disparate as substantive law, procedural law, and factual record, depending on context. But there is another subtlety to Deutsch’s fable that bears directly on the phenomenon of retrospective construction of precedent as it applies to dissents. The opinion that Deutsch chose to present as the retrospective constructor of precedent—*Snyder*—overruled *Liggett Co. v. Baldrige*, 278 U.S. 105 (1928), a case that contained a dissent by Holmes and Brandeis. *See Snyder*, 414 U.S. at 167. Douglas in *Snyder* redeemed that dissent. *See id.* at 166-67. At the risk of retrospectively attributing meanings to Deutsch, I suggest that it was not by accident that a fable about the retrospective construction of judicial meaning took as its seminal text a case that redeemed a dissent by two of the greatest dissenters in the American constitutional tradition. Deutsch implicitly argues that the redeemed dissent is a paradigmatic locus of retrospectively created meaning.

154. *See supra* text accompanying notes 61-68.

155. *See supra* text accompanying notes 55-56.

relies on the fact that his *Plessy* dissent has been redeemed; the redemption of dissent is largely a function of substance; the substance of a dissent is retrospectively created. It follows that the greatness of Harlan (or Holmes, or Brandeis) relies at least in part on the retrospective interpretation of *Plessy* (or *Lochner*, or *Whitney*). Once that interpretation is given and Harlan is presented as a great Justice, Harlan's own status is an "independent" source of legitimacy for the later court's use of his newly authoritative opinion. Thus, the heroism of the Justice is constructed in tandem with the holding of the dissent. Redeeming and canonizing a dissent involves the misreading, or the reimagining, of the author as well as the text.<sup>156</sup>

Indeed, all three of the great dissenters were substantially reimagined by those who canonized their dissents. Brandeis was reimagined as a New Deal nationalist.<sup>157</sup> Harlan, in many ways progressive for his era but certainly not a thoroughgoing racial egalitarian in the modern sense,<sup>158</sup> was reimagined as a racial egalitarian so that his *Plessy* dissent could be redeemed for the holding that the Constitution is "color-blind." Holmes, the greatest of the dissenters, was reimagined no fewer than four ways by the generation of judges and academics who canonized his dissents and made him into a heroic Justice.<sup>159</sup>

On the level of broad theory, liberals and pragmatists came to claim Holmes as a hero of their camps, although Holmes was more correctly understood as a member of neither. On the basis of his economic regulation and free speech opinions, progressive reformers like Felix Frankfurter, Harold Laski, Jerome Frank, and Max Lerner

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156. A redeeming court has less distance to travel when the Justice it must present as heroic already has that status. Thus, had Holmes been established as a heroic dissenter in the *Lochner* case long before courts wished to redeem his free speech dissents, the later courts would have had an easier time making the free speech dissents authoritative because the heroism of the author would already have been established. As it happened, Holmes's dissents in these cases were redeemed roughly contemporaneously. See *infra* text accompanying notes 222-36. Today, however, it would be much easier for a court to redeem an opinion by Holmes, Brandeis, or Harlan, all other things being equal, than to redeem a dissent by a Justice who was obscure or reviled. Redeeming that kind of dissent would require not one, but two new reimaginings—one of the opinion and one of the Justice.

157. See *supra* note 101.

158. See BARTH, *supra* note 14, at 36; KULL, *supra* note 14, at 124-25; see also *infra* Part III.A.

159. For an opposing view, namely that Holmes was a self-created judicial hero who invented his own image and who deliberately presented himself in the way that we know him today, see Robert A. Ferguson, *Holmes and the Judicial Figure*, in THE LEGACY OF OLIVER WENDELL HOLMES, JR. 155, 166-85 (Robert W. Gordon ed., 1992) [hereinafter THE LEGACY].

reinvented Holmes as a liberal.<sup>160</sup> Nevertheless, to think of Holmes's worldview or disposition as liberal would be misleading at best. After all, Holmes was also the author of *The Soldier's Faith*, a speech described by one scholar as "a celebration of an unthinking and unquestioning obedience to orders and a vindication of violence for its role in 'the breeding of a race fit for headship and command.'"<sup>161</sup> Similarly, Karl Llewellyn claimed Holmes as a legal realist on the basis of his skepticism.<sup>162</sup> Zechariah Chafee presented Holmes as a sociological judge, indeed, as the "judge who has done the most to bring social interests into legal thinking."<sup>163</sup> There is some truth in those claims, but neither can account for the blistering formalism of what was perhaps Holmes's most canonical opinion: the *Lochner* dissent. This is not to deny that Holmes did, at least sometimes, explicitly promote a sociological approach to jurisprudence.<sup>164</sup> The point is rather that none of these characterizations of Holmes accounts for the set of Holmes's opinions that appear, retrospectively, as the most important. Each is a reimagining, though not necessarily one which lacks foundation.

Finally, Holmes is often hailed as a great judicial pragmatist, but he actually disagreed, and explicitly so, with most of what he took William James to be arguing about pragmatism.<sup>165</sup> As Hollinger has explained, Holmes did share certain tenets of pragmatist thought. He was an antifoundationalist, and he was concerned with the practical consequences of rules and ideas, and he at least sometimes subscribed to a "market acceptance" theory of truth which was not far from the pragmatist view.<sup>166</sup> On the other hand, he was utterly unconcerned with the central problem for which pragmatism was supposed to be the solution: the need to choose between what James

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160. See Robert W. Gordon, *Introduction: Holmes's Shadow*, in *THE LEGACY*, *supra* note 159, at 5.

161. David A. Hollinger, *The "Tough-Minded" Justice Holmes, Jewish Intellectuals, and the Making of an American Icon*, in *THE LEGACY*, *supra* note 159, at 222 (quoting Oliver Wendell Holmes, *The Soldier's Faith*, in *THE MIND AND FAITH OF JUSTICE HOLMES* 18-25 (Max Lerner ed., 1943)).

162. See Gordon, *supra* note 160, at 5.

163. ZECHARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* 34 (1946) [hereinafter CHAFEE, *FREE SPEECH*].

164. See, e.g., Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV., 457, 467 (1897) (urging judges to weigh "considerations of social advantage" when making decisions).

165. See Hollinger, *supra* note 161, at 222.

166. See *id.* at 221.

called “tough minded” and “tender minded” ways of thinking.<sup>167</sup> James described the “tough minded” thinker as “empiricist,” “materialistic,” “pessimistic,” “irreligious,” and “sceptical.”<sup>168</sup> These traits described Holmes to a fault. The “tender minded” thinker was nothing at all like Holmes: “idealistic,” “optimistic,” “religious,” “free-willist.”<sup>169</sup> The point of pragmatism was to mediate between the two ways of thinking. Holmes was all one and none of the other. Holmes the pragmatist, like Holmes the liberal, the realist, and the sociological jurist, is a retrospective creation, made by exaggerating some elements of Holmes’s thought and obscuring others to construct and trade on a particular view of a judicial hero.

More narrowly but even more ironically, Holmes’s relationship to the practice of dissent itself was reimagined by other writers. The received picture of Holmes the dissenter is that of a prophet, a Justice who knew the truth of the law even when nobody else did.<sup>170</sup> The dispute between the dissenter and the majority, on this view, is not simply about a question over which reasonable people could disagree. Someone is right and someone is wrong. Holmes speaks for the law, temporarily dishonored though it might be, and the majority merely expounds error. Charles Evans Hughes famously captured this attitude toward dissent when he wrote that “[a] dissent in a court of last resort is an appeal to the brooding spirit of the law.”<sup>171</sup> That image of dissent implicitly evokes Holmes as the model dissenter, using the motif of the law as a brooding spirit that Holmes had famously used twelve years earlier in *Southern Pacific Co. v. Jensen*.<sup>172</sup> The evocation is deeply ironic. Holmes in *Southern Pacific* had said that the law is *not* a brooding spirit, that it is made and unmade by people.<sup>173</sup> The dissenter who appeals to the brooding spirit of the law is thus engaged in an un-Holmesian enterprise. The Hughes image of prophetic and objectively correct dissent, however, is much more conducive to the practice of redeeming dissents. If the dissenter is a prophet, then his dissent is true; moreover, the dissenter is a hero,

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167. See WILLIAM JAMES, PRAGMATISM 13 (Harvard Univ. Press 1975) (1907).

168. *Id.*

169. *Id.*

170. See, e.g., White, *supra* note 98, at 577.

171. CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES: ITS FOUNDATIONS, METHODS, AND ACHIEVEMENTS: AN INTERPRETATION 68 (1928).

172. 244 U.S. 205, 222 (Holmes, J., dissenting).

173. See *id.* (“The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi-sovereign that can be identified . . .”).

and the heroism of a Justice assists in the redemption of his dissents. Among the misreadings that went into the retrospective creation of Holmes as the great dissenter, then, was a misreading that helped establish him as a kind of legal hero that his own theory of the law would not have permitted to exist.

Finally, later courts and commentators strongly misread Holmesian doctrine when they redeemed his dissents. The expansive free speech doctrine associated with the *Abrams* dissent and the dissents that followed, for example, was largely a product of revisionism by academic commentators.

Throughout this Essay, I argue that the most important element of a redeemed dissent is its holding and that those holdings are retrospectively created. The redemption and reconstruction of Harlan's *Plessy* dissent and Holmes's free speech dissents provide paradigmatic illustrations of that process. I will consider each in turn.

#### A. *Reimagining Harlan on Racial Egalitarianism*

Harlan's dissent in *Plessy* is best remembered, and most invoked, for its famous pronouncement that "our Constitution is color-blind, and neither knows nor tolerates classes among citizens."<sup>174</sup> His opinion has been cited for more than thirty years for the simple proposition that governmental racial classifications are unconstitutional.<sup>175</sup> In *Romer*, Justice Kennedy broadened that proposition and applied the lesson of Harlan's *Plessy* dissent to a classification on the basis not of race but of sexual orientation.<sup>176</sup> Kennedy achieved that broadening by the simple expedient of quoting only the last several words from the quotation above, leaving out the part that refers specifically to color.<sup>177</sup> Notably, *Romer* was not the first time that a court broadened Harlan's *Plessy* dissent through the strategy of quoting less to say more. The biggest such

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174. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

175. See, e.g., *Shaw v. Reno*, 509 U.S. 630, 642 (1993); *Richmond v. J.A. Croson*, 488 U.S. 469, 521 (1989) (Scalia, J., concurring); *Fullilove v. Klutznick*, 448 U.S. 448, 522-23 (1979) (Stewart, J., dissenting); *Garner v. Louisiana*, 368 U.S. 157, 185 (1961) (Douglas, J., concurring). See also *supra* note 17.

176. See *Romer v. Evans*, 517 U.S. 620, 623 (1996) ("Justice Harlan admonished this Court that the Constitution 'neither knows nor tolerates classes among citizens.' Unheeded then, those words now are understood to state a commitment to the law's neutrality where the rights of a person are at stake.") (citation omitted) (quoting *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting)).

177. See *id.*

broadening took place before Harlan's dissent had ever been canonized.

To see how the received reading of the redeemed *Plessy* dissent is a significant reimagining of that opinion, it is necessary to read Harlan's dissent as a nineteenth-century contemporary would have. The key element is Harlan's use of the term "civil rights." Harlan used that term eleven different times in his opinion, including three times in the famous paragraph that includes the canonical language quoted in *Romer*.<sup>178</sup> In the second half of the twentieth century, nothing about his use of the term "civil rights" seems to limit or qualify the principle that the declaration "[o]ur Constitution is color-blind" is taken to announce. On a nineteenth-century understanding of "civil rights," however, the situation is different. During Harlan's lifetime, "civil rights" was not an umbrella term coextensive with "constitutional rights" in the way that it largely is today. It was, rather, a limiting term referring to a subclass of rights. On that understanding, Harlan's assertion that the Constitution is color-blind with regard to civil rights states not the broad egalitarian proposition that government may not make any racial distinctions but rather the narrower proposition that government cannot discriminate on the basis of race when the issue is one falling into a limited category called "civil rights."

During and after Reconstruction, the jurisprudence of constitutional rights gave an important place to a tripartite typology of rights: civil, political, and social.<sup>179</sup> The typology was never stable, and the status of particular rights within one or another category was more heavily contested than most of the scholarship about these classifications has heretofore recognized.<sup>180</sup> Nevertheless, it is possible to give broad descriptions of how the categories were imagined.

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178. See *Plessy*, 163 U.S. at 554-56, 560, 562-63, 559 (Harlan, J., dissenting).

179. Many scholars of history as well as of law have explored this typology. See, e.g., WILLIAM R. BROCK, *AN AMERICAN CRISIS: CONGRESS AND RECONSTRUCTION, 1865-67*, at 19-20 (1963); ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877*, at 231 (1988); HAROLD M. HYMAN & WILLIAM M. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835-1875*, at 276-78 (1982); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 *STAN. L. REV.* 1111, 1119-20 (1997); Akhil Reed Amar, *The Fifteenth Amendment and "Political Rights"*, 17 *CARDOZO L. REV.* 2225, 2227-28 (1996); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 *YALE L.J.* 1193, 1198-260 (1992); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 *YALE L.J.* 1131, 1164, 1176, 1202-03 (1991).

180. See RICHARD A. PRIMUS, *THE AMERICAN LANGUAGE OF RIGHTS* (forthcoming 1999) (manuscript at ch. 4, on file with author).

“Civil rights” were conceived of as the rights that people must hold in order to act as private individuals in civil society, capable of personal independence and self-sufficiency. The aptly named Civil Rights Act of 1866 guaranteed black freedmen the rights “to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property.”<sup>181</sup> These rights were the minimum basic requirements for distinguishing free persons from slave laborers. “Political rights” paradigmatically meant suffrage and the right to hold office, but sometimes the term referred to those rights that were left up to the political process to allocate.<sup>182</sup> According to Akhil Amar’s thick theory of Reconstruction rights, the category of political rights encompassed all the rights associated with the republican tradition of participatory citizenship, including not just suffrage and officeholding but also the right to sit on juries and the right to serve in the military.<sup>183</sup> “Social rights” dealt on some accounts with personal and private matters, such as access to privately organized schools; slightly different accounts maintain that social rights encompassed access to education generally, as well as access to public transportation and public accommodations.<sup>184</sup>

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181. Civil Rights Act of 1866, 14 Stat. 27, 27 (1866) (codified as amended at 42 U.S.C. § 1981 (1994)).

182. See, e.g., *Ex parte Virginia*, 100 U.S. 339, 367 (1879) (Field, J., dissenting) (equating political rights to those that “arise from the form of government and its administration”).

183. See Amar, *The Fifteenth Amendment and “Political Rights”*, *supra* note 179, at 2225, 2227; Amar, *The Bill of Rights and the Fourteenth Amendment*, *supra* note 179, at 1261-62; Amar, *The Bill of Rights as a Constitution*, *supra* note 179, at 1164, 1202.

184. Compare BROCK, *supra* note 179, at 19-20 (noting that social rights “were those which individuals could [accord to others or not] when receiving [fellow citizens] into their homes . . . or [when] welcoming them into private associations or private schools,” and also characterizing access to public transportation and public education as “political rights”), with WILLIAM WIECEK, *LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE* 94 (1988) (noting that social rights meant principally “equal access to public accommodations and education”), and CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 42 (1993) (noting that social rights applied to “education, public transportation, public accommodations, and so forth”). The tripartite scheme was similar to that presented in T.H. MARSHALL, *CITIZENSHIP AND SOCIAL CLASS* (1950), in which Marshall famously distinguished civil, political, and social components of citizenship. The civil component, Marshall wrote, incorporates “the rights necessary for individual freedom,” in which he included freedoms of speech, faith, and movement, rights of contract and property, and access to equal justice. *Id.* at 10. Courts of law are the relevant institutions for the regulation and enforcement of civil rights. The political component, Marshall continued, incorporates the rights to elect and to be elected, and the corresponding institutions are legislative government bodies. Finally, the social component included the right to minimum economic welfare and “the right to share to the full in the social heritage.” *Id.* at 11. The most relevant institutions for this social component are schools and social services. See *id.*



Through most of Reconstruction and the years that followed, it was generally understood that blacks were constitutionally entitled to the same civil rights as whites but not necessarily to the same social and political rights.<sup>185</sup> Several important constitutional controversies of that time accordingly turned on whether a given right was civil, and therefore available to blacks, or political or social, and therefore not available to blacks. For example, when the Supreme Court in *Strauder v. West Virginia* confronted the question of whether the Constitution gave a black criminal defendant the right not to have black men excluded from service on his jury, the Court's majority referred to jury service as a civil right and ruled that excluding blacks violated the Fourteenth Amendment.<sup>186</sup> Dissenting from that decision in a companion case, Justice Stephen Field protested that jury service was a political right, not a civil one, and therefore not guaranteed to blacks.<sup>187</sup> Similarly, when the Court struck down the Civil Rights Act of 1875 as unconstitutional, it did so on the grounds that the rights contained in that Act were actually not civil but social, and that Congress had exceeded its authority by extending to blacks rights that were beyond the scope of the category of rights that were constitutionally available to them.<sup>188</sup> Even when the Court in that case sharply limited the rights of blacks, however, it did not contest the proposition that civil rights were equally guaranteed to all citizens regardless of race.<sup>189</sup>

Seeing that "civil rights" referred to the limited set of rights that was to be enjoyed equally by blacks and other citizens makes it clear that Harlan's dissent in *Plessy*, progressive for its time though it was, was not as broad an egalitarian statement as it seems to modern readers who have forgotten the tripartite system of rights. In the *Plessy* opinion, the passage immediately following the canonical language about the color-blind Constitution is as follows:

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Marshall's typology, designed with Britain rather than America in mind, does not completely map the Reconstruction system of classification. Nevertheless, it bears substantial resemblance to the classifications of rights popular in early Reconstruction.

185. See BROCK, *supra* note 179, at 19-20; FONER, *supra* note 179, at 231; HYMAN & WIECEK, *supra* note 179, at 277-78; see also *Ex parte Virginia*, 100 U.S. at 367-68 (Field, J., dissenting). Amar presents a different view, arguing that the Fourteenth Amendment made civil rights equally available to all regardless of race and that the Fifteenth Amendment did the same for political rights. See Amar, *The Fifteenth Amendment and "Political Rights"*, *supra* note 179, at 2227-28.

186. See *Strauder v. West Virginia*, 100 U.S. 303, 306, 309-10 (1879).

187. See *Ex parte Virginia*, 100 U.S. at 367-70 (Field, J., dissenting).

188. See *The Civil Rights Cases*, 109 U.S. 3, 19, 24-26 (1883).

189. See *id.* at 22.

In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.<sup>190</sup>

If “civil rights” meant “all rights”, those sentences would indeed have been bold and revolutionary in their liberalism. But understood within their nineteenth-century parameters, they said nothing about civil rights with which the Court’s majority would have disagreed. It was true, the majority would have acknowledged, that all citizens of all colors are equal with regard to civil rights. Their disagreement with Harlan lay elsewhere, in the classification of the right at stake as civil as opposed to social.<sup>191</sup> The majority’s decision turned on their judgment that the right that Homer Plessy sought was a one of social rather than civil equality.<sup>192</sup> Harlan was more egalitarian than his fellow Justices in that he was willing to classify as civil, and therefore as rightfully belonging to blacks, more rights than were the other members of the Court. At the same time, however, Harlan’s *Plessy* dissent did not argue for unlimited egalitarianism. It did not challenge the assumption that there did exist kinds of rights that whites but not blacks were entitled to enjoy.

Modern courts that cite the *Plessy* dissent can cite Harlan’s language about equality of civil rights with little fear that they will be taken to imply the existence of other categories of rights in which racial discrimination remains constitutional. American law has, after all, largely forgotten the tripartite Reconstruction typology.<sup>193</sup> But the modern use of the *Plessy* dissent to represent the color-blind ideal is a reimagining of that opinion. Indeed, the proposition for which Harlan’s dissent is now cited is broader than either his original

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190. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

191. See PRIMUS, *supra* note 180; Siegel, *supra* note 179, at 1126-27.

192. See *Plessy*, 163 U.S. at 544.

193. It is probably not coincidental that “civil rights” has come to mean, roughly, “all constitutional rights” in an age when the distinguishing characteristic of “civil rights” in the nineteenth-century sense—that is, their availability to black citizens—has ceased to be a limiting characteristic. Because all rights are now supposed to be enjoyed without regard to race, all rights are now civil rights.

intention or the holding of *Brown v. Board of Education*.<sup>194</sup> This state of affairs is especially remarkable if it is true, as some recent historical accounts maintain, that Harlan continued to favor segregated public schools even after his dissent in *Plessy*.<sup>195</sup> It may not be ironic that an opinion which originally did not even assert the unqualified equality of blacks has come to be used to argue against affirmative action for blacks, but it is certainly ironic that such an opinion should be used to make the argument in the name of unqualified egalitarianism.<sup>196</sup> That irony, however, is a normal product of a process by which the redemption and canonization of dissent is a function not of the dissenting Justice or of the opinion he wrote but of the rereadings that later courts conduct when they reverse yoked pairs and revise the constitutional canon.

### *B. Reimagining Holmes on Free Speech*

Until the First World War, Holmes would have been an unlikely candidate to become a hero to civil libertarians. On both the Massachusetts and United States Supreme Courts, Holmes had regularly taken restrictive positions on free speech issues.<sup>197</sup> By the mid-1920s, however, Holmes's name had become synonymous with free speech. Central to the transformation was a strong misreading of Holmes around the time of *Abrams*, a misreading which Holmes himself came to adopt.<sup>198</sup> The misreaders of Holmes included Felix Frankfurter, Harold Laski, Jerome Frank, Max Lerner, Harlan Fiske Stone, and many others,<sup>199</sup> but the central figure in the free-speech

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194. There is here an analogy between Harlan's dissent in *Plessy* and Brandeis's dissent in *Olmstead*, which is also routinely cited for a proposition broader than the one affirmed in the case that redeemed it, albeit not necessarily for one with which its author would have disagreed, even in his own time. See *supra* text accompanying notes 62-67.

195. See KULL, *supra* note 14, at 125.

196. See, e.g., *Richmond v. J.A. Croson*, 488 U.S. 469, 521 (1989) (Scalia, J., concurring); *Fullilove v. Klutznik*, 448 U.S. 448, 522-32 (1979) (Stewart, J., dissenting).

197. See Rogat & O'Fallon, *supra* note 32, at 1352-60. It is ironic that an article like Rogat and O'Fallon's, which explicitly derogates Holmes, draws strength from the image of the heroic dissenter by presenting itself, in its title (*Mr. Justice Holmes: A Dissenting Opinion—The Speech Cases*), as a dissent.

198. The misreading of Holmes's views on free speech is probably the most spectacular case of Holmes's complicity in being misread, but it is not the only one. In contrast to the misreading of Harlan's *Plessy* dissent, which did not begin until decades after Harlan's death, all the reimaginings of Holmes described above took place largely while Holmes still lived, and Holmes often interacted with the revisers and even conformed to the misreadings. See *infra* notes 218-22 and accompanying text. Indeed, adopting the canonizer's revision of oneself might be a good strategy for becoming canonical.

199. See Gordon, *supra* note 160, at 5.

misreading was Zechariah Chafee, the revered Harvard Law professor and possibly the most important First Amendment scholar of the first half of the twentieth century.

In 1918, when Chafee was a young scholar, Laski and Herbert Croly commissioned Chafee to write about free speech and the Espionage Act for *The New Republic*.<sup>200</sup> The Espionage Act and other repressive wartime measures had pushed the progressive coterie that at that time clustered around *The New Republic* to become more and more unreserved in their support for free speech. John Dewey, for example, hoped that the wartime repression would trigger a progressive reaction and help overcome reactionary social thinking.<sup>201</sup> The progressives were never radical individualists, but the free speech question in those years forced them to choose between the pacifists and Eugene V. Debs on one hand and the right-wing jingoists on the other, and they had little difficulty making their decision.<sup>202</sup> They had, however, a particular version of free speech, one consistent with their progressive social philosophy. Being people who questioned the notion of rights-bearing individuals, they did not conceive of free speech as an individual right on a free expression model. Instead, as exemplified in the writings of people like Dewey, Croly, and Roscoe Pound, they believed that free speech had socially constructive functions because the expression of dissenting views served the community's interest in progress.<sup>203</sup> Theirs was a vision of free speech that fit with Mill's arguments in *On Liberty*<sup>204</sup> and Milton's dictum in *Areopagitica* that "Truth is great and will prevail in open struggle."<sup>205</sup> War and repression hardened their views somewhat, but their underlying approach to free speech was still in place when Laski and Croly commissioned Chafee in 1918.

Chafee began publishing in *The New Republic*<sup>206</sup> about four months before the Supreme Court handed down its decision in

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200. See David M. Rabban, *Free Speech in Progressive Social Thought*, 74 TEX. L. REV. 951, 1017 (1996) [hereinafter Rabban, *Free Speech*].

201. See John Dewey, *Public Education on Trial*, in 10 JOHN DEWEY, THE MIDDLE WORKS 1899-1924, at 173, 177 (Jo Ann Boydston ed., 1980).

202. See Rabban, *Free Speech*, *supra* note 200, at 1020-21.

203. See *id.*

204. JOHN STUART MILL, ON LIBERTY 23-24 (Oxford Univ. Press 1952) (1859).

205. JOHN MILTON, AREOPAGITICA 51-52 (John W. Hales ed., Oxford Univ. Press 1949) (1875).

206. See Zechariah Chafee, *Freedom of Speech*, 17 NEW REPUBLIC 66 (1918).

*Schenck v. United States*.<sup>207</sup> He had a strong bias in favor of free speech, so strong that David Rabban has characterized Chafee's work as "propaganda."<sup>208</sup> After *Schenck* was decided, Chafee seized on the "clear and present danger" formulation Holmes used in that case, presenting it as the original theory of the First Amendment<sup>209</sup> and as a strongly pro-free speech doctrine even though Holmes had decided against the free speech interest in *Schenck*.<sup>210</sup> Rabban describes Chafee's argument as a "libertarian misconstruction of 'clear and present danger,'"<sup>211</sup> but Chafee's analysis was actually less libertarian than progressive and consequentialist. Chafee explicitly argued that the free speech interest is social, not individual: free speech, he contended, is instrumentally valuable for the public because it helps to bring out all sides of an issue and to move society toward the best view.<sup>212</sup> The epigraph opening to the first chapter of Chafee's major work *Free Speech in the United States* was the famous passage from Milton's *Areopagitica* on Truth always triumphing in open battle with Falsehood.<sup>213</sup> Chafee's theory of free speech thus fit quite well with the approach of the progressives who had commissioned him, and it also fit with what would come to be the Holmesian position on free speech.

Holmes seems to have eventually adopted Chafee's version of what he, Holmes, had meant by the "clear and present danger" test,

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207. 249 U.S. 47 (1919) (per Holmes, J.) (rejecting free speech challenge to Espionage Act convictions for circulating subversive materials during wartime).

208. David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1285 (1983) [hereinafter Rabban, *Emergence*]. Chafee's own attitudes were born partly of outrage at the World War I repressions, see *id.* at 1284, particularly at the tendency of the sedition laws of the period to destroy academic freedom, an interest that Chafee felt personally. In *Free Speech in the United States*, Chafee detailed the effects that the sedition laws would have on scholarship. See CHAFEE, FREE SPEECH, *supra* note 163, at 189-90 (noting that the portion of the book describing the effects of the sedition laws on scholarship was actually written for an earlier edition in 1920). He dedicated the book to A. Lawrence Lowell, "whose wisdom and courage in the face of uneasy fears and stormy criticism made it unmistakably plain that so long as he was president no one could breathe the air of Harvard and not be free." *Id.* at v.

209. See CHAFEE, FREE SPEECH, *supra* note 163, at 82.

210. See Zechariah Chafee, *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 967-69 (1919).

211. Rabban, *Emergence*, *supra* note 208, at 1285; see also Rabban, *Free Speech*, *supra* note 200, at 1018 (describing Chafee's view as an "unfounded libertarian reading" of Holmes's opinion).

212. See CHAFEE, FREE SPEECH, *supra* note 163, at 33-35 (noting "a social interest in the attainment of truth, so that the country may not only adopt the wisest course of action but carry it out in the wisest way").

213. See *id.* at 3 (quoting JOHN MILTON, AREOPAGITICA, *supra* note 205, at 51).

thus internalizing a misreading of himself.<sup>214</sup> In *Frohwerk*<sup>215</sup> and *Debs*,<sup>216</sup> two important free speech cases decided shortly after *Schenck*, Holmes made no reference at all to “clear and present danger.” The absence of that phrase from those two cases indicates that Holmes did not believe he had articulated a new controlling doctrine with that locution in *Schenck*. But Chafee was hard at work canonizing the “clear and present danger” formula, and his approach took hold with Holmes by the time of *Abrams*.<sup>217</sup>

Tracing the influence of one figure on another is at best an inferential enterprise, but there are strong reasons for believing that Holmes did not adopt the Chafee position completely by accident. In letters to Laski and others, Holmes praised Chafee’s free speech writings, and Laski arranged for the two men to meet in July 1919, halfway between *Schenck* and *Abrams*.<sup>218</sup> It would be overstatement to argue that Chafee singlehandedly persuaded Holmes to become an advocate of the freedom of speech: many factors, including reaction against the same tide of wartime repression that galvanized Chafee and the others, surely contributed to Holmes’s substantive view.<sup>219</sup> Once Holmes started voting to reverse the convictions of political dissenters on free speech grounds, however, the theory of free speech that he put forward was the Chafee view of “clear and present danger.”<sup>220</sup> Nor was Holmes alone in adopting Chafee’s strong

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214. See Rabban, *Emergence*, *supra* note 208, at 1285.

215. *Frohwerk v. United States*, 249 U.S. 204 (1919) (upholding Espionage Act convictions).

216. *Debs v. United States*, 249 U.S. 211 (1919) (upholding an Espionage Act conviction).

217. *Abrams v. United States*, 250 U.S. 616, 627-31 (1919) (Holmes, J., dissenting).

218. Rabban, *Emergence*, *supra* note 208, at 1315 n.682.

219. Through the friends and disciples in the academy who would help make him a canonical figure, Holmes came into close proximity with the threats to free academic inquiry that were so important to Chafee. For example, Holmes learned in 1919—the year of *Frohwerk*, *Debs*, and *Abrams*—that Frankfurter’s position at Harvard might be in jeopardy because of Frankfurter’s then-radical politics. See *id.* at 1314-15. Holmes quickly wrote to President Lowell in Frankfurter’s defense. See *id.* In addition to the shift in Holmes’s own views that might have been involved in such an incident, Holmes’s intervention must have further raised his standing in Frankfurter’s eyes, as well as strengthened Frankfurter’s association of Holmes with free speech. See *id.* at 1315 (noting that “in his own book on Holmes, Frankfurter . . . maintained that this ‘period of hysteria undoubtedly focused the attention of Mr. Justice Holmes on the practical consequences of a relaxed attitude toward’ free speech” (quoting FELIX FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 79 (2d ed. 1961))). Those effects could then help shape the image of Holmes that Frankfurter, one of Holmes’s leading canonizers, would project.

220. See Rabban, *Emergence*, *supra* note 208, at 1302-03.

misreading: Brandeis, Holmes's colleague in dissent, also began citing to Chafee in his opinions on free speech.<sup>221</sup>

After Holmes dissented in *Abrams*, Chafee constructed an explanation for why Holmes had voted to uphold the conviction in *Schenck* in the first place. After all, if Holmes was to be the hero of free speech and a heroic dissenter in *Abrams*, it would be convenient to explain away his earlier and less glorious decisions limiting free speech. Chafee argued that Holmes had intended all along to make the bold announcement he made in his *Abrams* dissent and had cleverly gone along with the majority in *Schenck* so as to get the "clear and present danger" test adopted in a unanimous decision of the Court.<sup>222</sup> Once the standard was accepted, Holmes could then fight in later cases about its proper application and redeem its potential for protecting free speech. *Frohwerk* and *Debs* did not provide the opportunity. According to Chafee, "Holmes was biding his time until the Court should have before it a conviction so clearly wrong as to let him speak out his deepest thoughts about the First Amendment."<sup>223</sup>

This account is not plausible.<sup>224</sup> It is a transparent attempt on Chafee's part to make Holmes into a consistent defender of free speech when he in fact came late to that position.<sup>225</sup> But it is also something more: it is a construction of Holmes as a visionary, a far-sighted Justice who knew in advance what course doctrine would take and how best to vindicate truth in the end. It is, in short, a view of Holmes as a judicial prophet. By portraying Holmes in that way,

221. See, e.g., *Whitney v. California*, 274 U.S. 357, 376 n.3 (Brandeis & Holmes, JJ., concurring) (citing ZECHARIAH CHAFEE, JR., *FREEDOM OF SPEECH* 46-56, 174 (1920) [hereinafter CHAFEE, *FREEDOM OF SPEECH*]); *United States v. Bursleson*, 255 U.S. 407, 431 n.1, 433 n.1 (1921) (Brandeis, J., dissenting) (citing CHAFEE, *FREEDOM OF SPEECH*, *supra*, at 105-09, 233-34); *Schaefer v. United States*, 251 U.S. 466, 486 (1920) (Brandeis & Holmes, JJ., dissenting) (citing Chafee, *Freedom of Speech in War Time*, *supra* note 210, at 963, on the "clear and present danger" requirement).

222. See CHAFEE, *FREE SPEECH*, *supra* note 163, at 86.

223. *Id.*

224. It is unlikely that Justices of the Supreme Court deliberately feint one way before striking out in the other, plotting a reversal several decisions in advance. Even if we were to accept that Holmes intended to do just that in the free speech cases, however, we would have trouble explaining his opinions in the intermediate cases, *Frohwerk* and *Debs*. If Holmes was guided throughout by a master plan to develop the "clear and present danger" doctrine with the blessing of the Court's majority and then to turn it to other purposes, he would have used *Frohwerk* and *Debs* to repeat and reinforce that doctrine. That he did not suggests that there was no master plan—which in any case does not seem like a radical conclusion.

225. Cf. Rogat & O'Fallon, *supra* note 32, at 1376-77 (discussing flaws in Chafee's interpretation).

Chafee not only shaped the meaning of Holmes's dissent but also prepared the ground for the redemption of that dissent by constructing the dissenter along with the dissent. If Holmes is a heroic Justice, and if Holmes means what Chafee says he means, then the Chafee position stands a better chance of becoming authoritative.

In fact, Chafee saw no need to wait for a later court to redeem Holmes's dissents. He played the redeemer himself, pronouncing the dissents authoritative even when only Holmes and Brandeis on the Court agreed with them. Only a year after *Abrams*, Chafee described the majority opinion in that case as "temporary" and the Holmes reasoning as "enduring."<sup>226</sup> He acknowledged that the Holmes opinion was a dissent, but he wrote that it must carry "great weight" because it was merely an application of the clear and present danger test established "by a unanimous court in *Schenck v. United States*."<sup>227</sup> The reasoning is specious, of course. Taken at face value, it would make a dissenter's opinion more authoritative than the majority's merely because it purported to be grounded in authoritative precedent, something which is true of almost all dissents and which does not distinguish the Holmes dissents from the majority opinions to which they are opposed. Having passed off the *Abrams* dissent as justified by *Schenck*, however, Chafee went on to describe a glorious history of free speech opinions in the 1920s, all uncomplicatedly authoritative. He presented Brandeis's dissent in *Gilbert v. Minnesota*<sup>228</sup> as an authoritative opinion grounded in *Schenck*.<sup>229</sup> Of course, *Schenck* justifies Brandeis's opinion in *Gilbert* only on the *Abrams* dissent's version of *Schenck*, but Chafee preferred not to articulate that qualification. And according to Chafee, Brandeis's dissent in *Gilbert* was in turn "the first glimmer of the new day which

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226. See CHAFEE, FREE SPEECH, *supra* note 163, at 136. Compare Chafee's 1920 claim that Holmes' dissent in *Abrams* was *already* authoritative with Frankfurter's statement in 1915 that "the turning point [in the jurisprudence on economic regulation] is the dissent in the *Lochner* case." Felix Frankfurter, *The Constitutional Opinions of Justice Holmes*, 29 HARV. L. REV. 683, 691 (1915). Both pronouncements were premature. Holmes's view on free speech was still very much a minority position in the Court in 1920. *Lochner* was still good law in 1915, and a dissent only becomes a turning point when the original decision has been repudiated. At that point, the yoked pair has been inverted and people can retrospectively trace the path of the doctrinal shift. By identifying Holmes's *Lochner* dissent as a turning point at this early date, Frankfurter was constructing rather than merely reporting the importance of that opinion. Chafee was doing the same with *Abrams*.

227. CHAFEE, FREE SPEECH, *supra* note 163, at 136.

228. 254 U.S. 325, 334-43 (1920) (Brandeis, J., dissenting) (arguing that a state law that prohibits publicly discouraging men from enlisting in the military is unconstitutional).

229. See CHAFEE, FREE SPEECH, *supra* note 163, at 295-96.



was to dawn with *Gitlow v. New York*.<sup>230</sup> One would hardly know that the Supreme Court upheld Gitlow's conviction: the *Gitlow* opinion of which Chafee approves is not the majority but the dissent.<sup>231</sup>

By writing as he did, however, Chafee helped to reverse a series of yoked pairs. In Chafee's retelling of the line of cases, the meaning of *Gilbert* is Brandeis and the meaning of *Gitlow* and *Abrams* is Holmes. The doctrinal evolution is from dissent to dissent, not from majority to majority; the majority opinions are significant only as yoked-pair partners of the dissents. Having successfully misread a doctrinal statement ("clear and present danger") and a Justice (Holmes), Chafee went on to misread an entire line of cases, constructing a tradition of free speech without even a single decision of the Court in his favor.<sup>232</sup> The tradition, moreover, stretched back far earlier than *Abrams* and *Schenck*. The greatest believers in freedom of speech, Chafee wrote, are Milton, Mill, and Holmes.<sup>233</sup> That collection is not arbitrary. By presenting Holmes as the successor to Milton and Mill, Chafee not only helped to enhance his prestige but also helped to shape the content of the Holmes position on free speech. Milton and Mill, after all, believed in free speech as progress and the quest for truth more than as a libertarian right of free expression.<sup>234</sup> To be sure, the former version of free speech was present in Holmes's and Brandeis's dissents; Chafee did not simply impose that reading groundlessly on their opinions. Until Chafee's

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230. *Id.* at 297.

231. *See Gitlow v. New York*, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting).

232. Chafee's construction of a judicial tradition of defending free speech out of a line of dissents shows a limitation of the theory that Maurice Kelman advanced in *The Forked Path of Dissent*, 1985 SUP. CT. REV. 227. In that article, Kelman recommended that dissenters dissent a single time and then acquiesce in the decision of the majority of the Court until such time as a majority of the Court is ready to reconsider the issue in question. *See id.* at 297-98. A single dissent, however, cannot be a tradition. A later writer can, of course, invert a single yoked pair and redeem a dissent whether or not there are other dissents that go with it, but the systematic misreading of a whole line of cases that Chafee attempted, and largely achieved, in *Free Speech in the United States* is possible only if dissenters dissent repeatedly.

233. *See* CHAFEE, *FREE SPEECH*, *supra* note 163, at 325, 509.

234. Chafee's line of doctrinal dissent, Milton to Mill to Holmes, was reiterated by others who helped make Holmes the heroic figure he is. For example, when introducing the *Abrams* dissent in his Holmes's anthology, Max Lerner describes it as "ranking in the English tongue with Milton and Mill." THE MIND AND FAITH OF JUSTICE HOLMES 306 (Max Lerner ed., 1943). The linkage among the three authors also survives in contemporary legal opinions. *See, e.g.*, *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 592 (1980) (Rehnquist, J., dissenting); *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 330 (7th Cir. 1985) (striking down an antipornography ordinance on free speech grounds).

strong misreading, however, Holmes would not have presented himself as the successor to Milton and Mill. Indeed, the greatest of his early dissents alluded to Mill derisively.<sup>235</sup> Later, however, the opinions he wrote were influenced by Chafee's misreadings and interpretations. Holmes became a heroic Justice partly by conforming to the vision of himself presented by a commentator who constructed part of the judicial canon, and Chafee, through a strong misreading of Holmes and his opinions, helped to create a jurisprudence of free speech and the Justice who personified it.<sup>236</sup>

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235. See *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting):

The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not.

The phrase "some well-known writers" likely refers, among others, to Mill, who argued that "[t]he only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute." MILL, ON LIBERTY, *supra* note 204, at 15.

236. The greatness of Holmes as a dissenter stands on two pillars rather one—that is, on the economic regulation cases as well as on the free speech cases—and the interaction between the two is complex. Because Holmes is Holmes whether the case before the reader is *Abrams* or *Lochner*, the heroism established with respect to one line of cases helps to establish the authority of the dissents in the other. At different times in history, that interrelationship has had different political effects. In the liberal jurisprudence of midcentury America, which applauded both judicial deference to legislatures on questions of economic regulation and expanded notions of free political expression, Holmes's heroic status helped canonize two dissents for the price of one. Crudely, the doctrine of footnote four of *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), could be rendered as Holmes dissenting in *Lochner* plus Holmes dissenting in *Abrams*.

In recent years, however, some scholars have implicitly pitted the two against each other. After *Buckley v. Valeo*, 424 U.S. 1 (1976), and at a time when the right of free speech is routinely invoked against hate speech laws that seek to protect traditionally underprivileged minority groups, many on the academic left have begun to protest that the formally neutral right to free speech actually favors the continued domination of the weak by the powerful. In an attempt to capture this situation in rhetorically powerful terms, Horwitz has decried the "Lochnerization of the First Amendment." Morton Horwitz, *Foreword: The Constitution of Change: Legal Fundamentalism without Fundamentalism*, 107 HARV. L. REV. 30, 109-16 (1993). In keeping with the metaphor, Cass Sunstein has proposed a "New Deal for speech," meaning a transformation whereby the state could regulate in the public interest something which had previously been the province of a nearly absolute individual right. CASS SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 17-51 (1993); see also OWEN FISS, THE IRONY OF FREE SPEECH (1996) (discussing the areas in which state regulation of speech in the public interest is necessary and in fact supported by the First Amendment). The attempt to overcome this second "Lochnerization" implicates the authority of Holmes's canonical dissents in a problematic way. To protest a "Lochnerization" is implicitly to invoke Holmes, but Holmes for Horwitz and Sunstein is also part of the problem, because his authority also supports the viewpoint-neutral right of free speech. Indeed, some of his free speech opinions are virtual statements of the creed for that cause.

## CONCLUSION

The notion that canonical dissent is a phenomenon in need of explanation rests on two ideas, one about the nature of dissent and one about the shape of the constitutional canon. The former idea is that dissents are statements of positions rejected by the law. The latter idea is that the canon is composed of those texts that the law has embraced as authoritative. But the canon is actually more capacious. Its structure is dual, and its anti-canonical track gives a home to many rejected positions. There is thus a sense in which it is misleading to think of the positions expressed by dissents as rejected, because the yoking together of paired texts actually preserves those positions within the corpus of the law rather than banishing them or leaving them behind. A position preserved in dissents, even if not authoritative, often has less distance to travel to become authoritative than does a position that has never been “rejected.” The rejected positions are at least present within the system, and inversions of yoked pairs are not uncommon. Indeed, the structure of the canon is not even hostile to such inversions. It invites them. Because the constitutional canon is dual, its authorities always keep us mindful of the set of their possible replacements.

To be sure, not all reversals of yoked pairs are equally easy to achieve. Where the canonization of dissents is concerned, such reversals are limited by the structural need for canonical texts and by the need to trade on the reputation of a heroic Justice. The structural concern is a powerful one, as is illustrated by the near disappearance of dissents, like that in *Dred Scott*, which would seem to be natural candidates for canonical status. The need for a heroic Justice, however, may be less confining, given that the heroism of Justices and the greatness of their dissents can be constructed in tandem.

Just as the reimagining of dissenter and dissent are largely simultaneous, the two taken together are substantially convergent with re-presenting the constitutional tradition as endorsing a given position—as permitting economic regulation, or as requiring a thoroughgoing egalitarianism that prohibits affirmative action, or as supporting a strong marketplace-of-ideas vision of the right to free speech. And judges or commentators who conduct strong misreadings of canonical and anti-canonical texts often misread not just one previous judge or one previous opinion but the entire judicial tradition of which the redeemed holding is a part. At the very least, they invert one yoked pair of majority and dissent, thus misreading

not just the dissenting opinion but the whole case, both opinions together. Sometimes, however, they misread a line of cases, reversing a series of yoked pairs and constructing a new authoritative tradition in the way that Chafee did with Holmes.

The process of reimagining past opinions as a way of reconstructing the canon of constitutional authority is not limited to the treatment of dissents. Judges who wrote for the majorities of their courts can also be reimagined, and authoritative opinions as well as dissenting ones can come, in the hands of later courts, to have meanings that their issuers would not have intended or even have been able to foresee.<sup>237</sup> When Justices and casebook editors contest the content of the canon, they do so by choosing which settled cases to venerate, follow, or print—and how—as well as by choosing whether to invert yoked pairs. Much of what this Essay has described about canonicity being a function of the use that later actors make of earlier texts thus applies to majorities as well as to dissents, and indeed, as Balkin and Levinson would stress, to constitutionally significant texts that are not judicial opinions at all. One important area in which the reimagining of dissents by those who construct the canon does indeed differ from the reimagining of majority opinions lies in an inherent difference between what might be meant by the “holding” of a majority and of a dissent. Because they actually did dispose of a case on a particular set of facts, the holdings of majority opinions are generally less open to reimaginings than those of dissents. This is not to say that creative judges cannot reimagine the holdings of majorities. They do so all the time. It is rather to say that to whatever extent courts perform that function with majorities, they should be even more able to do so with dissents.

If, with that exception, the uses of dissents by canonizers are not so different from the uses of majority opinions, there is less difference than might be supposed between the those two kinds of texts. The view that one kind is authoritative and therefore a natural candidate for canonicity and the other kind rejected and therefore the very antithesis of canonical thus seems overstated, and the need for special theories to explain redeemed dissents is, to a certain extent, diminished. Dissents become canonical for the same reasons that majority opinions become canonical, namely, because of the views that later constructors of the canon take toward the holdings which can be attributed to those earlier opinions. Cases with little

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237. That is the moral of Deutsch's fable about Frankfurter. See Deutsch, *supra* note 153, at 1584.

abiding significance disappear from casebooks, and their majorities fade as well as their dissents. And where opinions have continuing importance, the canonical and the anti-canonical are both preserved, each drawing its significance from the other.