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ON THE EVOLUTION OF THE CANONICAL DISSENT

Anita S. Krishnakumar*

*Legal theorists increasingly have come to recognize and study the existence of a constitutional canon composed of highly authoritative legal texts that command special reverence in the law. Among these highly authoritative texts are a series of dissenting opinions—e.g., Justice Holmes's in *Lochner v. New York*, and Justice Harlan's in *Plessy v. Ferguson*—that ironically are more famous than the majority opinions in most other cases. This Article examines the evolution of the dissenting canon, seeking to explain both the methods by which various dissenting opinions became canonized and the motivating factors behind these canonizations.*

*Specifically, the Article argues that the canonization of dissenting opinions began as a New Deal phenomenon—linked to the public rejection of the Old Court's economic rights jurisprudence, as embodied in the majority opinion in *Lochner v. New York*. The canonization of Holmes's *Lochner* dissent, it is shown, was a product both of progressive intellectuals eager to usher in the New Deal, and of a judicial desire to memorialize the popular repudiation of the Old Court's philosophy. Other early canonizations of dissent followed the *Lochner* pattern, emerging only as responses to popular rejections of old precedents. But as time wore on, the Court began developing a new kind of canonization, whereby justices consciously lifted and adopted principles articulated in dissenting opinions of yore as authority for the formulation of new constitutional rights and rules. Several civil liberties dissents (involving, inter alia, *First* and *Fourth Amendment* rights) thus became canonized even before the majority opinions which they criticized had been overruled.*

The Article ends with a look at what the evolution of the dissenting canon teaches about the shape of the constitutional canon as a whole—noting, for instance, the central role that political conflict plays in the creation and elevation of canonical texts.

Borrowing from a concept coined with reference to Biblical and literary studies,¹ legal scholars recently have analogized a constitu-

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tional canon of highly authoritative *uber*-texts that hold a privileged place in American law.² Constitutive members of the canon include revered judicial opinions such as *Marbury v. Madison*,³ textual provisions such as the First Amendment, and founding documents such as the Federalist Papers and the Declaration of Independence. Some of these legal texts have been celebrated almost from their inception; others have entered the canon only gradually, as constitutional understandings have shifted and evolved. A few have turned the canon on its head. Among these latter are a handful of judicial dissents, originally penned to record the losing, minority viewpoint—that since not only have shaken off the stigma of the losing position but have come to command a constitutional stature far superior to that accorded most *majority* opinions in other cases.

Justice Holmes's dissenting opinion in *Lochner v. New York*,⁴ for instance, rivals *Brown v. Board of Education*⁵ in legal eminence and distinction. Every law student in the country has read or at least heard of *Lochner*, and Holmes's clairvoyance therein. Moreover, judges,⁶ scholars,⁷ and advocates alike regularly cite the dissent as established legal doctrine.

1. See, e.g., HAROLD BLOOM, *THE WESTERN CANON* 4 (1994) (discussing Shakespeare as "[o]ne mark of . . . originality that can win canonical status for a literary work"); HENRY LOUIS GATES, JR., *LOOSE CANONS: NOTES ON THE CULTURE WARS* 22-42 (1992) (discussing the early development of an African-American literary canon); LAWRENCE W. LEVINE, *THE OPENING OF THE AMERICAN MIND: CANONS, CULTURE, AND HISTORY* 91-101 (1996) (describing and discussing the American literary canon).

2. See PAUL W. KAHN, *THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA* 106 (1997); J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963 (1998).

3. 5 U.S. (1 Cranch) 137 (1803).

4. 198 U.S. 45, 74 (1905) (Holmes, J., dissenting).

5. 347 U.S. 483 (1954).

6. Twenty-five Supreme Court opinions alone reference Holmes's *Lochner* dissent as an important legal opinion. See *College Sav. Bank v. Florida Prepaid Post-secondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2233 (1999); *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 505 n.2 (1997) (Thomas, J., dissenting); *Brown v. Pro Football, Inc.*, 518 U.S. 231, 252 (1996) (Stevens, J., dissenting); *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 425 (1994) (Souter, J., dissenting); *American Dredging Co. v. Miller*, 510 U.S. 443, 458 (1994) (Stevens, J., concurring); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 455 n.19 (1993); *Planned Parenthood v. Casey*, 505 U.S. 833, 961-62 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); *County of Yakima v. Confederated Tribes*, 502 U.S. 251, 273 (1992) (Blackmun, J., concurring in part and dissenting in part); *Harmelin v. Michigan*, 501 U.S. 957, 1000 (1991) (Kennedy, J., dissenting); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 300 (1989) (O'Connor, J., concurring in part and dissenting in part); *Rivera v. Minnich*, 483 U.S. 574, 578 (1987); *United States v. Salerno*, 481 U.S. 739, 769 (1987) (Stevens, J., dissenting); *Bowers v. Hardwick*, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting); *Thornburgh v. American College of Obstetricians*, 476 U.S. 747, 788 (1986) (White, J., dissenting); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 470 (1985) (Mar-

In the hierarchical world of legal authority, the notion of dissenting opinions as thus influential is at once paradoxical and intriguing. It raises numerous questions such as how particular dissents came to be renowned, why others were not, and what role the canonization of dissents has played in the development of American constitutional law. Yet the legal literature contains surprisingly little on the phenomenon of canonical dissents or dissenters.⁸ This Article undertakes to fill the void, exploring the genesis, evolution, and significance of canonical dissents. I submit that, historically, the canonization of dissents was a two-tiered process, which began as part of the effort to cement the New Deal Court's switch in time, and since has evolved into a judicial tool for the instigation of constitutional change. Part I lays the groundwork for this bifurcated theory of canonization, analyzing the time and manner in which individual dissents and dissenters became canonized. Part II assesses a few existing theories of redeemed dissents, and concludes that none can satisfactorily account for this constitutional development. Part III elaborates on the bifurcated theory introduced in Part I, filling in the gaps left by other theories.

I. THE HISTORY OF CANONIZATION

The practice of dissent in the Supreme Court dates back almost to the Constitution's ratification,⁹ and judicial reversals of decisions issued over dissent surfaced as early as the mid-1800s.¹⁰ Yet, no

shall, J., concurring in the judgment in part and dissenting in part); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 900 (1985) (O'Connor, J., dissenting); *E.E.O.C. v. Wyoming*, 460 U.S. 226, 250 n.9 (1983) (Stevens, J., concurring); *AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 723 (1980) (Marshall, J., dissenting); *Rummell v. Estelle*, 445 U.S. 263, 281-82 (1980); *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977); *Roe v. Wade*, 410 U.S. 113, 117 (1973); *Sailors v. Board of Educ.*, 387 U.S. 105, 109 (1967); *Griswold v. Connecticut*, 381 U.S. 479, 523 (1965) (Black, J., dissenting); *Ferguson v. Skrupa*, 372 U.S. 726, 732 n.13 (1963); *Winters v. New York*, 333 U.S. 507, 527 (1948) (Frankfurter, J., dissenting).

7. Some 669 law review articles similarly cite to Holmes's *Lochner* dissent. Search of WESTLAW, JLR database (Aug. 15, 1999) (searching for "Lochner /p Holmes /s Dissent!").

8. Indeed, as of February 6, 2000, only one essay discusses the existence of canonical dissents and dissenters as such. See generally Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243 (1998). Similarly, one piece attempts to explain the canonization of dissenters. See G. Edward White, *The Canonization of Holmes and Brandeis: Epistemology and Judicial Reputations*, 70 N.Y.U. L. REV. 576, 590 (1995).

9. See, e.g., *Georgia v. Brailsford*, 2 U.S. (2 Dall.) 402, 408 (1792) (Cushing, J., dissenting).

10. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 406 (1856) (functionally overruling *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842)).

dissents became canonized until the twentieth century.¹¹ This part explores the historical creation and expansion of the dissenting canon, i.e., the subset of the constitutional canon composed of dissenting opinions, and argues that it is a New Deal phenomenon, made possible by the Court's switch in time and attendant repudiation of its prior economic rights jurisprudence. Part I.A. discusses the Court's reluctance to reference dissents prior to the New Deal, suggesting that this reflected the Court's pre-1937 image as infallible arbiter of constitutional law. Part I.B. explains how the switch in time and its aftermath affected this image, and rendered acceptable the citation of dissenting opinions as legal authority. Part I.C.

11. As suggested in the introduction, canonical dissents are those that are viewed as constitutional icons, and that are accordingly cited and extolled as legal authority in matters of constitutional interpretation. It follows that, in order for a dissent to be canonized, it must both be famous and be the subject of frequent reference within the legal community. As fame is a difficult quality to measure, this Article gauges the status of individual dissents by the number of favorable references they have garnered in subsequent Supreme Court opinions—with ten references as a baseline for canonical status. I selected the number ten because a study of Supreme Court citations to dissenting opinions demonstrates a sharp drop-off around this point. Indeed, while many canonical dissents are cited or quoted significantly more than ten times, *see infra* Part I.C., few other dissents are referred to more than three or four times. *Compare, e.g.*, Search of WESTLAW, SCT database (Aug. 15, 1999) (searching “Lochner & Holmes /s dissenting” and retrieving 26 cases, 23 of which cite or quote Holmes’s opinion in *Lochner v. New York*, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting)), and Search of WESTLAW, SCT database (Aug. 15, 1999) (searching for “Olmstead & Brandeis /s dissenting” and finding 58 cases, 37 of which cite or quote Brandeis’s opinion in *Olmstead v. United States*, 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting)), with Search of WESTLAW, SCT database and SCT-OLD database (Aug. 15, 1999) (searching for “Dred /2 Scott /s dissenting” and turning up two and zero cases respectively, citing to the *Dred Scott* dissents), and Search of WESTLAW, SCT database (Aug. 15, 1999) (searching for “Taxicab & Holmes /s dissenting” and locating eight cases, four of which cite or quote Holmes’s dissent in *Black and White Taxicab v. Brown and Yellow Taxicab*, 276 U.S. 518, 532 (1928) (Holmes, J., dissenting)).

As Judge Richard Posner has noted:

The number of times a scientific or other scholarly work is cited in the scholarly literature is an index to the influence, and less confidently to the quality, of the paper. The counting of citations to the work of a scholar is therefore a possible method of evaluating the quality of the scholar’s output, and of comparing the output of different scholars. It is not only a possible method, but one that is heavily used. There is no reason in principle why it could not be used as a method of evaluating appellate judges.

Richard A. Posner, *The Learned Hand Biography and the Question of Judicial Greatness*, 104 YALE L.J. 511, 534 app. (book review) (1994). Nor, I submit, is there any reason that counting subsequent citations should not be used as a method of evaluating the stature of judicial opinions. In any case, I have used this slightly imperfect empirical method mostly as a default, starting from a baseline of numerous famous or vindicated dissents, and checking each for the frequency with which it is later cited.

explores the post-New Deal evolution of canonical dissents, and particularly, their role in the judicial expansion of civil rights.

A. *Dissents That Could Have Been*

Prior to the New Deal, the Supreme Court was extremely reluctant to admit judicial error, let alone to overturn its earlier decisions. Indeed, it feared that doing either would undermine its legitimacy as final arbiter of the nation's law. The Court's unwillingness to impugn its earlier judgments in turn left little room for the vindication or subsequent canonization of its dissents. In fact, on the few pre-New Deal occasions where the resurrection of dissenting opinions might have been appropriate, the Court instead struggled so assiduously to distinguish its prior caselaw—dissents and all—that it eschewed association with dissenting opinions from the past.

Take, for instance, the Court's treatment of Justice Field's dissents in the *Slaughter-House Cases*¹² and *Munn v. Illinois*.¹³ In *Slaughter-House*, Field railed against the majority's parsimonious reading of the Fourteenth Amendment's Privileges or Immunities Clause, arguing that the amendment protected economic liberties such as the right to pursue a trade, and thus prohibited the state-created monopoly upheld by the majority.¹⁴ Similarly, Field's *Munn* dissent denounced the Court's decision to uphold rate regulation on the ground that such regulations violated private property rights.¹⁵ Although *Lochner*-era decisions in which the Court invalidated statute after statute in the name of contractual liberty effectively redeemed Field's economic rights position, Supreme Court opinions of that era contain almost no mention of Field's dissents.¹⁶ Rather,

12. 83 U.S. (1 Wall.) 36 (1872).

13. 94 U.S. 113 (1876).

14. See *Slaughter-House*, 83 U.S. at 83 (Field, J., dissenting).

15. See *Munn*, 94 U.S. at 140 (Field, J., dissenting).

16. Lower courts did cite to Field's dissents as authority in striking down laws that interfered with the right of individuals to ply a trade. See, e.g., *United States v. Morris*, 125 F.2d 322, 330-31 (E.D. Ark. 1903) (quoting Field's *Slaughter-House* dissent in ruling that the rights to lease land and accept employment are fundamental rights which cannot be abridged); *People ex rel. Annan v. Walsh*, 22 N.E. 682, 685 (N.Y. 1889) (Peckham, J., dissenting) (quoting Field's *Munn* dissent in arguing that it is unconstitutional for legislatures to fix prices); *White v. Holman*, 74 P. 933, 935 (Or. 1904) (quoting Field's *Slaughter-House* dissent for the proposition that it is unconstitutional for states to create business monopolies). However, the Supreme Court itself rarely cited these dissents. Search of WESTLAW, SCT-OLD database (Aug. 15, 1999) (searching for "Slaughter-House & Field /s dissenting" and retrieving 13 cases, only two of which cite or quote Field's *Slaughter-House* dissent as legal authority); Search of WESTLAW, SCT-OLD database (Aug. 15, 1999) (searching for "Munn & Field /s dissenting" and finding eight cases, one of which cites Field's dissent in *Munn* as legal authority).

in keeping with the Court's reluctance to admit prior judicial error, *Lochner*-era opinions distinguish themselves from *Slaughter-House* and *Munn* by relying on the due process liberty principle rather than on the Privileges or Immunities or private property concepts discarded in those two cases. To this day, the Privileges or Immunities Clause stands technically eviscerated, while most of the work it was intended to do is accomplished via the Due Process Clause.

The Court's reversal of its decision in *Hepburn v. Griswold*,¹⁷ also known as the *Legal Tender Cases*,¹⁸ followed a similar pattern. In that set of cases, decided shortly after the Civil War, the Supreme Court ruled unconstitutional the Legal Tender Act (a war-time measure that had made paper currency into legal tender). Specifically, the Court found that the Act was "not a means appropriate, plainly adapted, [or] really calculated to carry into effect any express power vested in Congress."¹⁹ Justice Miller dissented from the decision, arguing that the Act clearly fell within Congress's power to borrow money in the nation's name and was justified as a necessary war-time measure.²⁰

Within one year, the Court reopened the issue and overruled *Hepburn*, causing an outcry among the public.²¹ Concerned with the effect this quick reversal would have on its institutional legitimacy, the Court invented reasons why its earlier decision should be ignored, declaring, for instance, that:

[*Hepburn*] was decided by a divided court, and by a court having a less number of judges than the law then in existence provided this court shall have. These cases have been heard before a full court, and they have received our most careful consideration. The questions involved constitutional questions of the most vital impor-

17. 75 U.S. (8 Wall.) 603 (1869).

18. The *Legal Tender Cases* consist of two decisions, *Knox v. Lee* and *Parker v. Davis*. See 79 U.S. (12 Wall.) 457 (1870).

19. *Hepburn*, 75 U.S. (8 Wall.) at 625.

20. Indeed, Miller's dissent expressly stated that:

The power to declare war, to suppress insurrection, to raise and support armies, to provide and maintain a navy, to borrow money on the credit of the United States, to pay the debts of the Union, and to provide for the common defence and general warfare, are each and all distinctly and specifically granted in separate clauses of the Constitution.

We are in the midst of a war which called all these powers into exercise and taxed them severely.

Id. at 632 (Miller, J., dissenting).

21. See 2 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 519-25 (1926) (discussing public disapproval of the Court's decision to re-examine the *Legal Tender Cases* and citing contemporary views expressed in periodicals that the Court's decision to reopen the issues would weaken the Court's reputation in the eyes of the public).

tance to the government and to the public at large. We have been in the habit of treating cases involving a consideration of constitutional power differently from those which concern merely private right. We are not accustomed to hear them in the absence of a full court, if it can be avoided.²²

Given its desire to disassociate itself from the *Hepburn* decision, the Court's *Knox* opinion did not reference Miller's dissent, even though it echoed his argument that Congress's express power to borrow money encompassed the authority to issue legal tender.²³ Moreover, the Court's later decisions have failed to acknowledge Miller's *Hepburn* dissent, let alone to credit it as prophetic. While this may be due in part to the speed with which *Hepburn* was overruled—so that it never really became established law—it almost certainly had something to do with the Court's embarrassed downplaying of the entire episode.

Another, equally significant reason some pre-New Deal dissents have failed to become canonized is because they were vindicated by constitutional amendment rather than by subsequent Supreme Court decisions. This, for instance, describes the fate of the dissents in *Dred Scott v. Sandford*²⁴ and *Pollock v. Farmer's Trust Co.*²⁵ *Dred Scott* famously held that free blacks never could become citizens.²⁶ Justice McLean dissented from the majority's ruling on the grounds that slavery was immoral.²⁷ Justice Curtis also dissented, arguing that free blacks should be allowed to become citizens in light of the fact that several states had permitted free blacks to vote on the ratification of the Constitution itself.²⁸ Yet because the Civil War and the Fourteenth Amendment—rather than a later Supreme Court opinion—repudiated *Dred Scott*, and because they did so on a scale far broader than either Justice Curtis or Justice McLean could have imagined, modern courts apparently have found citation to the dissents unnecessary and unsatisfactory.

Similarly, in *Pollock*, Justice Harlan dissented from the Court's decision that taxes on income from real and personal property were unconstitutional.²⁹ Yet despite the fact that history has rendered his view correct, Harlan's dissent has failed to achieve canonical

22. *Legal Tender Cases*, 79 U.S. (12 Wall.) at 553-54 (citation omitted).

23. *See id.* at 464.

24. 60 U.S. (19 How.) 393 (1856).

25. 158 U.S. 601 (1895).

26. *Dred Scott*, 60 U.S. (19 How.) at 406.

27. *See id.* at 538 (McLean, J., dissenting) ("All slavery has its origins in power, and is against right.").

28. *See id.* at 577 (Curtis, J., dissenting).

29. *See Pollock*, 158 U.S. at 638 (Harlan, J., dissenting).

status.³⁰ Since *Pollock* was overruled by the Sixteenth Amendment (which explicitly authorizes the taxation of income)³¹ rather than by a subsequent Supreme Court decision, the legal community has had little reason to embrace Harlan's position that the original Constitution itself permitted income taxation; it is enough that the Constitution in its current form does so. Thus, the Sixteenth Amendment has overshadowed the *Pollock* dissent much as the Fourteenth has overshadowed the *Dred Scott* dissents.

B. *The Birth of the Dissenting Canon*

The New Deal, however, forever changed the landscape against which dissenting opinions operated. As with the *Hepburn-Knox* and *Slaughter-House-Lochner* turnabouts, the New Deal Court's "switch in time" effected substantial constitutional change absent any formal amendment.³² This time, however, the change was preceded by a pronounced public and political rejection of the Old Court's economic rights jurisprudence that forced the recognition of past judicial error, and paved the way for the exaltation of those who had seen it coming.

1. *Lochner v. New York*

The first Supreme Court dissent to become canonized was Justice Holmes's opinion in *Lochner v. New York*.³³ The majority opinion in *Lochner* struck down maximum hours legislation for bakers; Holmes had used the occasion to rail against judicial interference with legislative enactments on behalf of what he perceived as judges' personal economic predilections. Specifically, Holmes argued that:

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody

30. Search of WESTLAW, SCT database (Aug. 15, 1999) (searching for "Pollock /p Harlan /s dissenting" and retrieving one case that cites Justice Harlan's *Pollock* dissent).

31. See U.S. CONST. amend. XVI ("The Congress shall have the power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.").

32. See 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 312-33 (1998) [hereinafter ACKERMAN, TRANSFORMATIONS].

33. 198 U.S. 45, 74 (1905) (Holmes J., dissenting). Holmes's *Lochner* dissent has been cited or quoted in 25 subsequent Supreme Court decisions. See cases cited *supra* note 6.

their opinions in law The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics [a] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*.³⁴

In the aftermath of the switch in time, the *Lochner* decision was demonized as a symbol of the Old Court's flawed economic rights jurisprudence, and Holmes's criticisms of the Old Court's philosophy became hailed as prescient legal wisdom. Yet the lionization of Holmes's dissent did not coincide with the switch in time or even with the demonization of the *Lochner* majority opinion. Although the *Lochner* doctrine was discredited in 1937,³⁵ and constructively overturned in 1938,³⁶ the first judicial citations to Holmes's opinion did not surface until the late 1940s.³⁷ By that time, the repudiation (both popular and judicial) of economic due process rights had been completed, and the dissenting position of Justice Holmes in the *Lochner* line of cases³⁸ had been thoroughly vindicated. This lag between repudiation and elevation is significant because it indicates that the canonization of the *Lochner* dissent arose as an ex-post reaction to the New Deal Court's reversal of a hated constitutional precedent, not as an auxiliary to that event.

Indeed, later Courts cite the *Lochner* dissent not as a justification for overturning the Old Court's established line of precedent, but in recognition of its ultimate vindication³⁹ and as an admonition

34. *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

35. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937) (construing broadly Congress's Commerce Clause Powers in upholding the National Labor Relations Act); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937) (overruling the *Lochner*-era case of *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), and upholding minimum wage laws against Due Process Clause attacks).

36. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) (introducing the rational basis test of judicial deference to legislative decisions).

37. See *Winters v. New York*, 333 U.S. 507, 527 (1948) (Frankfurter, J., dissenting) (quoting Holmes's admonition that "the Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics"); *Harris v. United States*, 331 U.S. 145, 147 (1947) (Frankfurter, J., dissenting) (citing Holmes's caution that "[g]eneral propositions do not decide concrete cases").

38. See, e.g., *Adkins v. Children's Hospital*, 261 U.S. 525, 554-62 (1923) (striking down minimum wage legislation for women); *Coppage v. Kansas*, 236 U.S. 1, 26 (1915) (invalidating a statute which forbade employers from prohibiting employee membership in labor organizations); *Adair v. United States*, 208 U.S. 161, 179-80 (1908) (striking down a statute that prohibited employers from discharging employees based on labor organization membership).

39. The Court's first two citations to the dissent acknowledge the validity of Holmes's admonitions. See *Winters*, 333 U.S. at 527; *Harris*, 331 U.S. at 157. Subsequent citations, however, tend to quote the dissent as a warning against *Lochner*-style mistakes. See, e.g., *Moore v. City of E. Cleveland*, 431 U.S. 494, 502 (1977) ("As

against repeating the egregious mistakes of the *Lochner* era. *Watch out, we must be careful not to read our own biases into the Constitution*, they warn, lest we let "the ghost of *Lochner v. New York* walk again."⁴⁰ In this vein, the two most quoted propositions from Holmes's dissent are his exhortation that "the Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics,"⁴¹ and its corollary, "a constitution is not intended to embody a particular economic theory,"⁴² both of which are referenced as authority for the proposition that judges should not measure the constitutionality of legislation based on their own agreement or disagreement with its substance. Thus, the canonization of the *Lochner* dissent was a judicial reaction to the country's lived experience under the *Lochner* doctrine. Once the Great Depression and its aftermath had demonstrated the vicissitudes of *Lochner*-style jurisprudence, the Court both rejected that jurisprudence and began to echo the cautions of its greatest detractor in an effort to guard against analogous mistakes in the future.

2. *New State Ice Co. v. Liebmann*

The New Deal Court's rejection of the *Lochner*-era economic rights jurisprudence also played a critical role in the canonization of

the history of the *Lochner* era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court."); *Griswold v. Connecticut*, 381 U.S. 479, 522 (1961) (Black, J., dissenting) ("[A liberal reading of the Due Process Clause] is no less dangerous when used to enforce this Court's views about personal rights than those about economic rights."); *Poe v. Ullman*, 367 U.S. 497, 517 (1961) (Douglas, J., dissenting) ("For years the [*Lochner*] court struck down social legislation when a particular law did not fit the notions of a majority of Justices as to legislation appropriate for a free enterprise system. Mr. Justice Holmes, dissenting, rightly [cautioned against this].").

40. *Federal Hous. Admin. v. Darlington, Inc.*, 358 U.S. 84, 92 (1958) (citation omitted).

41. *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting). Of the 25 cases that cite the *Lochner* dissent, eight quote this sentence. See *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S.Ct. 2219, 2233 (1999); *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457, 505 n.2 (1997) (Thomas, J., dissenting); *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 425 (1994) (Souter, J., dissenting); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 300 (O'Connor, J., dissenting); *AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 723 (1980) (Marshall, J., dissenting); *Ferguson v. Skrupa*, 372 U.S. 726, 732 n.13 (1963); *Winters*, 333 U.S. at 527 (Frankfurter, J., dissenting).

42. *Lochner*, 198 U.S. at 75. Of the remaining 17 cases that cite the *Lochner* dissent, four quote this sentence. See *C&A Carbone*, 511 U.S. at 425 (Souter, J., dissenting); *Planned Parenthood v. Casey*, 505 U.S. 833, 961 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 470 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 900 (1985) (O'Connor, J., dissenting).

Justice Brandeis's dissent in *New State Ice Co. v. Liebmann*.⁴³ In *Liebmann*, the Court held that an Oklahoma requirement that ice manufacturers obtain a certificate from the state before they could construct an ice plant violated manufacturers' due process liberty interest in "engaging in a lawful, private business."⁴⁴ Brandeis's dissent protested that the majority's decision would impede states' ability to respond to the nation's changing needs:

Some people assert that our present plight is due, in part, to the limitations set by courts upon experimentation in the fields of social and economic science

. . . Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.⁴⁵

As with the *Lochner* dissent, the first citation to the *Liebmann* dissent did not appear until 1947.⁴⁶ By that time, the nation's experience with the Great Depression and the New Deal reforms had proven the value of a broad legislative power of experimentation.⁴⁷ Moreover, the due process liberty concept on which the *Liebmann* majority relied had been thoroughly repudiated.⁴⁸ Thus the lionization of the *Liebmann* dissent, like that of the *Lochner* dissent before it, occurred as a derivative rather than a component of the abrogation of the Old Court's economic rights jurisprudence.

Further, the modern Court's citations to the *Liebmann* dissent, like its citations to the *Lochner* dissent, have been cast primarily as warnings not to repeat the Old Court's mistakes.⁴⁹ Indeed, the Court typically quotes the dissent's "laboratory of experiments" concept as an admonition against the curtailment of states' regulatory powers, lest it impede the nation's progress. In *Reeves v. Stake* for instance, the Court, quoting from the *Liebmann* dissent, upheld South Da-

43. 285 U.S. 262, 280 (1932) (Brandeis, J., dissenting). The dissent has been cited or quoted 27 times by subsequent courts. Search of WESTLAW, SCT database (Aug. 15, 1999) (searching for Liebmann & Brandeis /s dissenting" and retrieving 27 cases that cite or quote Brandeis's *Liebmann* dissent as legal authority).

44. *Liebmann*, 285 U.S. at 277-78.

45. *Id.* at 310-11 (Brandeis, J., dissenting).

46. See *Fay v. New York*, 332 U.S. 261, 296 (1947), *overruled in part by*, *Taylor v. Louisiana*, 419 U.S. 522 (1975).

47. See ACKERMÁN, TRANSFORMATIONS, *supra* note 32, at 257 (noting a judicial shift by the end of the New Deal era towards acceptance of legislative efforts to regulate business enterprises).

48. See *id.* (noting the repudiation of "laissez-faire jurisprudence").

49. See *id.* at 255-56 (noting the "New Deal generation[s]" warnings against repeating the mistakes of the Old Court).

kota's "residents only" policy for the purchase of state-owned cement for fear that striking down the policy would "threaten the future fashioning of effective and creative programs for solving local problems and distributing government largesse."⁵⁰ Accordingly, the *Liebmann* dissent, like its *Lochner* precursor, appears to have been canonized as a judicial memorialization of the nation's adverse experience with the Old Court's restrictions on legislative power.

3. Canonical Dissenters

The New Deal also made possible the canonization of the authors of the *Lochner* and *Liebmann* dissents—Justices Holmes and Brandeis. Notably, both Holmes and Brandeis received considerable praise from progressive intellectuals long before the switch in time vindicated their dissenting philosophies. Yet as the following discussion shows, it is unlikely that this contemporary praise would have blossomed into the historical reverence the Justices enjoy today absent the switch in time.

a. Oliver Wendell Holmes

Then professor Felix Frankfurter was the first to praise Holmes, with a eulogistic essay in the *Harvard Law Review* entitled *The Constitutional Opinions of Justice Holmes*.⁵¹ It took some time for others to follow suit, but during the late 1920s and early 1930s, a series of articles appeared in the *New Republic* and other progressive New Deal magazines hailing Holmes as the "idol" of the progressive movement and casting him as "the great dissenter."⁵² The authors of these articles were members of the liberal elite who sought to promote the New Deal and embraced Holmes's methodology as a means of reversing the Old Court's jurisprudence and ushering in President Roosevelt's reforms.⁵³ It was this conscious desire to elevate Holmes that led Frankfurter to compare Holmes's reasoning to John Marshall's in one of his eulogistic *Harvard Law Review*

50. *Reeves v. Stake*, 447 U.S. 429, 441 (1980).

51. Felix Frankfurter, *The Constitutional Opinions of Justice Holmes*, 29 HARV. L. REV. 683, 684 (1916) (noting Justice Holmes's tremendous influence over the development of constitutional law).

52. See, e.g., Charles E. Carpenter, *Oliver Wendell Holmes, Jurist*, 8 OR. L. REV. 269, 270 (1929) (noting that "Justice Holmes has been a great dissenter . . . perhaps due to the fact that he has been a great liberal"); John Dewey, *Justice Holmes and the Liberal Mind*, NEW REPUBLIC, Jan. 11, 1928, at 210, 211 (stating that "[h]is ideas have usually been at least a generation ahead of the day in which they were uttered; many of his most impressive statements have been set forth in dissenting opinions"); Oswald G. Villard, *Issues and Men, The Great Judge*, 140 NATION 323, 323 (1935) (praising Holmes as "the idol of progressives who believed that America must evolve and change").

53. See White, *supra* note 8, at 590.

essays about the Justice⁵⁴—for such comparison lent legitimacy to the progressives' project to convince the nation and the Court of the New Deal's consonance with the Constitution. Similarly, others praised Holmes's "faith that . . . our social system is one of experimentation subject to the ordeal of experienced consequences,"⁵⁵ and commented that "no judge who has sat upon the bench has ever been more progressive in his attitude."⁵⁶

Thus, in marked contrast to the canonization of his *Lochner* dissent, the elevation of Justice Holmes himself was more than a mere reaction to the repudiation of the Old Court's *Lochner*-era economic due process jurisprudence. Rather, Holmes's canonization was part and parcel of the project to reconstitute the Court's interpretation of the Fourteenth Amendment. Once the switch in time had effected this reconstitution, and permitted the New Deal to become a pervasive element in American society, commentators began to hail Holmes, not just as their champion of right, but as a "prophet" and a cultural hero. Writing in the 1940s, for instance, Zechariah Chafee of the *American Historical Review* lauded Holmes for "guid[ing] the nation with the insight of a philosopher through a host of problems which were wholly unforeseen when he was young."⁵⁷ Charles Clark, then Dean of the Yale Law School, similarly eulogized that

if . . . many of our brilliant young men . . . still cherish a belief in idealism as a proper motivating force for a public career and law as an assisting means, then we owe, indeed, a large measure of gratitude to that wise, witty, and eloquent aristocrat who dared to desert his class to express these thoughts.⁵⁸

By the late 1950s, even Hollywood and Broadway had joined in the praise of Justice Holmes, making him the subject of a popular movie⁵⁹ and a play.⁶⁰ While Justice Holmes's elevation began well before the switch in time or the implementation of the New Deal, it was the success of the New Deal movement that guaranteed the public nature and longevity of his revered stature.

54. See Frankfurter, *supra* note 51, at 684-85.

55. Dewey, *supra* note 52, at 210-11.

56. Carpenter, *supra* note 52, at 270.

57. Zechariah Chafee, Jr., Book Review, 49 AM. HIST. REV. 457, 459 (1943).

58. Charles E. Clark, *Mr. Justice Holmes*, NEW REPUBLIC, June 28, 1943, at 868-869 (book review).

59. See THE MAGNIFICENT YANKEE (Metro-Goldwyn-Mayer 1950).

60. See Emmet Lavery, *The Magnificent Yankee* (1946).

b. *Louis Dembitz Brandeis*

Justice Brandeis's canonization, like Justice Holmes's, was inextricably linked to the promotion and success of the New Deal. As in the case of Holmes, progressive praise for Brandeis began slightly before the vindication of the Justice's dissents in 1937. In 1931, the *New York Times* began publishing a series of articles praising Brandeis's "logic, his learning, the lucid order of his reasoning, the exactness of his language, his extraordinary penetration of facts"⁶¹ and declaring him "one destined to be memorable in the front row of great judges."⁶² Others soon joined in the praise, hailing Brandeis as "an analyst of the processes of his own times"⁶³ and praising his concern with the social, economic, and political ramifications of proposed legislation.⁶⁴ Brandeis's *Liebmann* dissent, though silent on the wisdom of federal economic regulation,⁶⁵ soon became the rallying cry for intellectuals determined to usher in the New Deal's redistributive reforms. Hence, the *New York Times*' citations to the *Liebmann* dissent as evidence for the proposition that Brandeis was "[a] vigorous defender of many New Deal measures and social experimentation."⁶⁶

As the switch in time and the Court's subsequent rulings vindicated the New Deal and Brandeis's dissenting position, the Justice's status flourished. Brandeis quickly became a judicial hero, lauded as a "prophet"⁶⁷ and "the spiritual father of the New Deal."⁶⁸ Indeed,

61. *Mr. Justice Brandeis*, N.Y. TIMES, Nov. 8, 1941, § 3, at 1.

62. *Id.*; accord R.L. Duffus, *Brandeis, Crusader at Eighty*, N.Y. TIMES, Nov. 8, 1936, § 8 (Magazine), at 4; *Justice Stone Ill, Kept from Bench*, N.Y. TIMES, Nov. 8, 1936, § 1, at 3 [hereinafter *Justice Stone Ill*] (quoting and exalting Brandeis's *Liebmann* dissent).

63. White, *supra* note 8, at 604 (quoting A.A. Berle, Jr., *The Way of an American*, SURV. GRAPHIC, Nov. 1936, at 597, 597).

64. *See id.* at 603 (describing Brandeis "as a judge who believed in the capacity of humans to alter purportedly inexorable external forces in a nation's history").

65. Indeed, as Professor Edward G. White points out in his pioneer article, *The Canonization of Holmes and Brandeis: Epistemology and Judicial Reputations*, Brandeis's *Liebmann* dissent hardly indicates support for the New Deal. *See* White, *supra* note 8. In fact, while Brandeis may have subscribed to the view that laissez faire capitalism was a large contributor to the economic disorder of the 1930s, he did not think that regulation by the federal government of the economy was the solution to this ill. *See id.* In Professor White's words, "[h]owever 'prophetic' [Brandeis] may have been about economic difficulties, he was by no means prophetic about the policies initiated by the Roosevelt administration . . ." *Id.* at 602.

66. *Justice Stone Ill, supra* note 62, § 1, at 3.

67. *See Supreme Court Honors Brandeis*, N.Y. TIMES, Oct. 7, 1941, at 24 (quoting Justice Harlan Fiske Stone's remarks from the bench on Oct. 6, 1941, reported at 314 U.S. vii, viii (1941)).

68. Warren H. Pierce, *Shaper of Economic Thought*, CHI. DAILY TIMES, Oct. 7, 1941, reprinted in MR. JUSTICE BRANDEIS: GREAT AMERICAN 58 (Irving Dilliard ed., 1941) [hereinafter GREAT AMERICAN].

it was at this point that he acquired the appellation "Isaiah,"⁶⁹ and was credited with the ability to see "the directions of our social progress."⁷⁰ Moreover, commentators routinely suggested that "much of what [was] best in the New Deal trace[d] directly to [Brandeis's] influence."⁷¹ Thus Brandeis's canonization, like Holmes's, began as part of the movement to undo the Old Court's jaded jurisprudence, and ultimately was cemented by that movement's success.

C. *The Dissenting Canon Expands*

Once the New Deal had set a precedent for the canonization of dissenting opinions and turned Justices Holmes and Brandeis into judicial heroes, the Court began to elevate other dissents written by these justices and, eventually, to canonize dissenting opinions penned by other justices as well. These other canonizations sometimes followed the memorialization-warning pattern⁷² set by the *Lochner* and *Liebmann* dissents. More often, however, they did not. Indeed, after *Lochner* and *Liebmann*, the canonization of dissenting opinions sometimes preceded or coincided with the vindication of the dissent's substantive position. This Part examines such later canonizations and seeks to identify salient patterns in their evolution.

1. *The Free Speech Cases: Abrams, Whitney, and Gitlow*

Although its origins lay in the aftermath of the New Deal, the elevation of the Holmes-Brandeis free speech dissents⁷³ deviated

69. See Harvey J. Bresler, *Brandeis, Epitome of Democracy*, N.Y. TIMES, Sept. 22, 1946, § 7, at 4 (book review) ("It was with wisdom that Franklin D. Roosevelt addressed [Brandeis], affectionately, as 'Isaiah.'").

70. Joseph N. Moody, COMMONWEAL, Book Review, Sept. 27, 1946, at 580, 581.

71. Edward A. Evans, *Believed in Realities, Not Formulas*, ROCKY MOUNTAIN NEWS (Denver), Oct. 6, 1941, reprinted in GREAT AMERICAN, *supra* note 68, at 84, cited in White, *supra* note 8, at 606.

72. For a fuller explication of the various methods by which a dissent may become canonized, see *infra* Part III.A.

73. Justice Brandeis's opinion (joined by Holmes) in *Whitney v. California* technically was a concurrence; however, it is often considered a dissent because Holmes and Brandeis disagreed with the majority on substantive grounds, concurring in their judgment only because of a procedural issue (e.g., the defendant had failed to raise the clear-and-present danger defense, on which Holmes and Brandeis based their finding that his actions were lawful, at the trial level). See 274 U.S. 357, 372 (1927) (Brandeis, J., concurring), *overruled in part by*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969). The *Whitney* concurrence has been cited 51 times. Search of WESTLAW, SCT database (Apr. 21, 2000) (searching for "Whitney & Brandeis /s concurring" and finding 55 cases, of which 51 cite or quote Brandeis's *Whitney* concurrence in an authoritative capacity). The dissent in *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting), has been cited 26 times. Search of WESTLAW, SCT database, (Apr. 21, 2000) (searching for "Abrams /s Holmes /s dissenting" and finding 27 cases, of which 26 cite or quote Holmes's dissent as author-

substantially from the pattern set by the *Lochner* and *Liebmann* dissents. Notably, the apotheosis of the free speech dissents did not ensue from a categorical repudiation of the original decisions in those cases. Rather, the first few references to the dissents surfaced in the 1940s,⁷⁴ several years before the Court decisively had abandoned the speech restrictive jurisprudence against which the dissents protested. These early citations almost exclusively referenced the dissents for their reiteration of the "clear and present danger" test articulated in the Court's majority opinion in *Schenck v. United States*.⁷⁵ In fact, not only did the Court's initial citations to the dissents often reference *Schenck* in the same breath,⁷⁶ but the Court continued to uphold speech restrictive city ordinances,⁷⁷ labor organization provisions mandating disassociation with the Communist Party and disavowal of any belief in the violent overthrow of the government,⁷⁸ and statutes criminalizing association with the Communist Party⁷⁹ even as it referenced these dissents.⁸⁰ Citations

ity). The dissent in *Gitlow v. New York*, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting), is cited or quoted twelve times. Search of WESTLAW, SCT database (Aug. 15, 1999) (searching for "Holmes /s Gitlow /s dissenting" and finding 15 cases that cite or quote the *Gitlow* dissent as authority). It should be noted that there is significant overlap between the citation of these dissents—i.e., most of the cases that cite the *Abrams* dissent also cite the *Whitney* concurrence and/or the *Gitlow* dissent.

74. See, e.g., *American Communications Ass'n v. Douds*, 339 U.S. 382, 396 n.11 (1950) (citing *Abrams*'s dissent while upholding a provision of the Labor Management Relations Act that required its officers to file affidavits disclaiming membership in the Communist Party and any belief in overthrow of the government by force); *Musser v. Utah*, 333 U.S. 95, 102 n.8 (1948) (Rutledge, J., dissenting) (quoting Brandeis's *Whitney* concurrence in a case affirming a defendant's conviction for advocating polygamy).

75. 249 U.S. 47 (1919) (introducing the clear and present danger test but upholding an Espionage Act conviction for conspiracy to distribute antidraft literature).

76. See *Terminiello v. City of Chicago*, 337 U.S. 1, 26 (1948) (Jackson, J., dissenting); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 n.2 (1942) (citing *Schenk* and Brandeis's *Whitney* concurrence in support of the proposition that "the right of free speech is not absolute in all circumstances"); *Bridges v. California*, 314 U.S. 252, 261 (1941) (citing both *Schenk* and Brandeis's *Whitney* concurrence to recognize the complexities in determining "proximity and degree" in the "clear and present danger test"); *Milk Wagon Drivers v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 313 (1941) (Black, J., dissenting).

77. See, e.g., *Musser*, 333 U.S. at 98 (vacating public morals statute for interpretation by the Utah Supreme Court).

78. See, e.g., *Douds*, 339 U.S. at 395-96 (citing Brandeis but rejecting the "clear and present danger" test as applicable to the case).

79. See, e.g., *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961); *Scales v. United States*, 367 U.S. 203, 229 (1961) (citing *Schenk* but finding the statute only prohibits violent aims); *Dennis v. United States*, 341 U.S. 494, 503-06, 508-09 (1950) (citing to and discussing *Schenk* but upholding the validity of a statute criminalizing conspiracy to advocate overthrow of the government).

to the free speech dissents continued essentially in this vein until the early 1960s, when the Court began to embrace the "marketplace of ideas" and "public discussion" concepts with which the dissents typically are associated today.⁸¹

Thus, by the time the Court finally renounced the free speech doctrine followed in *Abrams*, *Whitney*, and *Gitlow* in 1969,⁸² it was not responding to an antecedent vilification of the holdings in those cases. Rather, it was cementing a shift in First Amendment jurisprudence that had begun several years earlier. Accordingly, the free speech dissents are cited not as warnings against repeating the mistakes of the past, but as models of construction for interpreting the extent of protection afforded by the First Amendment. Holmes's dissent in *Abrams*, for instance, is cited for its principle that "the best test of truth is the power of thought to get itself accepted in the competition of the market,"⁸³ not as a reminder of the Espionage Act and its consequences. Similarly, the *Whitney* concurrence is quoted for its eloquent articulation of the value of public discussion and its exhortation that "the remedy to be applied [for subversive or undesirable speech] is more speech, not enforced silence,"⁸⁴ for its rejection of California's criminal syndicalism statute. Likewise, the *Gitlow* dissent is referenced for its position that ideas should be "given their chance" to win or lose in popular discourse, not as a caution against the dangers of criminal anarchy laws. Thus the canonization of the free speech dissents, unlike that of the *Lochner* and *Liebmann* dissents, appears to have been part and parcel—rather than a reaction to—the evolution of the Court's free speech jurisprudence.

80. See, e.g., *Douds*, 339 U.S. at 395 n.10 (quoting Brandeis's concurring opinion in *Whitney* but distinguishing it in upholding restrictions on the actions of persons affiliated with the Communist Party).

81. The Court made several references to the *Whitney* concurrence/dissent's "public discussion" concept in the 1940s. See *Musser*, 333 U.S. at 102 (Rutledge, J., dissenting); *Schneiderman v. United States*, 320 U.S. 118, 157-58 (1943). Nonetheless, the bulk of the Court's references to this principle did not appear until the 1960s. See, e.g., *Stanley v. Georgia*, 394 U.S. 557, 566-67 (1969); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 148 n.12 (1967); *Bell v. Maryland*, 378 U.S. 226, 344 (Black, J., dissenting); *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964); *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 576 n.12 (1963) (Douglas, J., concurring); *Garner v. Louisiana*, 368 U.S. 157, 201 (1961) (Harlan, J., concurring); *Konigsberg v. State Bar*, 366 U.S. 36, 62-63 (1961) (Black, J., dissenting); *Wilkinson v. United States*, 365 U.S. 399, 423 n.11 (1961) (Black, J., dissenting).

82. Although only *Whitney* has been expressly overruled, see *Brandenburg*, 395 U.S. at 444, the categorical affirmation of the Holmes-Brandeis free speech model in that case effectively overturned the rulings in the other free speech cases as well.

83. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

84. *Whitney*, 274 U.S. at 385 (Brandeis, J., concurring).

2. *Olmstead v. United States*

The elevation of Justice Brandeis's dissent in *Olmstead* followed a pattern only slightly different from that forged by the free speech dissents. As with the free speech cases, the Court began citing to the *Olmstead* dissent in 1945,⁸⁵ long before the *Olmstead* decision was overruled.⁸⁶ These early citations primarily referenced Justice Brandeis's broad elaboration of the "right to be let alone".⁸⁷

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.⁸⁸

Less often, they focused on the related principle of the right to privacy⁸⁹ or quoted Brandeis's admonition that the government

85. See *Malinski v. New York*, 324 U.S. 401, 423 n.7 (1945) (Rutledge, J., dissenting in part). In all, the dissent was cited or quoted eleven times between 1945 and 1967. See *Miranda v. Arizona*, 384 U.S. 436, 479-80 (1966); *Estes v. Texas*, 381 U.S. 532, 585 n.44 (1965) (Warren, J., concurring); *Griswold*, 381 U.S. at 494 (Goldberg, J., concurring); *Lopez v. United States*, 373 U.S. 427, 454 n.3 (1963) (Brennan, J., dissenting); *Gibson*, 372 U.S. at 568 n.7 (Douglas, J., concurring); *Poe*, 367 U.S. at 550 (Harlan, J., dissenting); *Mapp v. Ohio*, 367 U.S. 643, 659 (1961); *Irvine v. California*, 347 U.S. 128, 146 (1954) (Frankfurter, J., dissenting); *United States v. Morton Salt*, 338 U.S. 632, 651 (1950); *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 203 n.30 (1946); *Malinski*, 324 U.S. at 423 n.7 (Rutledge, J., dissenting in part).

86. See *Katz v. United States*, 389 U.S. 347, 352-53 (1967) (expressly overruling *Olmstead*). The Court's specific holding in *Olmstead* technically was overturned by Congress via the Communications Act of 1934 (which prohibited the electronic interception of telephone communications, see DONALD E. LIVELY, *FORESHADOWS OF THE LAW: SUPREME COURT DISSENTS AND CONSTITUTIONAL DEVELOPMENT* 145 (1992)), but constitutional case law with respect to the Fourth Amendment continued to turn on *Olmstead* standards of a physical intrusion into a protected place until the Court's decision in *Katz*.

87. The right to be let alone was first articulated in a law review article coauthored by Justice Brandeis several years earlier. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). However, it was Brandeis's *Olmstead* dissent which enshrouded it with the legal authority it enjoys today.

88. *Olmstead*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

89. In *Harris*, *Morton Salt*, *Poe*, and *Griswold*, members of the Court expressly cited to "the right to be let alone." See *Griswold*, 381 U.S. at 494 (Goldberg, J., concurring); *Poe*, 367 U.S. at 550 (Harlan, J., dissenting); *Morton Salt*, 338 U.S. at 651; *Harris*, 331 U.S. at 159 (Frankfurter, J., dissenting). In *Irvine*, however, the Court discussed police actions that "drastically invade privacy." *Irvine*, 347 U.S. at

"teaches the whole people by its example" as a justification for imposing restraints on government officials.⁹⁰

Significantly, the character of the Court's citations to the *Olmstead* dissent has remained substantially the same since the case was overruled in 1967, though the incidence of citations to the dissent has increased.⁹¹ Indeed, the dissent typically is cited not for the narrow proposition that Fourth Amendment protection should extend to private conversations, or to warn against the dangers of wiretaps, but to support a broad reading of the protections afforded by the Fourth Amendment.⁹² This is true despite the fact that the *Katz* decision explicitly rejected an expansive interpretation of the Fourth Amendment that would "translate[] into a general constitutional 'right of privacy.'"⁹³ Thus, as with the free speech cases, the rejection of *Olmstead's* specific holding (that electronic eavesdropping on telephone conversations did not violate the Fourth Amend-

discussed police actions that "drastically invade privacy." *Irvine*, 347 U.S. at 146 (Frankfurter, J., dissenting); see also *Miranda*, 384 U.S. at 479-80.

90. *Miranda*, 384 U.S. at 479-80.

91. The Court has cited the *Olmstead* dissent 41 times since *Katz*, compared with 11 citations before then. Of the post-*Katz* citations, 16 reference the right to be let alone. See *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 459 (1990); *Washington v. Harper*, 494 U.S. 210, 238 (1990) (Stevens, J., concurring); *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 237 (1990); *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 641 (1989); *Bowers v. Hardwick*, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting); *Winston v. Lee*, 470 U.S. 753, 758 (1985); *New Jersey v. T.L.O.*, 469 U.S. 325, 361 (1985); *Hudson v. Palmer*, 468 U.S. 517, 557 (1983) (Powell, J., concurring); *H.L. v. Matheson*, 450 U.S. 398, 435 (1981); *Michigan v. DeFillippo*, 443 U.S. 31, 44-45 n.2 (1979) (Brennan, J., dissenting); *Kelley v. Johnson*, 425 U.S. 238, 253 (1976) (Marshall, J., dissenting); *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 65 (1974); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 15 (1974); *Miesel v. United States*, 412 U.S. 954, 954 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972); *Stanley*, 394 U.S. at 564. Ten opinions analogize a related right to privacy. See *United States Dep't of Defense v. Federal Labor Relations Auth.*, 510 U.S. 487, 501 (1994); *Bowers*, 478 U.S. at 207 (Blackmun, J., dissenting); *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984); *United States v. Knotts*, 460 U.S. 276, 280 (1983); *Kelley*, 425 U.S. at 250 (Marshall, J., dissenting); *Boraas*, 416 U.S. at 15; *Roe v. Wade*, 410 U.S. 113, 152 (1973); *Paris Adult Theatre v. Slaton*, 413 U.S. 49, 85 n.9 (1973) (Brennan, J., dissenting); *Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154, 188 (1971); *California v. Byers*, 402 U.S. 424, 453 (1971). Ten opinions reference the dangers inherent in a government that does not obey its own laws. See *Chandler v. Miller*, 520 U.S. 305, 322 (1997); *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261, 330 (1990) (Brennan, J., dissenting); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 687 (1989); *United States v. Dunn*, 480 U.S. 294, 312 n.3 (1987) (Brennan, J., dissenting); *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 367 (1985); *Hobby v. United States*, 468 U.S. 339, 352 n.2 (1984) (Marshall, J., dissenting); *Fullilove v. Klutznick*, 448 U.S. 448, 532 & n.15 (1980); *Richmond Newspapers v. Virginia*, 448 U.S. 555, 593 (1980); *United States v. Payner*, 447 U.S. 727, 733-34 (1980); *Stone v. Powell*, 428 U.S. 465, 483 (1976).

92. See sources cited *supra* note 91.

93. *Katz*, 389 U.S. at 350.

ment) in *Katz* has proven far less salient to the canonization of its dissent than have the broad rules of Fourth Amendment construction advanced therein.

3. *Plessy v. Ferguson*

In elevating Justice John Marshall Harlan's *Plessy v. Ferguson*⁹⁴ dissent, the Court harkened back to the pattern set by its *Lochner* and *Liebmann* canonizations. As with the *Lochner* and *Liebmann* opinions, Harlan's *Plessy* dissent chastised the Court and warned of the dangers inherent in its line of reasoning:

[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. . . . 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.⁹⁵

It took nearly fifty years for Harlan's words to be vindicated,⁹⁶ as the Court, in the landmark decision of *Brown v. Board of Education*, functionally overruled the "separate but equal" doctrine set forth in *Plessy*.

Yet the Court's opinion in *Brown* made no mention of the *Plessy* dissent; instead the Court explicitly distinguished *Plessy* on the ground that times and circumstances had changed. In fact, the first judicial citation to the *Plessy* dissent did not appear until 1961,⁹⁷ and frequent quotation of the dissent did not commence until the late 1980s.⁹⁸ By 1961, the civil rights movement was well underway, and the Court's disapprobation of the separate but equal doctrine well-established; by the 1980s, both society's and the Court's disavowal of the *Plessy* decision itself had become firmly entrenched. Thus, as with the *Lochner* dissent, the lionization of the *Plessy* dis-

94. 163 U.S. 537 (1896). Harlan's dissent in *Plessy* has been cited or quoted 16 times in 10 subsequent cases. Search of WESTLAW, SCT database (Aug. 15, 1999) (searching "Plessy & Harlan /s dissenting" and retrieving 16 references, 12 of which cite or quote the *Plessy* dissent as authority).

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

96. See *Brown v. Board of Educ.*, 347 U.S. 483, 494-95 (holding that "[t]o separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority, . . . [and] [a]ny language in *Plessy v. Ferguson* contrary to this finding is rejected.") (emphasis added).

97. See *Garner*, 368 U.S. at 177 (referencing Mr. Justice Harlan's reasoning in "the landmark case of *Plessy v. Ferguson*").

98. See *McCleskey v. Kemp*, 481 U.S. 279, 344 (1987) (quoting the *Plessy* dissent's caution that "[t]he destinies of the two races in this country are indissolubly linked together").

sent occurred as a memorial, rather than a source, for the demonization of the *Plessy* decision and the racist doctrine it propounded.

Also analogous to the *Lochner* case is the manner in which the Court has cited to the *Plessy* dissent. During the 1960s, the Court referenced and admired the wisdom of Harlan's dissent,⁹⁹ whereas in the 1980s it cited the dissent almost exclusively as a warning not to repeat the mistakes of the past. Indeed, the Court often has quoted the dissent's declaration that "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens," as a somber reminder of how dangerous and hateful discriminatory distinctions can be in cases involving modern racial preferences.¹⁰⁰ Thus the *Plessy* dissent, like that in *Lochner*, owes its canonization to its symbolic power as the voice of caution against a doctrine that later experience has proved to be anathema.

4. *John Marshall Harlan the Elder*

The elevation of the *Plessy* dissent also gave rise to the apotheosis of another canonical dissenter, Justice John Marshall Harlan the Elder. Although Harlan had been disliked for most of his tenure on the Court,¹⁰¹ the events of the 1960s transformed him into a judicial saint. Scholars and biographers composed volumes eulogizing his dissents,¹⁰² and the legal community began to include him in its lists of "great" Supreme Court Justices.¹⁰³ The impetus behind this canonization appears to have been the vindication of Harlan's dissents in the *Civil Rights Cases*¹⁰⁴ and *Plessy*,¹⁰⁵ occasioned by the

99. See, e.g., *Harper v. Virginia Bd. of Elections*, 383 U.S. 363, 378 n.7 (1966) (Black, J., dissenting); *Garner*, 368 U.S. at 176.

100. See, e.g., *Romer v. Evans*, 517 U.S. 620, 650-51 (Scalia, J., dissenting); *City of Richmond v. Croson*, 488 U.S. 469, 521 (1989) (Scalia, J., concurring in the judgment).

101. Justice Holmes, for instance, called him a man of weak abilities, see Henry S. Cohn, Book Review, 69 CONN. B.J. 443, 443 (1995), and once remarked that Harlan "did not shine either in analysis or generalization." John Phillip Reid, *Commentary: Beneath the Titans*, 70 N.Y.U. L. REV. 653, 663 & n.54 (1995) (citing Letter from Oliver Wendell Holmes to Frederick Pollock (Apr. 5, 1919), reprinted in 2 HOLMES-POLLOCK LETTERS 7, 7-8 (Mark D. Howe ed., 2d ed. 1961)).

102. See, e.g., ALAN BARTH, PROPHETS WITH HONOR: GREAT DISSENT AND GREAT DISSENTERS IN THE SUPREME COURT 27-30 (1974) (characterizing Harlan's *Plessy* dissent as prophetic); FRANK LATHAM, THE GREAT DISSENTER: JOHN MARSHALL HARLAN 1833-1911 at viii (1970) (discussing Harlan's dissents as "miles ahead of [Justice] Holmes"); Alan F. Westin, *Mr. Justice Harlan*, in MR. JUSTICE 93-126 (Allison Dunham & Philip B. Kurland eds., rev. ed. 1964) (discussing Justice Harlan's life). See generally G. Edward White, *John Marshall I: The Precursor*, 19 AM. J. LEG. HIST 1 (1975) (discussing Justice Harlan's jurisprudence and the augmentation of his reputation).

103. GREAT JUSTICES OF THE U.S. SUPREME COURT: RATINGS & CASE STUDIES 25-28 app. A (William D. Pederson & Norman W. Provizer eds., 1993).

104. 109 U.S. at 26 (Harlan, J., dissenting).

Civil Rights Act and subsequent Supreme Court decisions upholding them.¹⁰⁶ For as the nation came to recognize and reject the moral iniquity of the separate but equal doctrine, Harlan and his dissenting voice became the noble and judicious symbol of how the law should have been.

The canonization of the first Justice Harlan differed from that of Justices Holmes and Brandeis in that it occurred posthumously, more than fifty years after the Justice's death—and nearly seventy years after he penned what would ultimately become his most famous dissent.¹⁰⁷ Moreover, it was unique in that it appears to have occurred as a reaction, rather than an ancillary, to the Court's repudiation of the separate but equal doctrine and its concomitant vindication of Harlan's *Plessy* dissent. Yet whatever the differences in their origins, the apotheoses of all three Justices owe their longevity to the categorical repudiation of the constitutional doctrines against which the Justices were the first to agitate.

5. *Poe v. Ullman*

The lionization of the second Justice Harlan's dissent in *Poe v. Ullman*¹⁰⁸ presents an interesting wrinkle in the historical development of the dissenting canon. As with the free speech cases and *Olmstead*, the majority opinion in *Poe*, though considered a mistake, is hardly reviled by modern courts. More significantly, the *Poe* dissent was vindicated a mere four years after it was written, in a case that is itself famous today—*Griswold v. Connecticut*.¹⁰⁹ Further, the *Griswold* case involved the exact same statute and almost the same set of facts as those present in *Poe*; thus the question arises as to why later courts would cite the *Poe* dissent at all, rather than rely exclusively on the majority opinion in *Griswold*.

The answer appears to lie in the subtly different rationales advanced by the two decisions for invalidating the contraceptive ban at issue. While *Griswold* relied on penumbras emanating from specific guarantees in the Bill of Rights for its authority,¹¹⁰ Harlan's *Poe* dissent rested on an expansive construction of the word "liberty" in the Fourteenth Amendment's due process clause:

105. 163 U.S. at 552 (Harlan, J., dissenting).

106. See, e.g., *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

107. See *Plessy*, 163 U.S. at 552 (Harlan, J., dissenting). Harlan wrote the *Plessy* dissent in 1896, but his canonization did not occur until the mid-1960s.

108. 367 U.S. 497 (1961).

109. 381 U.S. 479 (1965).

110. See *id.* at 484 (holding that the guarantees of the Bill of Rights have penumbras that encompass peripheral rights including a right of marital privacy).

[Through] the course of this Court's decisions, [due process] has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society . . . [The] full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of . . . [such specific guarantees as speech and religion]. It is a rational continuum which . . . recognizes [that] certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgement.¹¹¹

Harlan found the distinction significant enough to write separately in *Griswold* (mostly repeating what he had written in *Poe*), and to this day the Court cites separately to the *Poe* dissent for its "due process liberty" concept.¹¹² Many of the cases that reference the *Poe* dissent involve claims to extend constitutional (Fourteenth Amendment) protection to new spheres. In *Youngberg v. Romeo* (involving an alleged constitutional right to safe conditions of confinement), for instance, the Court noted that: "In determining whether a substantive right protected by the Due Process Clause has been violated, it is necessary to balance 'the liberty of the individual' and 'the demands of an organized society.'"¹¹³ Thus, as with the free speech and *Olmstead* dissents, the dissent in *Poe* derives its canonical status not so much from the subsequent repudiation of the majority holding in the case, but from its own broad construction of Fourteenth Amendment liberty.

6. *Korematsu v. United States*

The lionization of the *Korematsu*¹¹⁴ dissents marked a unique development in the canonization phenomenon on multiple fronts. First, the *Korematsu* decision, unlike other decisions whose dissents eventually have become canonized, never explicitly or constructively has been overruled. Second, although Justice Murphy's dissent is considered the strongest in *Korematsu*,¹¹⁵ Justice Jackson's also is

111. *Poe*, 367 U.S. at 542-43 (citations omitted).

112. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 706 (1997); *Albright v. Oliver*, 510 U.S. 266, 287 (1994); *Planned Parenthood*, 505 U.S. at 858; *University of Michigan v. Ewing*, 474 U.S. 214, 229 (1985); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 427 (1983); *Youngberg v. Romeo*, 457 U.S. 307, 320 (1982); *Roe*, 410 U.S. at 168 n.3.

113. *Youngberg*, 457 U.S. at 320 (quoting *Poe*, 367 U.S. at 542).

114. 323 U.S. 214 (1944).

115. See, e.g., GERALD GUNTHER, *CONSTITUTIONAL LAW* 639 (12th ed. 1991).

well-known and often cited;¹¹⁶ thus it seems appropriate to consider both *Korematsu* dissents together, as a canonical unit. Indeed, while the two dissents focus on different themes, there is a measure of similarity in their exhortations. Both dissents protested against the notion that the Constitution can sanction racial discrimination. Justice Murphy, for instance, argued that the Japanese exclusion order at issue was unconstitutional because it was motivated by an undercurrent of racial animosity: "[Such] exclusion of 'all persons of Japanese ancestry . . . ' from the Pacific Coast . . . goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism."¹¹⁷ Similarly, Justice Jackson warned that the Constitution should not be stretched to accommodate racial discrimination:

[A] judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. . . . [O]nce a judicial opinion rationalizes . . . the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.¹¹⁸

Both dissents have been canonized because they demonize the *Korematsu* holding. For despite the fact that the *Korematsu* decision never has been overruled, it has been disparaged by the Court at least since the 1970s.¹¹⁹ Indeed, in 1988, Congress formally repudiated the decision with the passage of the Restitution for World War

116. Specifically, Justice Murphy's dissent is cited seven times. See *Adarand Constrs., Inc. v. Pena*, 515 U.S. 200, 214-15 (1995); *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 603-04 (1990) (O'Connor, J., dissenting); *J.A. Croson Co.*, 488 U.S. at 500; *Fullilove*, 448 U.S. at 526; *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 422-23 (1948); *Ex Parte Mitsuye Endo*, 323 U.S. 283, 307 (1944). On the other hand, Justice Jackson's dissent is cited four times. See *Adarand*, 515 U.S. at 215; *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 814-15 (1994); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 357-58 (1987) (Brennan, J., dissenting); *Goldman v. Weinberger*, 475 U.S. 503, 522 (1986).

117. *Korematsu*, 323 U.S. at 233 (Murphy, J., dissenting).

118. *Id.* at 245-46 (Jackson, J., dissenting).

119. The Court first suggested that *Korematsu* had been an undesirable decision in 1953. See *Shaughnessy v. United States*, 345 U.S. 206, 222 (1953) (Jackson, J., dissenting) (remarking that due process could at times leave a "dangerous latitude for executive judgment"). By the 1970s, the Court acknowledged more definitely that *Korematsu* had been discredited. See *DeFunis v. Odegaard*, 416 U.S. 312, 339 (1974) (Douglas, J., dissenting) (noting disparagingly that "[t]his Court has not sustained a racial classification since the wartime cases of *Korematsu v. United States* and *Hirabayashi v. United States*") (citations omitted); see also *University of California v. Bakke*, 438 U.S. 265, 297 (1978) (invalidating a quota for minorities at a state medical school).

II Internment of Japanese Americans and Aleuts Act, which explicitly states that "Congress recognizes . . . a grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II," and provides for the payment of reparations to Japanese-Americans who were detained during that period.¹²⁰

Interestingly, the first references to the dissents in *Korematsu* were made by Justice Murphy himself, in a series of contemporary cases dealing with the curtailment of the rights of Japanese-Americans.¹²¹ The next citation to the dissents, however, did not occur until 1980, well after the holding in *Korematsu* had been discredited.¹²² Since then, the Court often has quoted the *Korematsu* dissents as a warning of the dangers attendant to the employment of racial preferences,¹²³ or as an admonition against the blind acceptance of the "exigent circumstances" rationale for restricting constitutional rights.¹²⁴ Thus, as with the *Lochner* and *Plessy* dissents, the chief referential function of the *Korematsu* dissent has been to warn against the repetition of past mistakes or their analogues. Moreover, the lionization of the *Korematsu* dissents, like that of the *Lochner* and *Plessy* dissents, appears to have evolved primarily as a postscript to the categorical rejection of the majority opinion in the case.

120. Pub. L. 100-383, § 2(a), 102 Stat. 903.

121. See *Oyama v. California*, 332 U.S. 633, 671 (1948) (Murphy, J., concurring) (discussing the merits of the Alien Land Law); *Takahashi*, 334 U.S. at 412 (involving a mandamus proceeding to compel the issuance of a fishing license to a person of Japanese ancestry); *Endo*, 323 U.S. at 283 (ruling on a habeas corpus petition for discharge from custody in a relocation center persons of Japanese ancestry).

122. See *Fullilove*, 448 U.S. at 525 n.5 (Stewart, J., dissenting) (quoting Justice Murphy's admonition that "[r]acial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life" to support his position that the use of racial preferences for minority contractors was an impermissible practice).

123. See *Adarand*, 515 U.S. at 214-15 (referencing the *Korematsu* dissents in connection with a challenge to a federal program preferencing disadvantaged business enterprises); *Metro Broad.*, 497 U.S. at 603-04 (O'Connor, J., dissenting) (quoting Justice Murphy's *Korematsu* dissent in arguing that the use of racial preferences in the licensing of radio and television stations is unconstitutional); *Croson*, 488 U.S. at 501 (citing Murphy's dissent as a justification in invalidating a city-sanctioned preference for minority subcontractors).

124. See, e.g., *Estate of Shabazz*, 482 U.S. at 357-58 (Brennan, J., dissenting) (citing the *Korematsu* dissents in arguing that mere assertions of exigency by prison officials cannot justify the invasion of inmates' First Amendment rights); *Goldman*, 475 U.S. at 522 (Brennan, J., dissenting) (citing Jackson's dissent for the proposition that where the Air Force has failed to furnish a credible rationale for preventing Orthodox Jews from wearing their yarmulkes while in uniform, the Court cannot "distort the Constitution to approve all that the military may deem expedient").

D. Dissents That Were Not

The astute reader might notice that the preceding taxonomy leaves out at least a few noteworthy post-New Deal dissents. Such a reader also might wonder whether this omission is a limitation of the technical ten-citation minimum I have imposed,¹²⁵ or conversely, where there is some reason that these neglected dissents deserve to be left out of the dissenting canon. The following subsections seek to address this lacuna with respect to three dissents one might expect to see in the dissenting canon.

1. *Adamson v. California*

In *Adamson v. California*, the Supreme Court held that the federal Constitution does not require states to abide by the Fifth Amendment privilege against self-incrimination.¹²⁶ Justice Hugo Black dissented, arguing that the Bill of Rights applies to the States via the Fourteenth Amendment.¹²⁷ The Court eventually overruled *Adamson's* specific holding, ruling in *Griffin v. California* that "the Fifth Amendment, in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."¹²⁸ Moreover, during the 1960s, the Court "selectively incorporated" many of the Bill of Rights' other guarantees against the states.¹²⁹ Yet the *Adamson* dissent does not meet this paper's frequency of citation criteria for canonization.¹³⁰

125. See *supra* note 11.

126. See *Adamson v. California*, 332 U.S. 46, 54 (1947).

127. See *id.* at 68-75 (Black, J., dissenting).

128. 380 U.S. 609, 615 (1965).

129. See, e.g., *Malloy v. Hogan*, 378 U.S. 1, 3 (1964) (applying the Fifth Amendment's privilege against self-incrimination to the states under the Fourteenth Amendment); *Gideon v. Wainwright*, 372 U.S. 335, 341 (1963) (finding the Sixth Amendment right to counsel applicable to the states via the Fourteenth Amendment); *Mapp*, 367 U.S. at 655 (applying the Fourth Amendment against the states by way of the Fourteenth Amendment).

130. See *supra* note 11. Technically, the dissent has been cited in 20 subsequent Supreme Court cases. Search of WESTLAW, SCT database (Aug. 15, 1999) (searching for "Adamson & Black /s dissenting" and retrieving 20 cases that specifically reference the dissent rather than the majority opinion). However, only three of these references cite the dissent as legal authority. See *Estes*, 381 U.S. at 559 n.16 (Warren, J., concurring) (citing the *Adamson* dissent as authority for incorporating the Sixth Amendment against the states); *Bell*, 378 U.S. at 294 & n.8 (Goldberg, J., concurring) (citing the dissent's discussion of the Fourteenth Amendment's relation to the Reconstruction-era Civil Rights Bill); *In re Oliver*, 333 U.S. 257, 280 (1948) (Rutledge, J., concurring) (lamenting the Court's "depart[ure] from our constitutional plan" in refusing the Fourteenth Amendment's incorporation of the Bill of Rights). Of the remaining 17 citations, 15 consist of self-references by Justice Black in later dissents or concurrences which reiterate his *Adamson* position. See Groppi v.

I submit that this apparent incongruence makes perfect sense because although the *Adamson* dissent technically was redeemed in *Griffin*, its central position never has become the law of the land. Indeed, the Supreme Court to this day never has fully adopted Justice Black's incorporation theory. Yet while the *Adamson* dissent has failed to achieve canonical status, it has achieved something greater than the status of an ordinary dissent. This too makes sense, since the dissent has played an important role in the legal debate over incorporation—prompting, for instance, Charles Fairman's famous law review article, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*¹³¹

2. *Black and White Taxicab & Minersville v. Gobitis*

In *Black and White Taxicab v. Brown and Yellow Taxicab*,¹³² the Supreme Court ruled that a state common law policy against monopoly could be ignored, and upheld a monopolistic arrangement between two companies incorporated in different states. Justice Holmes dissented, arguing that there is no "transcendental body of law outside of any particular State,"¹³³ that the common law of a state is as much a creation of the state's sovereign power as the statutory law, and that federal courts under the Rules of Decision

Wisconsin, 400 U.S. 505, 515 (1970) (Black, J., dissenting); *In re Winship*, 397 U.S. 358, 377 (1970) (Black, J., dissenting); *Goldberg v. Kelly*, 397 U.S. 254, 275 (1970) (Black, J., dissenting); *Sniadach v. Family Fin. Corp. of Bay View*, 395 U.S. 337, 344 (1969) (Black, J., dissenting); *Duncan v. Louisiana*, 391 U.S. 145, 162 (1968) (Black, J., dissenting); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 676 & n.5 (1966) (Black, J., dissenting); *Jackson v. Denno*, 378 U.S. 368, 407 (1964) (Black, J., dissenting); *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 91 (1964) (Black, J., concurring); *Cohen v. Hurley*, 366 U.S. 117, 153 (1961) (Douglas, J., with whom Black, J., joins, dissenting); *Flemming v. Nestor*, 363 U.S. 603, 625 (1960); *Hannah v. Larche*, 363 U.S. 420, 493 (1960) (Douglas, J., with whom Black, J., joins, dissenting); *Bute v. Illinois*, 333 U.S. 640, 656 n.12 (1948) (Rutledge J., with whom Black, J., joins, dissenting). The other citations merely note that the Court has rejected the *Adamson* dissent's total incorporation position, or seek to describe Justice Black's viewpoint in detail. See *Albright*, 510 U.S. at 287 (noting that the Court has rejected the total incorporation view); *Planned Parenthood*, 505 U.S. at 847 (reaffirming the Court's rejection of the total incorporation view). I believe that it would be inappropriate to count repeated self-references or citations that disagree with rather than exalt a dissent as steps in the process of canonization; thus, I have considered only the four "legal authority" citations in assessing whether the *Adamson* dissent meets the quantity of citation criteria outlined in footnote 11.

131. Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5, 173 (1949) (disagreeing with Justice Black by arguing that the Framers failed to include the Bill of Rights into the Constitution and that judges should accordingly respect the limits on their constitutional powers).

132. 276 U.S. 518 (1928).

133. *Id.* at 533 (Holmes, J., dissenting).

Act should therefore be bound to follow state common law. Ten years later, in the legendary case of *Erie Railroad v. Tompkins*,¹³⁴ the Court switched gears and adopted the reasoning advanced by Justice Holmes.¹³⁵ Specifically, the Court held that the Rules of Decision Act applied to the common law as well as to constitutional and statutory provisions, and that there is no such thing as federal common law.¹³⁶ Yet by the frequency of citation criteria outlined in footnote eleven, the *Taxicab* dissent does not rank among the Supreme Court's canonical dissents.¹³⁷

Similarly, in *Minersville v. Gobitis*, the Court upheld a public school board's authority to require a flag salute as a condition of receiving a public school education against a freedom of religion challenge.¹³⁸ Justice Stone dissented from the majority, noting that:

If [constitutional guarantees of civil liberty] are to have any meaning they must, I think, be deemed to withhold from the state any authority to compel belief or the expression of it where that expression violates religious convictions, whatever may be the legislative view of the desirability of such compulsion.¹³⁹

Just one year later, in *West Virginia State Board of Education v. Barnette*, the Court overruled *Gobitis*, holding that it was unconstitutional for public school officials to force school children to salute the flag or recite the Pledge of Allegiance.¹⁴⁰ Indeed, in one of its most famous lines, the Court echoed Justice Stone's earlier sentiments and declared that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."¹⁴¹ Yet, as with Justice Holmes's dissent in *Taxicab*, Stone's *Gobitis* dissent has failed to achieve canonical status.¹⁴² In fact, I discuss the two dissents together because they share the common fate of having lost out to the majority opinions that overruled them—i.e. it is the majority opinions in *Erie* and *West Vir-*

134. 304 U.S. 64 (1938).

135. *See id.* at 78.

136. *See id.*

137. *See supra* note 11.

138. *See* 310 U.S. 586, 599 (1940).

139. *Id.* at 604 (Stone, J., dissenting).

140. 319 U.S. 624, 642 (1942).

141. *Id.*

142. Search of WESTLAW, SCT database (Aug. 15, 1999) (searching for *Gobitis* /s Stone /s Dissent!) and retrieving three cases that cite or quote Justice Stone's *Gobitis* dissent).

ginia, rather than the *Taxicab* and *Gobitis* dissents, that have become part of the American constitutional canon.

I suggest that this is because the vindication of these dissents did not follow the patterns set by either the *Lochner* or the free speech type canonizations. In other words, the redemption of the *Taxicab* and *Gobitis* dissents neither ensued from a popular repudiation of the majority opinions in those cases, nor served as a springboard for the judicial expansion of individual rights. Because the public never rose up against the *Taxicab* and *Gobitis* decisions, there was no pre-reversal worship of the dissents in those cases. Moreover, the reversals in *Erie* and *West Virginia* came relatively quickly and directly; thus, there was no pre-reversal judicial elevation of the dissents, as there had been with the free speech and *Olmstead* dissents, nor was there any distinction in rationales as in the case of the *Griswold* decision and the second Justice Harlan's *Poe* dissent. Accordingly, in the years since it overruled *Taxicab* and *Gobitis*, the Court had no reason to privilege or exalt the dissents in those cases over the majority opinions in *Erie* and *West Virginia*.

II. CURRENT THEORIES OF CANONICAL DISSENT

The canonization of judicial dissents and dissenters raises numerous intriguing questions, such as why courts even bother citing to dissents rather than to the majority opinions in the cases that vindicate them, or why some dissents become canonized only after they have been redeemed, while others are cited much sooner. Yet surprisingly little attempt has been made to apprehend or explicate the underpinnings of the canonization phenomenon. This Part analyzes the few existing theories on the redemption of dissents, explaining why none of them adequately accounts for the evolution of the dissenting canon.

A. *Five to Four Decisions*

Justice Antonin Scalia has offered a formal theory of redeemed dissent which essentially holds that the dissents most likely to be vindicated by later courts are those issued in cases where the Supreme Court is divided by a margin of five to four.¹⁴³ This theory, however, does little more than state the obvious; elementary math illustrates that five-four decisions are the most likely to be overturned because they require only one changed vote. More importantly, Scalia's theory fails to distinguish between the impetus for the vindication of a dissent, versus its canonization. Indeed, if we were to take his theory to its logical conclusion, it would suggest

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

that dissents issued in five-four cases are the most likely candidates for canonization.¹⁴⁴ But history illustrates the fallacy of this hypothesis; of the seven canonical dissents discussed above, only three were issued in cases where the Court divided five to four.¹⁴⁵ In fact, Harlan's archetypal dissent in *Plessy* was issued in isolation, and the free speech cases that spawned the celebrated Holmes-Brandeis dissents were decided seven to two.¹⁴⁶ Moreover, numerous dissents tendered in five-four decisions, such as *Pollock v. Farmer's Loan Trust Co.*, subsequently have been vindicated, but never canonized.¹⁴⁷ Justice Scalia's theory, then, is both over- and under-inclusive in its capacity to identify canonical dissents.

B. *Evolving Standards of Decency*

In an article entitled *In Defense of Dissents*, Justice William Joseph Brennan suggests that the most enduring dissents are those which "reveal the perceived congruence between the Constitution and the evolving standards of decency that mark the progress of a maturing society."¹⁴⁸ If we take his term "enduring" to be the functional equivalent of "canonical," his theory boils down to the intuition that canonical dissents are those which presage the evolution of societal and political norms—i.e., those dissents which time, experience, and changing circumstances eventually redeem.

Justice Brennan's description accounts rather well for the canonization of the seven dissents discussed above. The *Lochner* and *Liebmann* dissents were canonized as a result of evolving standards of economic necessity occasioned by the Great Depression.¹⁴⁹ Justice

144. See *id.* at 18. In fairness to Justice Scalia, I do not believe that he intended for his theory to be carried to this extreme—i.e., I do not think he meant for it to explain the canonization, as distinguished from the redemption, of dissent. Nevertheless, I think it is useful to evaluate his theory's capacity in this regard as part of the endeavor to uncover a suitable explanation for the canonization of dissents.

145. These three cases were *Lochner* (Justices Holmes, Harlan, White, and Day dissenting), *Olmstead* (Justices Brandeis, Holmes, Butler, and Stone dissenting), and *Poe* (Justices Harlan, Black, Douglas, and Stewart dissenting). Conversely, the canonical dissents in *Plessy*, *Liebmann*, *Korematsu*, and the free speech cases were issued eight-one (Justice Harlan dissenting), seven-two (Justices Brandeis and Stone dissenting), six-three (Justices Murphy, Jackson, and Roberts dissenting), and seven-two (Justices Holmes and Brandeis dissenting), respectively.

146. See *supra* note 145.

147. *Pollock* was functionally overruled by the Sixteenth Amendment, but Harlan's dissent has not been cited as legal authority even once by subsequent courts. Search of WESTLAW, SCT database (Aug. 15, 1999) (searching for "Pollock /s Harlan /s Dissent!" and retrieving one document, which does not actually reference Harlan's dissent as legal authority). See also *supra* note 30 and accompanying text.

148. William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 431 (1986) (internal quotations omitted).

149. While Brennan does not specifically mention *Lochner* or *Liebmann* in his list of great dissents, he acknowledges that the list is incomplete and would not, I think,

Harlan's *Plessy* dissent was canonized in response to evolving standards of racial equality.¹⁵⁰ The free speech dissents were lionized because of evolving standards of respect for politically unpopular speech, and so on.¹⁵¹ The problem with Brennan's formulation, however, is that it cannot explain why *more* redeemed dissents are not canonized. Indeed, if congruence with the "evolving standards of decency" is the guidepost for canonization, then Justice Stone's dissent in *Gobitis*,¹⁵² Justice Black's dissent in *Betts v. Brady*¹⁵³ (redeemed by the Court's landmark decision in *Gideon v. Wainwright*),¹⁵⁴ and Justice Curtis's dissent in *Dred Scott* all should have been canonized. Yet these dissents remain largely forgotten, while the majority opinions (or in the case of *Dred Scott*, the amendments) that vindicated them have been enshrined.¹⁵⁵

Brennan also suggests that the most enduring, or canonical, dissents are those that "soar with passion and ring with rhetoric. . . . dissents that, at their best, straddle the worlds of literature and law."¹⁵⁶ This basic perception that canonical dissents are simply better written than non-canonical dissents is a popular one.¹⁵⁷ How-

have objected to the inclusion of these two celebrated dissents within his formulation.

150. Cf. Brennan, *supra* note 148, at 431-32 (arguing that the nation continues to strive toward the standards of racial equality Justice Harlan aspired to in his *Plessy* dissent).

151. Cf. *id.* at 432 (characterizing the free speech dissenters in the same courageous light as Justice Harlan in *Plessy*).

152. Indeed, Brennan counts Stone's *Gobitis* dissent in his list of enduring dissents. See *id.* at 432. However, it would be a mistake to consider the dissent canonical given that it is rarely cited or quoted by later Courts. Search of WESTLAW, SCT database (Aug. 15, 1999) (searching for *Gobitis* /s Stone /s Dissent!" and retrieving only three documents that reference Stone's *Gobitis* dissent). See also *supra* note 148 and accompanying text.

153. 316 U.S. 455, 474 (1942) (Black, J., dissenting) (arguing that the Fourteenth Amendment makes the Sixth Amendment applicable to the states), *overruled by*, *Gideon v. Wainwright*, 372 U.S. 335 (1963).

154. See *Gideon v. Wainwright*, 372 U.S. 335, 341 (1963).

155. *West Virginia v. Barnette*, 319 U.S. 624 (1942), which overruled *Gobitis*, is a well-known and often-cited case. Search of WESTLAW, KEYCITE (Feb. 21, 2000) (retrieving a list of 3105 documents citing *Barnette*). Most school children have heard of both *Gideon v. Wainwright* (which overruled *Betts*) and the Fourteenth Amendment (which functionally overruled *Dred Scott*, as discussed in Part I.B.1.) is, of course, a well-known canonical text.

156. Brennan, *supra* note 148, at 431.

157. See, e.g., BARTH, *supra* note 102, at ix (stating that the opinions discussed in Mr. Barth's book were "selected for their literary quality and their significance as turning points in American jurisprudence"); BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 79 (1921) (praising Holmes as a master of aphorism in the context of discussing the *Lochner* dissent); Robert A. Ferguson, *Holmes and the Judicial Figure*, in *THE LEGACY OF OLIVER WENDELL HOLMES, JR.* 155, 177 (Robert

ever, it too fails to explain why more dissents have not been canonized. The dissents in *Betts v. Brady* and *Gobitis*—not to mention Justice Field's dissents in *Slaughter-House* and *Munn v. Illinois*—are all eloquent literary works, but none of them has achieved canonical status. Nor are all canonical dissents literary masterpieces; the second Justice Harlan's dissent in *Poe v. Ullman*, for example, is not particularly mellifluous or rhetorical.¹⁵⁸ Thus Justice Brennan's formulation, too, fails adequately to explain the canonization of dissent.

C. Substantive Holdings

In a recent essay in the *Duke Law Journal*, Richard Primus argues that the most important factor in the canonization of a dissent is whether later courts agree with its substantive holding.¹⁵⁹ In one sense, this theory states an obvious and seemingly indisputable proposition: Courts canonize dissents whose holdings have been redeemed. Yet on closer inspection, this theory, like Justice Scalia's five-four theory, is both over- and under-inclusive. First, Primus's theory fails to explain why courts do not canonize *all* dissents whose substantive holding they ultimately come to agree with. Second, it does not adequately explain the canonizations of the free speech or *Olmstead* dissents. For while it is true that the Supreme Court eventually embraced the substantive positions advanced in these dissents, that is hardly the reason why it chose to canonize them. In fact, as outlined above, the Court began citing to these dissents well before their substantive holdings had been redeemed.¹⁶⁰ Moreover, at least in the case of the free speech dissents, the Court sometimes quoted the dissents' constitutional constructions *even while rejecting the broader substantive positions for which the dissents stood*. In *Scales v. United States*¹⁶¹ (decided eight years before *Brandenburg* overruled *Whitney*), for instance, the Court cited Brandeis's *Whitney* concurrence/dissent while sanctioning a statute that criminalized the holding of membership in any organization that advocates the overthrow of the United States government by force or violence. This was despite the fact that the substance of the *Whitney* concurrence/dissent actually criticized the criminalization of mere mem-

W. Gordon ed., 1992) (maintaining that the key to Holmes's great dissents is their literary style).

158. See *Poe v. Ullman*, 367 U.S. 497, 549 (1961) (Harlan, J., dissenting) ("While these [Bill of Rights] Amendments reach only the Federal Government, this Court has held in the strongest terms, and today again confirms, that the concept of 'privacy' embodied in the Fourth Amendment is part of the 'ordered liberty' assured against state action by the Fourteenth Amendment.") (citations omitted).

159. See Primus, *supra* note 8, at 281.

160. See *supra* Parts I.C.1 & I.C.2.

161. 367 U.S. 203, 228 n.20 (1961).

bership in an organization that advocates "unlawful acts of force and violence" in furtherance of political change.¹⁶² Similarly, in *American Communications Association v. Douds*, the Court cited Holmes's dissent in *Abrams* while upholding a statute requiring labor organization officers to disclaim membership in the Communist Party.¹⁶³ In so doing, the Court was in direct contradistinction to the *Abrams* dissent's substantive holding criticizing the criminalization of mere pro-Russian sentiment or advocacy, absent any threat of "clear and present danger" to the government.¹⁶⁴

As a general matter, moreover, the Court's references to the free speech and *Olmstead* dissents consistently have focused on the First and Fourth Amendment constructions articulated therein—e.g., "the marketplace of ideas"¹⁶⁵ and "the right to be let alone"¹⁶⁶—rather than on the dissents' substantive holdings. In *Oklahoma Press Publishing Co. v. Walling*, for instance, the Court quoted the *Olmstead* dissent's "right to be let alone" formulation in evaluating the constitutionality of a subpoena compelling document production¹⁶⁷—a scenario rather divorced from the unauthorized wiretapping at issue in *Olmstead*. And in *Garner v. Louisiana*, the Court used the "free trade in ideas" concept to extend First Amendment protection to the act of sitting-in at a lunch counter¹⁶⁸—a far cry from the Espionage Act and Criminal Syndicalism convictions denounced in the free speech dissents. Thus, both the timing and the nature of judicial citation to the civil liberties dissents belie the accuracy of the substantive-holding theory.

D. Modernist Epistemology

Finally, a symposium piece by Professor G. Edward White in the *New York University Law Review* offers a sophisticated explanation for the canonizations of Justices Holmes and Brandeis.¹⁶⁹ Specifically, Professor White argues that the commentators of the 1920s and 1930s lionized Holmes and Brandeis not because the positions they took in their dissenting opinions were subsequently vindicated,

162. *Whitney v. California*, 274 U.S. 357, 360 (1927), *overruled in part by*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

163. *See* 339 U.S. 382, 396 n.11 (1950).

164. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

165. *See, e.g., Garner v. Louisiana*, 368 U.S. 157, 201 (1964) (Harlan, J., concurring).

166. *See, e.g., Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 204 (1946) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

167. *See id.* at 203 n.30.

168. *See Garner*, 368 U.S. at 200-02 (Harlan, J., concurring).

169. *See White, supra* note 8.

but because their conceptions of the role of judges and of the judicial power itself fit with the commentators' own progressive agenda.¹⁷⁰ According to Professor White's theory, the key to the canonizations of Holmes and Brandeis was that they advanced "modernist epistemologies," rejecting the concept of law as a transcendent body of unchanging principles and affirming that human beings, as the principal architects of the universe, had the "freedom and power to change the meaning of legal principles if they so chose."¹⁷¹ Progressive commentators, Professor White maintains, embraced this jurisprudential philosophy—and aggrandized its founders—because it resonated with their own perceptions about the role and function of law.¹⁷²

While there is some measure of descriptive truth to Professor White's theory, its conception ultimately is too narrow to explain the canonizations of Justices Holmes and Brandeis. Notably, Professor White seriously discounts the role of dissenting opinions in the canonization process.¹⁷³ More specifically, he disregards the fact that the dissents of Holmes and Brandeis in *Lochner*, *Liebmann*, and other cases were far more important to commentators than were the Justices' reasons for dissenting. Commentators latched onto Holmes's and Brandeis's jurisprudential philosophies precisely because those philosophies had produced the "correct" results in *Lochner* and *Liebmann*, and thus had symbolic power. That the commentators valued the symbolic, rather than the philosophical, power of Holmes's and Brandeis's dissents is evidenced by their willingness to misread¹⁷⁴ and even to conflate Holmes's and Brandeis's methodologies¹⁷⁵ as suited their needs; had they truly

170. See *id.* at 578-85.

171. *Id.* at 581.

172. See *id.* at 590.

173. See *id.* at 585.

174. Notably, the progressive commentators recast Holmes as a civil libertarian, and Brandeis as a supporter of the New Deal. While Professor White recognizes this, he seems to think this was a mistake, rather than an intentional tactic, on the commentators' parts, motivated by their epistemologically based affinity for the Justices. See *id.* at 578-79.

175. Despite their tendency to arrive at similar results, Holmes and Brandeis often espoused substantially different rationales for their decisions. Holmes, for instance, believed that judicial review of constitutional questions did not entitle judges to second-guess the worth of legislation duly passed by the people's representatives. See, e.g., *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law."). Brandeis, by contrast, believed that judges should consider the social and economic conditions a piece of legislation was designed to remedy when assessing the legislation's validity. See, e.g., PHILIPPA STRUM, LOUIS D. BRANDEIS, JUSTICE FOR THE PEOPLE 114-15 (1984) (excerpting and discussing the now-legendary "Brandeis Brief" submitted in *Muller*

agreed with the modernist epistemologies of Holmes and Brandeis and viewed the Justices as prophets wiser than themselves, they would have been far more reluctant to bend the principles articulated by the Justices.

Professor White also fails to credit the role that the eventual vindication of Holmes's and Brandeis's dissents played in cementing their canonizations. For while savvy political commentators initiated the canonizations of Holmes and Brandeis, the status of the Justices would not have endured if the New Deal Court had not redeemed, and ultimately canonized, their dissenting opinions in *Lochner* and *Liebmann*. In fact, had the country not repudiated the principles for which *Lochner* and *Liebmann* stood, Holmes's and Brandeis's canonizations would have failed much as Felix Frankfurter's did several years later.¹⁷⁶ Moreover, had Congress or the President, rather than the Court, discredited *Lochner* and *Liebmann*, Holmes and Brandeis likely would have faded from the nation's constitutional memory, as have Justices Curtis and Field.

Finally, Professor White's theory is conspicuous in its omission of the first Justice Harlan from its cast of canonical jurists. White suggests that Harlan's canonization differs substantially from Holmes's and Brandeis's because it was motivated purely by the redemption of Harlan's dissents in a series of cases involving the rights of Negro citizens, while Holmes's and Brandeis's were based on their modernist epistemologies.¹⁷⁷ However, given that dissenting opinions were at least as important to Holmes's and Brandeis's canonizations as were their modernist epistemologies, Professor White's distinction must collapse. Whatever their epistemologies, Harlan, Holmes, and Brandeis all are canonical dissenters in the same mold. All three, for instance, are remembered as "great dissenters" who "saw the light" before the rest of their contemporaries.¹⁷⁸ All three owe their canonizations to the fact that they dissented from decisions the nation later grew to find abhorrent. And all three have had their views "reimagined" to suit the needs of those responsible for their canonizations; indeed, civil rights era commentators' willingness to reimagine Harlan into a racial egalitarian

v. Oregon, 208 U.S. 412 (1908), in which Brandeis defended the constitutionality of an Oregon statute restricting the number of hours women could work by presenting social science research on the detrimental impact of long work hours on the health of women).

176. See White, *supra* note 8, at 576 n.4 (comparing LIVA BAKER, FELIX FRANKFURTER (1969) (presenting "official" view of Frankfurter as a competent, principled judge), with ROBERT A. BURT, TWO JEWISH JUSTICES: OUTCASTS IN THE PROMISED LAND 48-55, 60-61 (1988) (depicting Frankfurter as incompetent and neurotic), and H.N. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER 5-6 (1981) (same)).

177. See White, *supra* note 8, at 663-65.

178. See *infra* note 206.

tarian despite glaring evidence of his Chinese racism closely parallels their recasting of Holmes as a civil libertarian and Brandeis as a New Deal supporter.¹⁷⁹

III. THE EVOLVING CANON: FROM JUDICIAL ENTRENCHMENT TO JUDICIAL CONSTRUCTION

As the above discussions demonstrate, any serious canonization theory must account for two conspicuous features of the dissenting canon: 1) the canon's distinctly New Deal origins (no dissents were canonized prior to the New Deal); and 2) the dichotomy between the canonizations of the civil liberty versus other dissents. This Part endeavors to provide such a theory, suggesting that the canonization of dissent began as a corollary of the judiciary's expansive role in New Deal politics, and since has evolved into a judicial device for expanding the Court's construction of constitutional rights.

As shown in Part III.A. below, the New Deal Court set a precedent for acknowledging prior judicial error, and the canonization of dissent began as a warning against the repetition of such error. Once the precedent had been set, individual justices started citing dissents, particularly those written by canonical dissenters, as a device to help change the course of constitutional interpretation. Part III.B. confronts the canonization of dissenters, explaining why not all justices who author canonical dissents become canonized themselves.

A. *A New Deal Phenomenon*

Prior to the New Deal, outright reversals of a Supreme Court decision were extremely rare. In fact, as the controversy over the *Legal Tender Cases* illustrates,¹⁸⁰ the Court was exceedingly concerned with the effect such reversals would have on its legitimacy as an institution and thus bent over backwards to reconcile or somehow justify changes in its constitutional interpretations. With the New Deal's switch in time, however, the Court was forced to make several outright reversals of its prior decisions. The Court dealt with this embarrassing situation by casting its earlier jurisprudence as egregious judicial error and demonizing holdings such

179. See *infra* Part III.B.

180. See *supra* Part I.A.; see also WARREN, *supra* note 21, at 524-25 (arguing "that the reopening of the *Legal Tender Cases* would be a terrible blow at the independence and dignity of the profession" and that "[t]he present action of the Court is to be deplored, first because this sudden reversal of a former judgment which had been maturely considered after full argument, will weaken popular respect for all decisions of the Court including this last one").

as *Lochner* and *Adkins*¹⁸¹ that epitomized its doctrinal "mistake." In this vein, the Court also elevated the *Lochner* and *Liebmann* dissents, citing to them as an admonition against repeating the Old Court's jurisprudential errors. Accordingly, I submit that the canonization of dissent began as a New Deal phenomenon made possible by the Court's repudiation of its prior jurisprudence in that instance. Further, by vindicating their dissenting positions, the New Deal cemented the canonizations of Justices Holmes and Brandeis begun by progressive intellectuals in the 1920s and 1930s.¹⁸²

Once the New Deal thus had rendered it acceptable to cite dissenting opinions, the Court began doing so not merely as a warning against the repetition of past mistakes, but to expand its construction of constitutional protections. Thus, during the late 1940s and 1950s, dissenting and concurring justices began referencing the free speech and *Olmstead* dissents to support a broad reading of First and Fourth Amendment rights in contexts other than political subversion and wiretapping.¹⁸³ During the 1960s and 1970s, the Court latched on to this trend with full force, as Justices began employing the First and Fourth Amendment constructions of the *Abrams-Whitney-Gitlow* and *Olmstead* dissents as a springboard for the elaboration of new constitutional rights. Notably, the "free trade in ideas" and "public discussion" concepts of the *Abrams* and *Whitney* dissents were co-opted to advocate the protection of public acts of civil disobedience,¹⁸⁴ the possession and promulgation of obscene materials,¹⁸⁵ and the use of profanity in public speeches.¹⁸⁶ Similarly,

181. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937), *overruling* *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923); see also *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963) (noting that "[i]n the face of our abandonment of the use of the 'vague contours' of the Due Process Clause to nullify laws which a majority of the Court believed to be economically unwise, reliance on *Adams v. Tanner* is as mistaken as would be adherence to *Adkins v. Children's Hospital*") (citations omitted).

182. See *supra* Part I.B.3.

183. See *Musser v. Utah*, 333 U.S. 95, 102 & n.8 (1948) (Rutledge, J., dissenting) (citing *Whitney* concurrence/dissent in disagreeing with the conviction of persons who advocated and practiced polygamous marriage); *Harris v. United States*, 331 U.S. 145, 159 (1947) (Frankfurter, J., dissenting) (quoting *Olmstead's* "right to be let alone" concept in protesting against the warrantless search of a house in connection with the warranted arrest of its owner).

184. See *Garner v. Louisiana*, 368 U.S. 157, 201 (1961) (Harlan, J., concurring).

185. See *Young v. American Mini Theatre, Inc.*, 427 U.S. 50, 76 (1976) (Powell, J., concurring) (supporting regulation of adult mini theater so long as it does not interfere with the theater's "full opportunity for expression"); *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (holding that the "mere categorization of . . . films as 'obscene' is insufficient justification for . . . a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments").

186. See *Rosenfeld v. New Jersey*, 408 U.S. 901, 908 (1972) (Powell, J., dissenting) (citing *Whitney* concurrence/dissent in protesting defendant's conviction for swearing while giving a speech before a public school board, parents, and children).

the *Olmstead* dissent's "right to be let alone" principle was expanded to support constitutional rights to marital privacy¹⁸⁷ and personal autonomy;¹⁸⁸ and its caution against the dangers of overzealous law enforcement was quoted to support the invalidation of mandatory drug testing¹⁸⁹ and fee caps for attorney representation of veterans.¹⁹⁰

Such extensions of constitutional constructions voiced in dissenting opinions did not require the demonization of the cases' original holdings for two reasons: 1) as extensions rather than absolute applications of the dissenting reasoning, they did not directly challenge the majority holdings; and 2) they gained a certain automatic authority from their authors' New Deal-based canonical status. Accordingly, the canonizations of these dissents were able to begin, although perhaps not to flourish, before the original holdings against which they protested had been overruled. In fact, these early efforts to adopt the dissents' constructions facilitated the eventual overturning of the *Olmstead* and *Whitney* holdings by enabling the Court to claim that these decisions already had been eroded by the time *Katz* and *Brandenburg* came before it.

At first blush, it might seem inconsistent for the Court to use a process rooted in the New Deal crusade to curtail judicial activism on behalf of economic rights as a tool to expand judicial protection of individual rights. This constitutional development begins to make considerable sense, however, once one recognizes the central role played by Justices Holmes and Brandeis in both sets of canonizations. Specifically, the fact that the two dissenting justices simultaneously had decried legislative intervention in the economic marketplace while supporting such intervention on behalf of First and Fourth Amendment rights lent significant legitimacy and authority to judicial activists whose later efforts to expand constitutional protections for substantive civil liberties would be met with the charge that they were reviving that most hated of legal precedents—Lochnerism.¹⁹¹

187. See *Griswold v. Connecticut*, 381 U.S. 479, 494 (1965) (Goldberg, J., concurring) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

188. See *Roe v. Wade*, 410 U.S. 113, 152 (1973) (citing Justice Brandeis's dissent in *Olmstead*, among other authorities, in reaching its holding that the abortion decision is a constitutionally protected right).

189. See, e.g., *Chandler v. Miller*, 520 U.S. 305, 321-23 (1977) (declaring unconstitutional a Georgia state law requiring that candidates for state office take a drug test).

190. See *Walter v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 367 n.14 (1985) (Brennan, J., dissenting) (quoting *Olmstead*, 277 U.S. at 479 (Brandeis, J., dissenting)).

191. I am indebted to Professor Bruce Ackerman for the elucidation of this point.

This relation between Holmes's and Brandeis's New Deal and civil liberty dissents helps make sense of at least one other puzzling aspect of the dissenting canon—the Court's decision to latch on to the Holmes-Brandeis free speech model, despite the fact that Holmes and Brandeis themselves often used the model to support significant speech restrictions. Indeed, history seems to forget that Holmes and Brandeis sided with the majority in *Schenck v. United States*,¹⁹² *Frohwerk v. United States*,¹⁹³ and *Debs v. United States*,¹⁹⁴ which upheld the criminalization of (a) peaceful advocacy against draft resistance; (b) the publication of editorials criticizing the draft; and (c) the delivery of public speeches opposing the First World War, respectively. Once one appreciates the Court's obsession with distinguishing its civil liberty jurisprudence from its *Lochner*-era economic rights philosophy, however, this intentional legal amnesia becomes understandable.

By the 1960s, then, a dual form had evolved for the canonization of dissents: On the one hand, dissents could be memorialized as a judicial entrenchment of the repudiation of a hated precedent; on the other, canonization could occur as a vehicle for the judicial expansion of constitutional rights. The key word in both of these options is "judicial"—for canonization is a retrospective phenomenon constructed by Supreme Court Justices who look back on and reinterpret the holding of a particular dissent.¹⁹⁵ Thus, in the aftermath of *Brown's* and the civil rights movement's repudiation of the separate but equal doctrine, the Court chose to follow the *Lochner* and *Liebmann* model and canonize the *Plessy* dissent's "our Constitution is color-blind" as a warning against the repetition of past mistakes regarding racial segregation. Yet almost contemporaneously, it chose to apotheosize the Fourteenth Amendment liberty construction of Harlan's *Poe v. Ullman* dissent as a tool to promote constitutional rights including personal choice in family matters,¹⁹⁶ the re-

192. 249 U.S. 47 (1919).

193. 249 U.S. 204 (1919).

194. 249 U.S. 211 (1919).

195. See Primus, *supra* note 8, at 283. The phenomenon of retrospectively constructed precedent generally (i.e., without specific reference to dissents) has been contemplated by many legal theorists. See H.L.A. HART, *THE CONCEPT OF LAW* 134 (2d ed. 1994) (noting that it is only when an earlier case is applied to later cases that the bearing of the earlier case becomes clear); Jan G. Deutsch, *Precedent and Adjudication*, 83 *YALE L.J.* 1553, 1567-71 (1974) (suggesting a thought experiment in which Felix Frankfurter returns from the dead to counsel the Supreme Court that its decision in *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963), will one day be reinterpreted and given a meaning they do not intend for it to have).

196. See, e.g., *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977); *Fiallo v. Bell*, 430 U.S. 787, 810 (1977) (Marshall, J., dissenting); *Roe*, 410 U.S. at 168 (Stewart, J., concurring).

fusal of unwanted medical treatment,¹⁹⁷ and safe conditions of mental health confinement.¹⁹⁸

Further, in the case of the *Korematsu* dissents, the Court chose to combine these two modes of canonization. Because the Court never formally overruled the holding in *Korematsu*, and because there never was a specific popular repudiation of the *Korematsu* doctrine (i.e., military necessity as a justification for race-based curtailment of civil rights), the Court never formally overruled the case. Yet at the same time, the civil rights movement's agitation on behalf of racial equality indirectly left the *Korematsu* holding in a state of disrepute. By the 1980s, this disrepute was cemented, as evinced by Congress's enactment of the Restitution for World War II Internment of Japanese Americans and Aleuts Act.¹⁹⁹ Accordingly, the Court began citing to the *Korematsu* dissents, as it had to the *Lochner*, *Liebmann*, and *Plessy* dissents, as a caution against repeating the errors of a hated precedent.²⁰⁰ However, in the vein of the free speech, *Olmstead*, and *Poe* dissents, it also referenced the "loaded weapon" argument of Justice Jackson's dissent to support a greater constitutional protection of prison inmates' rights,²⁰¹ military servicemen's religious freedom,²⁰² and greater care in granting trial court injunctions.²⁰³

The varying modes of canonization employed by the Court can best be conceptualized with reference to the following diagram:

197. See *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261, 340 (1990) (Stevens, J., dissenting).

198. See *Youngberg v. Romeo*, 457 U.S. 307, 320 (1982).

199. See *supra* Part I.C.6.

200. See, e.g., *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 357-58 (1987) (Brennan, J., dissenting). Brennan's *Estate of Shabazz* dissent quoted Justice Jackson's dissent in *Korematsu v. United States*: "The principle . . . lies about like a loaded weapon ready for the hand of any authority that can bring forth a plausible claim of an urgent need." 323 U.S. 214, 246 (1944) (Jackson, J., dissenting); see also *Fullilove v. Klutznick*, 448 U.S. 448, 526 n.5 (1980) (Stewart, J., dissenting) (quoting Justice Murphy's *Korematsu* dissent for the proposition that "[r]acial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States.").

201. See *Estate of Shabazz*, 482 U.S. at 358 (Brennan, J., dissenting) (quoting Justice Jackson's "loaded weapon" logic in maintaining that Courts should be "especially wary of expansive delegations of power to those who wield it on the margins of society").

202. See *Goldman v. Weinberger*, 475 U.S. 502, 522 (1986) (Brennan, J., dissenting) (insisting that Orthodox Jews in the military should be permitted to wear yarmulkes while in uniform).

203. See *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 814 (1994) (Scalia, J., concurring in part and dissenting in part) (quoting the "loaded weapon" principle in arguing that courts should be more careful in granting free speech injunctions).

	Memorialization	Source
Model of Construction	Box 1 Recent <i>Plessy</i> cites	Box 2 <i>Abram-Whitney-Gitlow</i> , <i>Olmstead</i> , <i>Poe</i> , <i>Korematsu</i>
Warning	Box 3 <i>Lochner</i> , <i>Liebmann</i> , <i>Plessy</i>	Box 4 Recent <i>Olmstead</i> cites <i>Korematsu</i>

Canonization as memorialization places a negative cast on the original decision, and elevates the associated dissent as a warning against the repetition of past mistakes (Box 3). Alternatively, canonization as a source of rights-expansion involves the judicial use of dissenting opinions as models of construction for a given constitutional right or provision (Box 2). Until recently, Boxes 1 and 4 represented only theoretical possibilities; however, the judicial treatment of the *Plessy*, *Olmstead*, and *Korematsu* dissents during the 1980s and 1990s has put the promise of these boxes into effect. For instance, some members of the Court have begun to use the *Plessy* dissent's statement that "our Constitution is color-blind" not just as a warning but as a model or fundamental principle of constitutional construction—i.e., as a stick by which to measure the constitutionality of affirmative action programs.²⁰⁴ Conversely, the Court began citing the *Olmstead* dissent's criticism of official violations of the Fourth Amendment ("If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto

204. See, e.g., *Adarand Constrs., Inc. v. Pena*, 515 U.S. 200, 239 (1995) (Scalia, J., dissenting) (interpreting Harlan's color-blind principle to prohibit the affirmative action program at issue); *City of Richmond v. J.A. Croson Co.*, 448 U.S. 469, 521 (1989) (Scalia, J., concurring) (same); *Fullilove*, 448 U.S. at 522 (Stewart, J., dissenting) (advocating use of the "color-blind" principle as the standard for assessment of equal protection violations); see also ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* 113, 118-19 (1992); T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1075 (1991) (discussing Harlan's dissent as the root of the color-blind constitutional ideal).

himself; it invites anarchy")²⁰⁵ as a warning against the dangers of overzealous law enforcement practices. Thus, it might be said that there are now four emerging modes or patterns for the judicial canonization of dissenting opinions.

B. A Word About Dissenters

Interestingly, the canonization of dissenters has not followed the same bifurcated path paved by the canonization of dissents themselves. Indeed, all three canonical dissenters owe their status to the popular repudiation of the doctrines against which they protested, rather than to their brilliant constructions of First, Fourth, or Fourteenth Amendment protections. As shown in Part I.D. above, the canonizations of Justices Holmes and Brandeis began as part of the progressive effort to usher in the New Deal, and essentially were complete before the first citations to the free speech and *Olmstead* dissents began. Similarly, the first Justice Harlan's canonization was derived from the civil rights movement's campaign against the separate but equal doctrine he had opposed in *Plessy v. Ferguson*. Moreover, Justices such as Murphy, Jackson, and John Marshall Harlan II, whose dissents were canonized as part of a judicial expansion of constitutional rights, have failed to attain canonical status.²⁰⁶

205. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

206. In assessing the canonical status of judicial dissenters, I have employed a frequency of citation criterion similar to that used to isolate canonical dissents; specifically, I consider as canonical dissenters those Justices who are repeatedly referred to in the legal literature (as opposed to Supreme Court opinions) as "great dissenters." It should be noted that the existence of a judicial biography—even one labeling a Justice a "great dissenter"—is not, by my calculation, suffice to render its object a canonical dissenter; for, in my view, that the proliferation of such biographies in the last 20 years renders them an unreliable proxy for canonical status. Moreover, it should require more than one author's favorable opinion to canonize a dissenting Justice (just as it took more than one judicial citation to canonize a dissenting opinion).

In this vein, Justice Holmes has been referred to as a "great dissenter" in 27 law review articles after 1982 alone. See, e.g., Bruce Ackerman, *A Generation of Betrayal?*, 65 *FORDHAM L. REV.* 1519, 1522 (1997); Luke Bierman, *The Dynamics of State Constitutional Decision-Making: Judicial Behavior at the New York Court of Appeals*, 68 *TEMP. L. REV.* 1403, 1406 (1995); Brennan, *supra* note 148, at 427; Edward McGlynn Gaffney, Jr., *The Importance of Dissent and the Imperative Judicial Civility*, 28 *VAL. U. L. REV.* 583, 590 (1994); Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 *WASH. L. REV.* 133, 142 (1990); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 *N.Y.U. L. REV.* 1185, 1191 (1992); Thomas C. Grey, *Molecular Motions: The Holmesian Judge in Theory and Practice*, 37 *WM. & MARY L. REV.* 19, 38 (1995); Jules Lobel, *Losers, Fools & Prophets: Justice as Struggle*, 80 *CORNELL L. REV.* 1331, 1352 (1995); Louis Lusky, *Fragmentation of the Supreme Court: An Inquiry into Causes*, 10 *HOFSTRA L. REV.* 1137, 1138 (1982); Michael Mello, *Adhering*

This disparity between the canonization of dissents and dissenters is, I believe, a function of the fact that the elevation of dissents is a judicial act, while the elevation of dissenters is a creation of the public and of political commentators. Although the Court can canonize a given dissent as a tool to expand constitutional rights, it cannot force the public or political commentators to hail the dissent's author. Thus, while the second Justice Harlan is a respected figure among lawyers and legal scholars—in part because of his dissenting opinions—he is not the popular prophet that Holmes, Brandeis, or the first Justice Harlan are.

to Our Views: Justices Brennan and Marshall and the Relentless Dissent to Death as Punishment, 22 FLA. ST. U. L. REV. 591, 591 (1995); Alfred S. Neely, "A Humbug Based on Economic Ignorance and Incompetence"—*Antitrust in the Eyes of Justice Holmes*, 1993 UTAH L. REV. 1, 17-18 n.56; Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91 (1993); Edward J. Sullivan, *Substantive Due Process Resurrected Through the Takings Clause: Nollan, Dolan, and Ehrlich*, 25 ENVTL. L. 155, 157 (1995); Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441, 1461 (1990); Barbara Bennett Woodhouse, "Who Owns the Child?": *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1068 (1992). Justice Brandeis is so labeled in eight post-1982 articles. See, e.g., Ackerman, *supra* at 1522; Bierman, *supra* at 1406; Lusky, *supra* at 1138; Rustad & Koenig, *supra* at 107 n.66; Winter, *supra* at 1461. The first Justice Harlan is similarly exalted in 12 articles. See, e.g., David E. Bernstein, *The Law and Economics of Post-Civil War Restrictions on Interstate Migration by African-Americans*, 76 TEX. L. REV. 781, 820 (1998); Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151, 155 (1996); David P. Currie, *The Constitution in the Supreme Court: The Protection of Economic Interests, 1889-1910*, 52 U. CHI. L. REV. 324, 327 n.29 (1985); Gaffney, *supra* at 601; Robert J. Morris, "What Though Our Rights Have Been Assailed?" *Mormons, Politics, Same-Sex Marriage, and Cultural Abuse in the Sandwich Island (Hawaii)*, 18 WOMEN'S RTS. L. REP. 129, 162 n.288 (1997); Johnny Parker, *When Johnny Comes Marching Home Again: A Critical Review of Contemporary Equal Protection Interpretation*, 37 HOW. L.J. 393, 403 n.46 (1994); Louis Michael Seidman, *Brown and Miranda*, 80 CAL. L. REV. 673, 693 (1992); Hayakawa Torok, *Reconstruction and Racial Nativism: Chinese Immigrants and the Debates on the Thirteenth, Fourteenth, and Fifteenth Amendments and Civils Rights Laws*, 3 ASIAN L.J. 55, 96 (1996), and at least one book, FRANK B. LATHAM, *THE GREAT DISSENTER: JOHN MARSHALL HARLAN 1833-1911*, at 160 (1970). Despite the growing literature praising Justice William Johnson as the "first dissenter," see, for example, Benjamin F. Wright, *Foreword to DONALD G. MORGAN, JUSTICE WILLIAM JOHNSON: THE FIRST DISSENTER: THE CAREER AND CONSTITUTIONAL PHILOSOPHY OF A JEFFERSONIAN JUDGE* at v (1954), I do not consider him a member of the dissenting canon for two reasons: 1) as explained above, the acclamation of a few authors is not enough to confer canonical status on a Justice; and 2) there is an important distinction between being the "first" versus a "great" dissenter. Cf. STRUM, *supra* note 175, at 365-66 (detailing how Justice Brandeis chose the cases in which he issued a dissenting opinion and stating "Brandeis dissented when he considered it important to do so, but only after extensive attempts to bring the Court around to his way of thinking and only in carefully chosen cases").

But what, if not the respect of his brethren and the canonization of his dissents, motivates the public to canonize a dissenter? I want to suggest a simple answer: constitutional sins. Constitutional sins—i.e., interpretations of the Constitution that the public later comes to find morally repugnant—produce judicial saints, because when the public finds that the Constitution in its current form²⁰⁷ has sanctioned an outcome now considered abhorrent, the public needs a way of absolving that sacred document of the sin. Jurists who protested against the sin in the first place, and advanced constitutional interpretations that would have kept the nation's charter clean of its imprimatur, provide such absolution. Indeed, in retrospect there seems something oracular about such jurists' ability to see the light where everyone else failed. Thus, the public embraces these dissenters as judicial seers and pretends that theirs always has been the correct way to interpret the Constitution.

This explains why all three of the great canonical dissenters—Holmes, Brandeis, and Harlan—have to some degree been “reimagined”²⁰⁸ in the course of their canonizations. Holmes, for instance, has been characterized as a progressive liberal, despite his uneasiness with “redistributive social legislation . . . [and his] conservative approach to many civil liberties issues.”²⁰⁹ Similarly, Brandeis is heralded as the “spiritual father of the New Deal”²¹⁰ although he disagreed with many of the Roosevelt administration's New Deal policies.²¹¹ And Harlan, an open racist in the nineteenth century,²¹² has come to be viewed as a racial egalitarian in the twentieth. All of these reimaginings are part of the reconstruction of dissenters into judicial saints. In attempting to erase the imprimatur of constitutional sins from the legal landscape, the public conveniently has ignored those aspects of prophetic dissenters' jurisprudence and philosophies that do not fit its constitutional vision, and has conferred on these dissenters a status they do not fully deserve. Even

207. I add this caveat because if the Constitution is altered to remedy the sin, as with the Thirteenth, Fourteenth, and Fifteenth Amendments, then there is no need to explain away or separate the hated precedent from the text.

208. For a fuller discussion of the reimagination concept, see Primus, *supra* note 8, at 285-300.

209. White, *supra* note 8, at 590; see also, e.g., *Buck v. Bell*, 274 U.S. 200, 207 (1927) (upholding the constitutionality of a state law requiring the sterilization of mentally disordered persons); cases discussed *supra* Part III.A. (discussing conservative free speech decisions by Holmes and Brandeis).

210. White, *supra* note 8, 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 Dilliard ed., 1941)).

211. See White, *supra* note 8, at 602 (noting that Brandeis disagreed with the notion of a pervasive federal government in regulatory matters).

212. See, e.g., Chin, *supra* note 206, at 157 (chronicling Harlan's unmistakable Chinese racism).

the language used to describe these dissenters is part of the project; for in using words rife with religious connotation—e.g., prophet, saint, revered, sacred—we are, perhaps somewhat unconsciously, putting distance between the constitutional interpretations advanced by Holmes, Brandeis, and Harlan—and those which they have replaced. In this sense, it is no accident that the legal community has chosen to label Holmes, Brandeis, and Harlan as prophets—a word which, as Mr. Primus has noted, describes one who “recalls a people to its foundations, chastising them for having strayed from the true path.”²¹³

CONCLUSION

In detailing the development of the dissenting canon, this Article has sought to shift, rather than to end, the discourse on canonical dissents. Prior discussions all have assumed the existence of the canon, but none has examined or analyzed its origins or development. Such analysis is vital, I believe, because it reveals something instructive about the recent development of the nation’s constitutional law.

First, an understanding of how the dissenting canon evolved helps explain the proliferation of dissenting opinions on the modern Court; ever since the New Deal made possible the canonization of dissenting opinions, Justices who differ from the majority have had an incentive to dissent rather than compromise, in the hope that their vision might someday be vindicated and immortalized. Second, the evolution of canonical dissents suggests that dissents written in cases involving morally-charged political issues—such as *Bowers v. Hardwick*²¹⁴ (homosexuality), *Roe v. Wade*²¹⁵ (abortion), *Furman v. Georgia*²¹⁶ (death penalty)—are the most likely candidates for future canonization, since morally-charged cases are the most susceptible to popular repudiation.

Finally, an understanding of how the dissenting canon evolved helps inform our understanding of how the legal canon as a whole is shaped. For instance, the significance of popular repudiation to the dissenting canon brings to light the fact that memorialization of morally-charged political milestones long has been an important contributing factor in the canonization of texts other than dissents (consider, for example, the Declaration of Independence, the Emancipation Proclamation, and the Gettysburg Address). Similarly, the canonizations of the civil liberties dissents as models of construction

213. Primus, *supra* note 8, at 278.

214. 478 U.S. 186 (1986).

215. 410 U.S. 113 (1973).

216. 408 U.S. 238 (1972).

illustrates how other elements of the legal canon might consciously be constructed in the manner of the civil liberties dissents (see, for instance, Balkin's and Levinson's suggestion that Frederick Douglass's speeches should be part of the constitutional canon²¹⁷). Ultimately, then, the story of how various dissenting opinions entered the legal canon is more than a matter of mere curiosity; it is a story of how judges, lawyers, the media, and popular sentiment interact with each other in the construction of legal myth. The story of canonical dissents is thus a canon within a canon, so to speak—and as such, worthy of considerable further study.

217. See Balkin & Levinson, *supra* note 2, at 966 (positing that Frederick Douglass's speeches would balance Roger Taney's 1857 constitutional commentary, which is often cited in constitutional casebooks).