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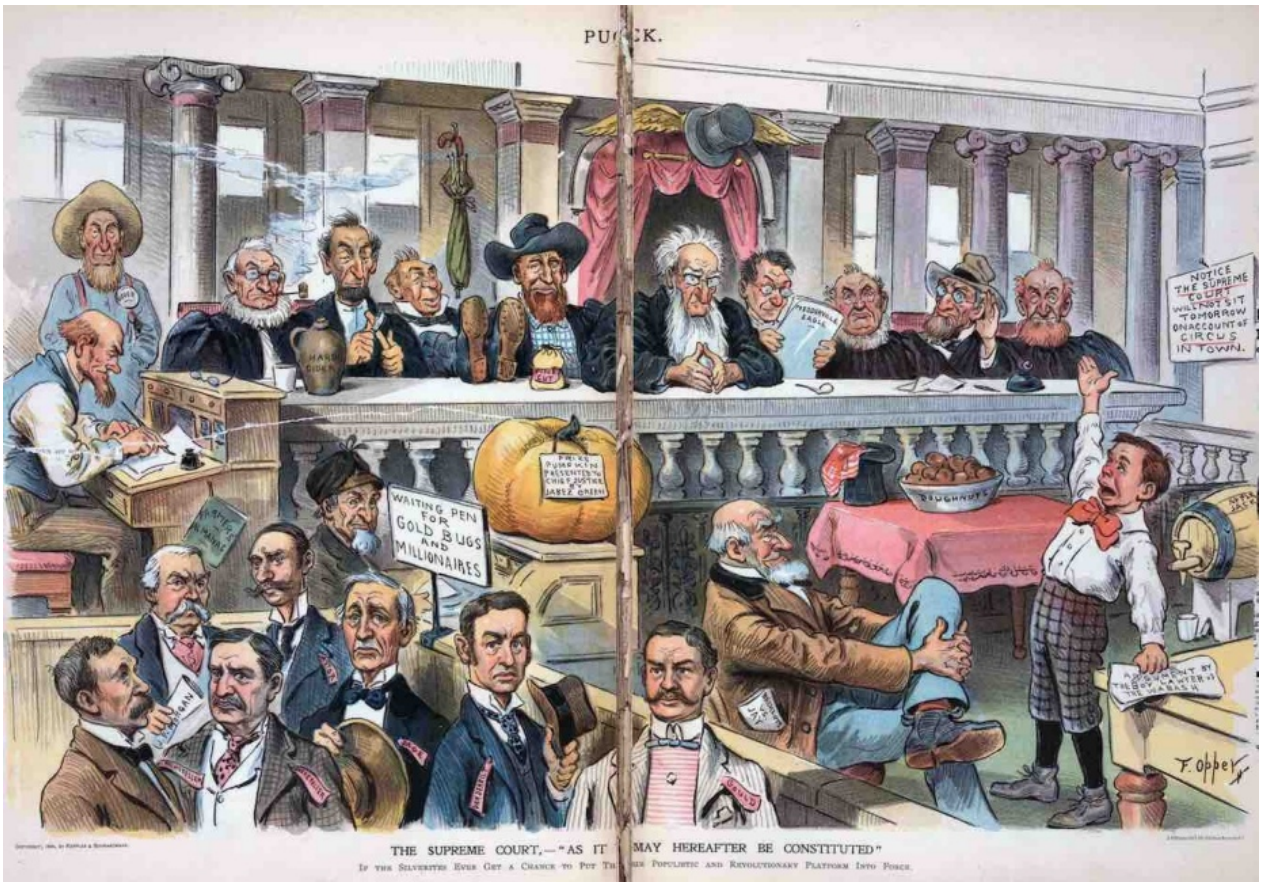

Editorial cartoon of 1896 courtesy of Puck Magazine, US Library of Congress.

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Introduction: A "canon" is a set of writings generally regarded as the most authoritative, important, or well-executed of their kind. When law teachers speak of a "canon," they usually mean a standard set of cases that forms the basis of an acceptable curriculum in their field. We teach our subjects from the canon. In my field, Constitutional Law, its principal members include Marbury, Gibbons, McCulloch, Youngstown, and Brown

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A "canon" is a set of writings generally regarded as the most authoritative, important, or well-executed of their kind. When law teachers speak of a "canon," they usually mean a standard set of cases that forms the basis of an acceptable curriculum in their field. We teach our subjects from the canon. In my field, Constitutional Law, its principal members include Marbury, Gibbons, McCulloch, Youngstown, and Brown.

In an important article, Professor Jamal Greene identified a Constitutional Law "anticanon," composed of cases regarded as the Supreme Court's worst: Dred Scott, Plessy, Lochner, and Korematsu. He thought the anticanon posed a special problem for teachers of Constitutional Law. Unlike, say, English literature, in law we teach from the anticanon as well as from the canon. Since we are teaching "professional competence," which in Constitutional Law consists in an ability to tell good from bad constitutional arguments, there is a temptation to explain the status of anticanonical opinions by identifying their argumentative defects. But the cases of the anticanon, it turns out, do not necessarily exhibit obvious "analytic errors." Rather, Professor Greene argued, each case has earned its membership in the anticanon because of "the attitude the constitutional interpretive community takes toward the ethical propositions that the decision has come to represent."

Of course, attitudes change. Much of Professor Greene's article was devoted to tracing the route of various cases into, and out of, the anticanon. There may be more than one interpretive community, as well. Different communities may have different attitudes about a case, and their relative status can affect the status of the case. In 2016, for example, a supporter of presidential candidate Donald Trump suggested on television that *Korematsu* could provide legal support for creating a "Muslim registry." Publicly embracing the case may have just been "trolling," or it may have been an effort to push the case out of the anticanon. (Notably, in *Trump v. Hawaii*, decided two years later, the Supreme Court appeared to disavow Korematsu, en route to upholding the President's statutory power to exclude broad classes of individuals from entering the United States).

Another source of change is in the attitudes of law teachers towards the Constitution itself. Over the last several decades a series of trenchant historical studies have exposed the depth of interconnection between the patriots of the American revolution and the system of race slavery that had developed in the colonies and in which some of the revolutionaries participated as plantation masters or agents. These slaver-patriots were frightened by judicial decisions like *Somerset v. Stewart* (1772), which held slavery unlawful under the law of England, and which some historians have described as provoking a firestorm in the American colonies. American efforts to ensure their "security of property" against

English interference were really efforts, at least in part, to preserve human bondage. Other works have shown the agency of black men and women in seeking their own freedom, sometimes by joining the loyalist cause. One commentator recently suggested that the preservation of race slavery was the Revolution's defining issue. The claim is controversial, but that the interests of a significant portion of America's political elite were bound up with the slave system and that they retained these interests at the time of the Constitution's framing are easy to prove. The text of the Constitution famously protects the slave trade from federal interference for 20 years, guarantees the return of escapees, and enhances the political influence of slave states by counting 3/5 of "all other persons," alongside their free persons, in apportioning seats in the national legislature. But the interests of the elite in slavery were more than economic. Enslavement was intensely personal, and intimacy, fear, and violence were intertwined in the master-slave relationship. Professor Annette Gordon-Reed's painstaking studies, having finally made plain Thomas Jefferson's relationship with his slave Sally Hemings, with whom he had a number of children, must now form an essential part of our understanding of the man. This important research, along with much else like it, seems finally to have registered in broader social attitudes. Among law teachers, at least, the liberal orthodoxy of Constitution- and framer-worship, born in America's post-war, mid-century glow, appears to be over.

As attitudes about the Constitution change, the very roles of the constitutional canon and anticanon seem to be changing as well. If, as was sometimes said of the Trump administration's immigration policy, "the cruelty was the point"—if the Constitution was intended to entrench a slave system and the social practice of race subordination and violence that underwrote it, then Dred Scott looks much less like a painful aberration and more like a foundational principle. It may still trigger our revulsion, but it now acquires the claim to a central place in our class. To tell the story of American constitutional law, one should *begin* from Dred Scott, Plessy, and Korematsu. It is the cases of the anticanon, not the canon, that form the basis of an acceptable curriculum. That they do not contain any obvious "analytic errors" is now explainable and makes the revision easier to carry out. That the language of these opinions may be offensive, corrosive, injurious or even traumatic for students is essential and it cannot be ignored (remember, "the cruelty is the point"). In these ways, the anticanon becomes the canon. Where does this leave the old canon? The awkward errors in some of the canonical cases, such as *Marbury*, can now be openly admitted. They were products of a need to supply the pretext for judicial action. In other cases, like Brown, the failure of the Supreme Court to achieve its grand objectives looks grimly predictable. Brown's prospects ultimately rested on the superficial, self-regarding integrationist impulses of what one journalist has called "nice white parents," who eventually proved unwilling to share resources with black pupils and black teachers, or to cede control to black parents.

I call this transformation the "anti-canonization" of Constitutional Law. What does it mean for the teaching and practice of Constitutional Law? In another article, Professor Greene described an attitude he called "constitutional optimism," which he associated with the ideas of constitutional redemption, progress, and faith developed by other writers. The optimistic attitude had little concrete legal value, he thought, but it did give "constitutional support to political imagination." Professor Greene suggested this kind of support might be necessary for constitutional government to survive.

Does constitutional optimism require ignoring the anticanon? "Cancelling" it? Is optimism consistent with anti-canonization? How can we responsibly teach constitutional optimism? Is it possible to give the anticanon its due place in our curriculum, while teaching a version of Constitutional Law that inducts students into a practice of optimism, as may be necessary to sustain our system of limited government? I don't think we know the answers to these questions, but I do think they are serious questions.

How many doses of reality can we give our students? An unrelenting emphasis on the disappointments of the system will invite the students to draw a normative inference about the system itself. The point is not that our students are pessimistic or "fragile," that they are unable to deal with disappointment in discovering the truth; this framing implies a need to develop their resistance to disappointment, a kind of mental toughness or "grit." It may be, however, that what they need is not toughness, but reason for hope, and the energy and determination that feed on hope. The anticanon has an essential role to play in generating this response, as a stimulant for justice, and it has an essential pedagogical role to play in explaining the evolution of legal doctrine and the American constitutional system. But at too great a dosage it poisons, robbing students of the optimism and self-respect necessary to maintain the project of constitutional governance at all. How can a teacher invite young lawyers to participate in a system, to take ownership of it, to assert their position as leaders within it, to make their own great use of it, if their only view of the system is its exclusion and subordination of people like them?