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IS *DRED SCOTT* REALLY THE WORST OPINION OF ALL  
TIME? WHY *PRIGG* IS WORSE THAN *DRED SCOTT* (BUT  
IS LIKELY TO STAY OUT OF THE “ANTICANON”)

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Professor Jamal Greene’s *The Anticanon*<sup>1</sup> is an important contribution to both constitutional theory and what might be termed the sociology of legal consciousness. With regard to the former, the central question is whether there are truly persuasive criteria that allow us to distinguish, on what might be termed “internalist” legal grounds — that is, independent of our approval or disapproval of the result on moral or consequential grounds — those opinions (and the decisions they attempt to justify) that we denominate as either “terrible (how could any self-respecting lawyer/judge write this)” or “truly admirable (this makes me proud to be a lawyer).” That discussion will profit from the identification of those cases that are widely viewed as exemplary in either direction. Using a variety of empirical measures, Greene has identified what might be termed the “Hall of Infamous Cases” whose function, whether in constitutional law casebooks, political speeches, or legal opinions, is to stand as paradigmatic instances of how not to do constitutional analysis. To embrace one of these cases as commendable, whether in the classroom, at the podium, or in a legal opinion, would be to reveal that one simply does not know “how to think” as a modern constitutional lawyer and to risk whatever shame (or worse) that might be attached to that. Quite obviously, given that the anticanonical cases identified by Greene all garnered majority votes on the United States Supreme Court, one has to explain this result. Perhaps our predecessors were simply stupid; perhaps they had ceased to be proper lawyers because they were in thrall to some ideological passion. What is presumably unacceptable is to say that the opinions they wrote are unproblematic (save in the immorality they reveal about our legal system or the unfortunate consequences they led to).

In any event, we are talking about an important aspect of the socialization process by which, especially, members of the legal profession, including students striving to achieve that status, are taught to distinguish cases on the basis of their quality as legal arguments. At the same time, we — as a society or simply as law professors — are of-

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<sup>1</sup> Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011)

ten trying to generate a sense of pride as well in the discipline of law — and of “thinking like a lawyer.” Even if this socialization process is most pronounced with regard to members of the legal profession, it plays a role as well in forming the consciousness of ordinary citizens, who may well carry in their minds certain iconic catchphrases or references that serve as important rhetorical markers with regard to the meaning of living within the American constitutional order. One need not be a diplomatic historian, for example, to know that “Munich,” for better or, quite probably, worse,<sup>2</sup> still has a power even for a generation that can identify neither any of the participants besides Hitler nor the particular dynamics of the agreement reached there. Similarly, “Pearl Harbor” or, for a younger generation, “September 11,” can be useful in stilling debate, even (or especially) among audiences who cannot identify Premier Hideki Tōjō or locate Afghanistan on a map.

So it is with the “anticanonical cases,” especially the case that is at the head of the (relatively small) pack, *Dred Scott v. Sandford*.<sup>3</sup> Consider the following comment offered by President George W. Bush during the 2004 presidential campaign regarding the kinds of persons whom he would (or, as importantly, would not) appoint to the Supreme Court. He would, he informed us, “pick people that would be strict constructionists.” He offered as one of his central negative examples “the *Dred Scott* case, which is where judges, years ago, said that the Constitution allowed slavery because of personal property rights. That’s a personal opinion. That’s not what the Constitution says. The Constitution of the United States says we’re all — you know, it doesn’t say that. It doesn’t speak to the equality of America.”<sup>4</sup> Put to one side that this is gibberish. One can be quite certain that the former President, like the overwhelming majority of his audience, had never read the decision and had almost literally no idea of the basis of Chief Justice Roger Taney’s arguments. But, of course, it doesn’t matter, because *Dred Scott* has become synonymous among the general public with what Professor Jack Balkin and I have labeled “judges on a rampage.”<sup>5</sup> Gibberish or not, President Bush’s invocation of *Dred Scott* is dispositive evidence that a savvy politician could assume that enough of his audience was aware of the reference — and of its “harmonic overtone,” as it were, with *Roe v. Wade* — that he felt no hesitation in

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<sup>2</sup> See ALAN WOLFE, POLITICAL EVIL 113–15 (2011) (attacking misuse of “the appeasement analogy,” *id.* at 114, and concluding, “[w]hat happened in Munich deserves to stay in Munich,” *id.* at 115).

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

<sup>4</sup> Timothy Noah, *Why Bush Opposes Dred Scott*, SLATE (Oct. 11, 2004, 6:45 PM), [http://www.slate.com/articles/news\\_and\\_politics/chatterbox/2004/10/why\\_bush\\_opposes\\_dred\\_scott.html](http://www.slate.com/articles/news_and_politics/chatterbox/2004/10/why_bush_opposes_dred_scott.html).

<sup>5</sup> Jack M. Balkin and Sanford Levinson, *Thirteen Ways of Looking at Dred Scott*, 82 CHI.-KENT L. REV. 49, 78 (2007).

using it. That's just what it means for something to be "canonical" (even if the canon, in this instance, is called the "anticanon").

But what if conventional wisdom is wrong? Perhaps "canonical" cases are, on closer analysis, dreadful, while "anticanonical cases" turn out to be indistinguishable from those treated with greater respect or even — gasp! — to have some genuine merits and lessons worth drawing on. Thus one should understand Greene's article as an important effort to complicate our thinking. The anticanon may be conventional, but does its condemnation necessarily reflect wisdom, whether within the legal profession or among the laity?

Consider perhaps the hoariest case in the contemporary canon, Chief Justice Marshall's opinion in *Marbury v. Madison*.<sup>6</sup> What allows us to say that it is a "better" opinion, applying the criteria of that ineffable quality called "legal craft," than *Dred Scott*? Yes, Taney might have overreached in some of his arguments, but were they any worse, as examples of "craft," than Marshall's scandalous misquotations of Section 13 of the Judiciary Act of 1789 and then Article III of the Constitution?<sup>7</sup> Perhaps Taney was motivated by achieving what would be, from his perspective, the desirable result of saving the Union by declaring that one of the central planks of the newly formed Republican Party — the prohibition of extending slavery into the territories — was unconstitutional. But is *Dred Scott* more exemplary of "motivated" decisionmaking than *Marbury* and its companion case, the far-too-ignored *Stuart v. Laird*,<sup>8</sup> which can be understood only as altogether rational decisions by the Court to retreat in the face of Jeffersonian opposition? Not only was the Federalist Mr. Marbury found to have had no cause of action in the Supreme Court, but, more importantly, the Jeffersonians were permitted to purge the federal judiciary of a host of Federalist judges newly appointed (and confirmed) to staff the new tier of intermediate appellate courts.

Moreover, as Greene notes, there is a small, but increasing, number of scholars who suggest that *Dred Scott* is far from exemplifying "judges on a rampage" and is, at the very least, a plausible rendering of our foundational document.<sup>9</sup> It helps, of course, if one accepts a basically Garrisonian reading of the Constitution as a "covenant with Death and an agreement with Hell" instead of glossing over the extent to which the 1787 Constitution includes a number of "rotten compro-

<sup>6</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>7</sup> See generally Sanford Levinson, *Why I Do Not Teach Marbury (Except to Eastern Europeans) and Why You Shouldn't Either*, 38 WAKE FOREST L. REV. 553 (2003).

<sup>8</sup> 5 U.S. (1 Cranch) 299 (1803) (holding that the abolition of federal circuit courts through the Repeal Act of 1802 was constitutional).

<sup>9</sup> E.g., Greene, *supra* note 1, at 408 (discussing Professor Mark Graber's attempts at defending *Dred Scott*).

mises” entrenching chattel slavery.<sup>10</sup> Indeed, Professor Mark Graber has demonstrated that Taney’s opinion can be rendered plausible, even if not necessarily compelling, under all of the “modalities” of constitutional interpretation — text, history, structure, precedent, “ethos” of the American social order, and prudence — identified by Professor Philip Bobbitt.<sup>11</sup> The naïve confidence that *Dred Scott* is self-evidently “wrong” may thus be most useful as an example of our desire to construct a “constitutional faith” that the Constitution, even if not “perfect,” is not synonymous on occasion with radical evil.<sup>12</sup> Though I can easily understand the impulse, I doubt whether one can successfully demonstrate that “constitutional fidelity” will protect us from collaborating with evil. There can be no doubt that such a demonstration would be recognized as a major contribution to constitutional theory.

Greene offers much useful information and many conjectures about what accounts for the particular “rise” to the status of anticanonicity of his four key cases, *Dred Scott*, *Plessy v. Ferguson*,<sup>13</sup> *Lochner v. New York*,<sup>14</sup> and the (relatively) new kid on the block, *Korematsu v. United States*.<sup>15</sup> At the very least, it is clear that it takes a while for the degree of ostensible awfulness to be recognized. Part of *Dred Scott*, of course, was reviled immediately and notably overridden by the first section of the Fourteenth Amendment. But only a part. As Greene notes, it was positively cited as late as a full half century after its issuance; more to the point, it formed part of the basis for the dissents in *Downes v. Bidwell*,<sup>16</sup> the key “Insular Case” by which a five-justice majority put the lie to Roger Brooke Taney and held that the United States could emulate imperialist Europe by holding a territory without expressly incorporating it into the United States and extending the protections and limits of the Constitution to its people and government. *Lochner*, in addition to being near-overruled within a very short time by *Bunting v. Oregon*,<sup>17</sup> became the focus of Felix Frankfurter’s unrelenting opposition, first as a long-time professor at the Harvard Law School, then, of course, as an equally long-time member of the United States Supreme Court. Frankfurter basically ignored Justice Harlan’s

<sup>10</sup> See AVISHAI MARGALIT, ON COMPROMISE AND ROTTEN COMPROMISES 56–57 (2010); Sanford Levinson, *Compromise and Constitutionalism*, 38 PEPPERDINE L. REV. 821, 826–27 (2011).

<sup>11</sup> See MARK A. GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL 28–83 (2006); PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12–13 (1991).

<sup>12</sup> See, e.g., JACK M. BALKIN, CONSTITUTIONAL REDEMPTION 105–11 (2011) (presenting the problem of “constitutional evil” and how it may make true fidelity to the Constitution undesirable). See also SANFORD LEVINSON, CONSTITUTIONAL FAITH (2d ed. 2011).

<sup>13</sup> 163 U.S. 537 (1896).

<sup>14</sup> 198 U.S. 45 (1905).

<sup>15</sup> 323 U.S. 214 (1944).

<sup>16</sup> 182 U.S. 244 (1901).

<sup>17</sup> 243 U.S. 426 (1917).

rather temperate dissent in favor of Justice Holmes's maximally deferential one. After Frankfurter triumphed, both metaphorically and literally, in the spate of new appointments that President Franklin Roosevelt finally got to make in his second and third terms, *Lochner* became an almost-mythic symbol of everything that was rotten in the now-displaced judicial regime.<sup>18</sup> *Plessy* also remains in presumptively permanent exile, though I, for one, find that its principal interpretive mistake is its misapplication of the doctrine, so well set out in *Strauder v. West Virginia*,<sup>19</sup> that "unfriendly" legislation seeking in effect to return African Americans to the condition of a subject race is unconstitutional under the Fourteenth Amendment. One can easily object to the outcome in *Plessy* without adopting Justice Harlan's basically mischievous suggestion that the Fourteenth Amendment, correctly understood, requires "colorblindness." As Professor Andrew Kull powerfully demonstrated, contrary to his preference as to what the Constitution should say, "colorblindness" is a notion that finds support neither in the text nor in the history of the Fourteenth Amendment.<sup>20</sup> Finally, there is *Korematsu*, which continues to garner affirmative citation for the proposition that racial or ethnic classifications will be closely scrutinized, even if that scarcely occurred in the case itself. Moreover, unlike the other three cases, it has never been formally overruled, even if a later court did decide that Fred Korematsu's conviction should be overturned.<sup>21</sup> To be sure, the United States, with the approval of President Ronald Reagan, did formally apologize to the victims of what Justice Roberts termed the "concentration camps" and give to each of the living survivors a token \$20,000 of reparations. However, as former Attorney General Edwin Meese informed an audience at the University of Chicago Law School some years ago, a confession of injustice is not equivalent to an admission of illegality; in no way did he see *Korematsu* as in fact wrongly decided, even if he might well agree that it endorsed an unfortunate policy choice of the Roosevelt Administration.

Along with its theoretical and empirical riches, Greene's article almost begs the reader to join in the "rating game" of picking his or her own list of all-time awful cases and then defending them against all comers. He does this himself by offering an interesting list of contend-

<sup>18</sup> But *Lochner*, unlike *Dred Scott*, may exemplify a type of "zombie constitutionalism" inasmuch as there are at least several important scholars, even if as yet no prominent judges, who believe that it was correctly decided and should serve as a template for future decisions. See, e.g., DAVID E. BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (2011).

<sup>19</sup> 100 U.S. 303 (1880).

<sup>20</sup> See, e.g., ANDREW KULL, THE COLOR-BLIND CONSTITUTION 222 (1992).

<sup>21</sup> See *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984).

ers, together with explanations as to why they do not measure up to the leading examples of the Hall of Infamy. Congruent with the general methodology of his article, he develops this list empirically, by looking at such things as citations and, especially, appearance (and normative presentation) in casebooks. I suspect that many of us who are less empirical could offer at least one case to add to this list, even if we agree on its secondary status relative to the “big four.” As my colleague Justin Driver has suggested, *Swain v. Alabama*<sup>22</sup> certainly represents the Warren Court at its most remarkably obtuse, inasmuch as six justices (including, significantly, Justice Brennan, though not, in fact, Chief Justice Warren) agreed that the demonstrable use of peremptory challenges in a manner that systematically denied African Americans the ability to serve on a jury did not constitute a constitutional offense unless the prosecutors were so monumentally stupid (and not merely evil) as to specify that that was exactly what they were intending to do. Some of us, no doubt, would include *Bush v. Gore*,<sup>23</sup> though primarily because, as Richard Posner has well argued, it is literally inconceivable that at least three of the five justices in the majority gave any credence to the Fourteenth Amendment argument that they signed on to.<sup>24</sup> And, of course, there are many who would place *Roe v. Wade* in the Hall, justifying the comparison to *Dred Scott* by its conclusion that fetuses, at least during the first trimester, have no rights that a pregnant woman and her doctor are bound to respect. Moreover, for “legal craft” devotees, it is hard to forget Professor Mark Tushnet’s famous description of Justice Blackmun’s opinion in *Roe*. The emphasis on “legal craft,” wrote Tushnet,

make[s] sense only if we can agree what the craft is. But consider the craft of “writing novels.” Its practice includes Trollope writing *The Eustace Diamonds*, Joyce writing *Finnegan’s Wake*, and Mailer writing *The Executioner’s Song*. We might think of Justice Blackmun’s opinion in *Roe* as an innovation akin to Joyce’s or Mailer’s. It is the totally unreasoned judicial opinion. To say that it does not look like Justice Powell’s decision in some other case is like saying that a Cubist “portrait” does not look like its subject as a member of the Academy would paint it. The observation is true, but irrelevant both to the enterprise in which the artist or judge was engaged and to our ultimate assessment of his product.<sup>25</sup>

<sup>22</sup> 380 U.S. 202 (1965).

<sup>23</sup> 531 U.S. 98 (2000).

<sup>24</sup> See Sanford Levinson, *Speaking in the Name of the Law: Some Reflections on Professional Responsibility and Judicial Accountability*, 1 U. ST. THOMAS L.J. 447, 460–61 (2003), available at <http://www.stthomas.edu/law/programs/journal/Volume1num1/Speaking%20in%20the%20Name%20of%20the%20Law%20Some%20Reflections%20on%20Professi.pdf>.

<sup>25</sup> Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 821 (1983).

Even if one finds Tushnet's comment a bit snarky, I suspect that even those who advocate the notion of constitutionally supported reproductive rights can easily agree that Justice Blackmun's opinion exhibits some remarkable problems with regard to its persuasiveness for anyone not predisposed to accept that outcome.<sup>26</sup>

But I want to conclude these brief remarks by considering one of the cases that Greene *does* discuss at some length, *Prigg v. Pennsylvania*,<sup>27</sup> in which Justice Joseph Story, for the majority of the Court:

- a. held that the Constitution gave slave owners a right of "self-help repossession" to snatch back anyone they deemed to be a fugitive slave;
- b. upheld as an implied power of Congress its ability to pass the Fugitive Slave Law of 1793; and
- c. struck down as preempted by the 1793 statute Pennsylvania's "personal liberty" law that at least would have required slave owners (or slave catchers, like Prigg) to go before a state court before taking the alleged fugitive — and, as in the actual case, children who under no plausible theory could be deemed slaves at all — out of the ostensibly free state and back to a slave state.

Greene generally adopts the tone of the laconic reporter of empirical evidence, but this, I believe, is the one occasion where his article achieves genuine, burning eloquence. It is worth quoting his entire lead paragraph about *Prigg*:

*Prigg v. Pennsylvania* could easily be called the worst Supreme Court decision ever issued. The human tragedy of the decision is breathtaking. In an opinion by Justice Story, the Court reversed the criminal prosecution of a slave catcher who had kidnapped and sold into slavery a woman, Margaret Morgan, who likely was not a fugitive slave, and her two children, who assuredly were not. The Court's holding was that the Fugitive Slave Clause prohibited states from subjecting slave catchers to a state-sanctioned civil process, except to prevent "breach of the peace, or any illegal violence." Under the logic of the opinion, however, the kidnapping could not itself be outlawed as "illegal violence." Put otherwise, violence against blacks was "legal" violence; "illegal" violence was violence against whites. The decision abided the constant threat of enslavement experienced by free brown-skinned Americans in both the North and the South. By constitutionally forbidding states from preventing private violence against blacks, *Prigg* worked a simultaneous assault on due process

<sup>26</sup> Thus the "need" for a volume like WHAT ROE V. WADE SHOULD HAVE SAID (Jack M. Balkin ed., 2005).

<sup>27</sup> 41 U.S. (16 Pet.) 539 (1842).

and on equal protection, the twin pillars of the modern Fourteenth Amendment. . . . *Prigg* virtually made *Dred Scott* a fait accompli.<sup>28</sup>

I agree with every one of these words. So the obvious question is why *Prigg* — and its author — have suffered neither the public obloquy nor the condemnation by professional legal academics, obsessed with theories of interpretation, as have *Dred Scott* and its principal author, Chief Justice Roger Taney. Consider that Taney, surely one of our most important Chief Justices, has never been the subject of a commemorative stamp issued by the United States Postal Service (unlike, bizarrely enough, Jefferson Davis and Robert E. Lee).<sup>29</sup> Joseph Story, on the other hand, was one of four justices honored in 2009 by the United States Postal Service as part of a series of forty-four-cent stamps commemorating Supreme Court justices.<sup>30</sup> The other three were Louis D. Brandeis, William J. Brennan, and Felix Frankfurter, all, perhaps tellingly, graduates of the Harvard Law School. Not, of course, that Story is without Harvard connections. A 1798 Harvard College graduate, he had no opportunity to attend the Law School, which was founded only in 1806, but he in effect saved the fledgling institution in 1827 upon his appointment as the first Dane Professor of Law. This duty, of course, did not require him to step down from the United States Supreme Court, to which he had been appointed in 1811 at the age of 32 by President James Madison. Indeed, Story may be described as a “brooding omnipresence” at the Harvard Law School inasmuch as his statue, created by his gifted son William Wetmore Story, is literally the first thing seen by anyone entering the Harvard Law School library.

I cannot help wondering if these facts help to explain why *Prigg* remains in the shadows of *Dred Scott*, particularly insofar as legal education is an important way of inculcating in the (relatively) young attitudes and dispositions toward particular judges and cases that help to constitute legal consciousness. It is emotionally satisfying for many to believe that the Marylander Taney, a slaveholder and close confederate of President Andrew Jackson — described by his predecessor, John Quincy Adams, as “a barbarian who could not write a sentence

<sup>28</sup> Greene, *supra* note 1, at 428 (footnotes omitted).

<sup>29</sup> For what it is worth, neither Justice Brown, the author of *Plessy*, nor Justice Peckham, *Lochner*'s writer, has ever received this form of commemoration, though Justice Black, the author of *Korematsu*, was memorialized in a 1986 stamp. Perhaps this is additional evidence of *Korematsu*'s uncertain status. And recall that Black, perhaps the greatest First Amendment civil libertarian in our history, also had to overcome his membership in the Ku Klux Klan.

<sup>30</sup> *Stamp Announcement 09-44: Justices of the Supreme Court of the United States*, USPS POSTAL BULLETIN, Aug. 13, 2009, available at [http://about.usps.com/postal-bulletin/2009/pb22265/html/info1\\_005.htm](http://about.usps.com/postal-bulletin/2009/pb22265/html/info1_005.htm).



of grammar and hardly could spell his own name”<sup>31</sup> — put his integrity to one side when faced with the prospect of viewing Dred Scott as an individual with legal rights. Story, on the other hand, was a self-described opponent of slavery and probably the major legal figure of the American republic prior to the Civil War if one combines his service at Harvard and authorship of many treatises, including his classic *Commentaries on the Constitution*, with his THIRTY-FOUR years on the Supreme Court. Perhaps this is enough to remove the taint of *Prigg*; more to the point, perhaps, it helps to justify the lack of embarrassing classroom conversations about how it is that someone as “great” as Story (and as central to the rise of the Harvard Law School to preeminence) could write such an unrelievedly dreadful opinion.

And it *is* unrelievedly dreadful. There is not a single inspiring sentence in the entire opinion, though, to be sure, it *can* be cited, even today, as supporting plenary power by Congress whenever it believes it is facing a basic threat to the Republic, including, in that case, the prospect of dissolution should slave owners not feel sufficiently appeased. In contrast, one of the paradoxes of *Dred Scott* is that there *are* inspiring passages, even for Americans today, buried among the parts of the opinion that repel us. I have already adverted to the citation of *Dred Scott* by Justice Harlan in his unsuccessful attempt to stave off the constitutionalization of American imperialism. But consider Taney’s robust notion of the rights attached to American citizenship, including, for what it is worth, the right to bear arms. One feels that for Taney blacks could not be full members of the American political community precisely because such membership included a full panoply of rights. One might contrast this with the crabbed interpretation of the rights of American citizenship in the *Slaughter-House Cases*.<sup>32</sup> To be sure, one can cavil at the strength of the distinction between the rights of “citizens” and the reduced, perhaps even nugatory, rights of noncitizens. But, for better or worse, this view is alive and well today in the jurisprudence of Justice Scalia and in a recent Fifth Circuit opinion finding that illegal aliens can claim no rights under the Second Amendment.<sup>33</sup>

One function of “canons” (and “anticanons”) is to generate a certain kind of mindlessness concerning the actual arguments made within the opinions themselves. A “canonical” opinion is not only important (which is true, obviously, of *Dred Scott*). If it is part of what Jack

<sup>31</sup> ROBERT V. REMINI, *THE LIFE OF ANDREW JACKSON* 258 (First Perennial Classics 2001). For what it is worth, Adams delivered these comments on the occasion of Jackson’s receiving an honorary degree from Harvard. *Id.*

<sup>32</sup> 83 U.S. 36 (1873).

<sup>33</sup> *United States v. Portillo-Munoz*, 643 F.3d 437 (5th Cir. 2011).

Balkin and I have called the “pedagogical” canon, it must also be presented as exemplifying judging at its relative best. Students should presumably learn from it what constitutes the kind of “thinking like a lawyer” that they should strive to emulate, either in their own careers or when assessing judges and their handiwork. Concomitantly, an “anticanonical opinion” should presumably exemplify what counts as a travesty of such thinking, something to be avoided lest one follow the authors of such opinions into disgrace. Canonical opinions, perhaps, can be analogized to Rembrandts or Monets, while anticanonical opinions are the equivalent of velvet Elvises or pictures of dogs playing poker. But what if things aren’t that simple? Perhaps, as Tushnet suggested, an opinion derided by many does in fact presage a new form of legal analysis, perhaps destined to be viewed by future generations of sophisticates as a definite improvement over the encrusted methods of the past, just as Picasso and Braque during their Cubist period were inventing radically new notions of what “representational art” could mean.<sup>34</sup> Or, as is also frequently the case in artistic or literary criticism, artists whose work had been condemned to oblivion are “rediscovered” and seen to have genuine value that had been overlooked by a generation too inclined to praise what is new and, at the same time, dismiss what their own elders had praised.

No discipline can do without canons and complementary anticanons. One does not have to be an ardent structuralist to know that the usefulness of a category called “great opinions” depends on the ability to identify decidedly “non-great,” even “awful,” opinions. After all, even a pass-fail course depends on the notion (even if it is often a fiction) that it is possible to fail if one writes a sufficiently terrible exam. Yet, as deconstructionists have also taught us in their critique of structuralism’s sometimes rigid reliance on binary oppositions, one sometimes finds embarrassing traces of the Other in its purported opposite. So may this be true with regard to “canonical” and “anticanonical” cases. We want, perhaps desperately, to believe they are separated by an impermeable wall. But what if they are not?

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<sup>34</sup> See Sanford Levinson, *Jack Balkin as the Picasso of Constitutional Theory*, 2012 ILL. L. REV. (forthcoming).