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Akhil Reed Amar
Yale Law School

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Plessy v. Ferguson and the Anti-Canon

Akhil Reed Amar*

In the spirit of the symposium generally, I want to step back a bit and not limit myself to *Plessy v. Ferguson*,¹ which, frankly, is a turkey shoot. It's easy. Barry McDonald's got a very difficult job to defend it.² Let me try to pull the camera back and talk more generally about what these cases that we're talking about today have in common. To do that, I want to comment on what we might think of as the canon and the anti-canon of Supreme Court cases. Here I build upon thoughtful work by, among others, Professor Richard Primus.³ In so doing, in talking about canon and anti-canon, I would like to preview my new book that's coming out, *America's Unwritten Constitution*,⁴ because I'm going to be building on some of these ideas. It is a complement to the last thing that I did, *America's Constitution: A Biography*, that tries to take the reader through the written document, the canonical text.⁵ The Constitution is very compact. I try to take the reader really from start to finish: from the Preamble through every article, and then through every amendment. The thought of the new book is that the Constitution is not all that we believe it to be. It proclaims itself the supreme law of the land, and yet all of us understand that there is more to it than that. There is also a canon and an anti-canon of decisions.

* Sterling Professor of Law and Political Science, Yale University. These remarks were delivered at the *Pepperdine Law Review's* April 1, 2011 *Supreme Mistakes* symposium, exploring the most maligned decisions in Supreme Court history, and edited by the symposium organizers and *Law Review* editors.

1. 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).
2. See Barry P. McDonald, *A Reluctant Apology for Plessy: A Response to Akhil Amar*, 39 PEPP. L. REV. 91 (2011).
3. Richard Primus defines the anti-canonical body of law simply as those decisions that were later rejected by canonical decisions. Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 254 (1998). He further states that the anti-canon may include "the set of the most important constitutional texts that we . . . regard as . . . repulsive." *Id.* at 254 n.41. See also Gerard N. Magliocca, *Preemptive Opinions: The Secret History of Worcester v. Georgia and Dred Scott*, 63 U. PITT. L. REV. 487, 487 (2002) ("[A] few legal classics . . . are often not read today because they stand as examples of a judicial system gone wrong.").
4. AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION* (forthcoming early 2012).
5. AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* (2005).

Erwin Chemerinsky began by giving you his general criteria. I'm going to do it the other way around. I'm going to try to persuade you that all of us in the room, as well-socialized Americans, law students, and law professors, understand that there are certain things that are constantly canonical, and correlatively things that are absolutely anti-canonical.

Let me start with America's symbolic Constitution—these great iconic symbols that unite us. The written Constitution is our Queen Elizabeth. It's what brings us together, but it's hardly the only thing.

I am looking for symbols that are textual, like the Constitution. I want to focus on texts that have propositions that are in some sense deeply connected to the Constitution, proximate to it, that have been ratified in some profound way, formally or informally, by the American people in the same manner that the Constitution has come to abide in our hearts and minds.

Accepting these criteria, something outside the Constitution and yet absolutely iconic, there are probably a couple of dozen textual symbols that conform. I offer six examples: The Declaration of Independence,⁶ *Federalist Papers*,⁷ The Gettysburg Address,⁸ Martin Luther King Jr.'s "I Have a Dream" speech,⁹ *Brown v. Board of Education*,¹⁰ and the Northwest Ordinance.¹¹ Of course, we could also talk just about iconic cases: *Marbury v. Madison*¹² and *McCulloch v. Maryland*¹³ are the big ones. The point is that these documents and cases form a constitutional canon.

Conversely, there is a counter-canon. I want to tell you a little bit about the connection between the canon and the anti-canon, which I detail in my forthcoming book on America's symbolic Constitution.¹⁴ Several constituent symbols of our constitutional identity are negative, crystallizing what America today rejects, indeed abhors. In particular, three court opinions occupy the lowest circle of constitutional hell: *Dred Scott*,¹⁵ *Plessy v. Ferguson*,¹⁶ and *Lochner v. New York*.¹⁷

6. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

7. The *Federalist Papers*, originally published in 1787 and 1788 in various New York newspapers, are available in several collections. See, e.g., ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, THE FEDERALIST PAPERS (SoHo Books 2011) (1787–88).

8. President Abraham Lincoln, Gettysburg Address (Nov. 19, 1863) [hereinafter Gettysburg Address], in 7 THE COLLECTED WORKS OF ABRAHAM LINCOLN 22 (Roy P. Basler ed., 1953).

9. Martin Luther King, Jr., Speech: I Have a Dream (Aug. 28, 1963) [hereinafter I Have a Dream Speech], in THE WORDS OF MARTIN LUTHER KING, JR. 95 (Coretta Scott King ed., 2d ed. 2008).

10. 347 U.S. 483 (1954).

11. Ordinance of 1787: The Northwest Territorial Government, 1 U.S.C., at LV (2006).

12. 5 U.S. (1 Cranch) 137 (1803).

13. 17 U.S. (4 Wheat.) 316 (1819).

14. AMAR, *supra* note 4.

15. 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

16. 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

Each case presents an example of unwritten constitutionalism run amok, and reminds us of the need to place principled limits on judges who venture beyond the text and original understanding of the Constitution. Sometimes judges should and must do so, but we need to be very attentive to why the Court went too far in such cases. We must try to figure this out by using democratic collective criteria, not our idiosyncratic views. We all recognize that certain decisions are either great or awful. We know these when we see them. The interesting question is why. What is it about these opinions that either elicits our great affection and allegiance or provokes revulsion?

Before turning to these three cases, it's worth pondering what general factors seem to be at work in shaping how the judicial actions of one era are evaluated by later generations of judges and citizens. Clearly not all cases that are overruled by a later court or a later constitutional amendment come to be demonized. For example, no one on the modern Court or in the legal academy cites the 1833 case of *Barron v. Mayor of Baltimore*,¹⁸ though *Barron's* vision of a world in which states and localities are free to ignore the Bill of Rights with impunity¹⁹ is anathema to modern sensibility. Think about what the world would be like without applying the Bill of Rights against states.

Just toss out the most famous Bill of Rights cases that pop into your head, whether you agree with them or not: *Miranda*,²⁰ *Griswold*,²¹ *Lawrence v. Texas*,²² *New York Times v. Sullivan*.²³ Not a single one of those is actually a Bill of Rights case. *Sullivan* is about Alabama libel law.²⁴ Our iconic Bill of Rights cases are really Fourteenth Amendment cases, which incorporate the Bill of Rights.²⁵ So that world is actually unimaginable, the world of *Barron v. Baltimore*, and yet it's not anti-canonical. It's not reviled.

17. 198 U.S. 45 (1905).

18. 32 U.S. (7 Pet.) 243 (1833).

19. *See id.* at 247–51.

20. *Miranda v. Arizona*, 384 U.S. 436 (1966).

21. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

22. 539 U.S. 558 (2003).

23. 376 U.S. 254 (1964).

24. *Id.* at 283–84.

25. *Lawrence*, 539 U.S. at 564 (deciding “whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution”); *Sullivan*, 376 U.S. at 282–83 (interpreting the First and Fourteenth Amendments as to an official privilege defense to a libel suit); *Brown v. Bd. of Educ.*, 347 U.S. 483, 487–88 (1954) (deciding whether segregation based on race of school children was constitutional under the Fourteenth Amendment).

Some might think this generosity towards *Barron* is simply because the ruling is moot. The Fourteenth Amendment overruled the case,²⁶ and that's that. But is it? The Fourteenth Amendment, after all, was designed to overrule not one, but two, major Supreme Court cases: *Barron* on the inapplicability of the Bill of Rights to the states, and *Dred Scott* on the impossibility of black citizenship.²⁷ Yet these two overruled cases receive sharply different treatment in modern constitutional discourse.

Dred Scott is openly trashed, not merely by many of America's best scholars, but by Justices of all stripes.²⁸ Not so with *Barron*. Is the answer simply that *Dred Scott* was racist and pro-slavery, and that is morally repugnant when judged by today's standards? This is surely part of the answer, but many other antebellum era cases with racist and pro-slavery bottom lines are not demonized, nor even remembered today, except maybe by our resident expert, Paul Finkelman.

Consider, for example, the 1851 Supreme Court case of *Strader v. Graham*,²⁹ which reaches a pro-slavery result in a setting similar to *Dred Scott*. Raise your hand if you had ever heard of *Strader v. Graham* before. There are seven people who are raising their hands. All law professors, I believe, and several of them among America's most distinguished legal

26. See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3033 (2010) (plurality opinion) (“[T]he chief congressional proponents of the Fourteenth Amendment espoused the view that the Amendment made the Bill of Rights applicable to the States and, in so doing, overruled this Court’s decision in *Barron*.”).

27. See Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992):

Surely the framers of the Fourteenth Amendment were entitled to rely on Supreme Court interpretations in *Dred Scott* no less than in *Barron*, even as they sought to overrule them using “Simon Says” language suggested by the Court itself. And once again, it is clear that they did so rely. John Bingham, the main author of Section One, not only cited to *Dred Scott* in a speech before the House in early 1866, but quoted the following key language: “The words ‘people of the United States’ and ‘citizens’ are synonymous terms.” In the Senate debates on the Fourteenth Amendment, the most extended and authoritative discussion of Section One came from Jacob Howard, and he too made plain that the language chosen was in response to *Dred Scott*

Id. at 1223 (footnotes omitted); see also U.S. CONST. amend. XIV, § 1, cl. 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”).

28. See, e.g., Mark Graber, “No Better Than They Deserve:” *Dred Scott and Constitutional Democracy*, 34 N. KY. L. REV. 589 (2007):

Instead of building upon those strands in the American constitutional tradition that celebrated equality and freedom, the judicial majority, when holding that former slaves could not become American citizens and that human bondage could not be prohibited in American territories, privileged those aspects of the American constitutional tradition that celebrated racism and slavery. At best, *Dred Scott* left Americans governed no better than they would have been in the absence of judicial review and constitutional limitations on federal power.

Id. at 590 (footnotes omitted).

29. 51 U.S. (10 How.) 82 (1851).

historians. It seems clear, then, that we remember *Dred Scott*, but not *Strader v. Graham*.

It is also notable that there is so little modern outrage directed towards *Minor v. Happersett*,³⁰ which in 1875 ruled that women had no constitutional right to vote.³¹ Just as *Dred Scott*'s racist result was overruled by the Fourteenth Amendment,³² so *Minor*'s sexist result was overruled by the Nineteenth Amendment.³³ Why, then, the different reputations of these two cases? The answer is twofold.

First, *Barron* and *Minor* were not merely plausible, but plainly correct interpretations of the written Constitution as it existed when these cases were decided.³⁴ *Strader* was at least a plausible decision, pro-slavery, yes, but not egregiously more pro-slavery than the antebellum Constitution itself was, if read fairly. *Dred Scott*, by contrast, was a preposterous garbling of the Constitution, as publicly understood when ratified and amended early on, and was harshly criticized on precisely these grounds by notable contemporaries.³⁵ In 1858, Abraham Lincoln famously called the case "an astonisher in legal history."³⁶ I think if you looked at the *Oxford English Dictionary*, that's the first use of the word "astonisher."³⁷ And he gives us the Gettysburg Address, which is iconic for just the reasons outlined earlier.³⁸ Here, we see the significance of America's written Constitution. Whatever government officials might think they can get away with at the time, in the long run it does seem to matter whether their actions—such as

30. 88 U.S. (21 Wall.) 162 (1875).

31. *Id.* at 177–78.

32. See U.S. CONST. amend XIV (guaranteeing equal protection to all citizens of the United States); *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3060 (2010) (plurality opinion) (“[T]he Fourteenth Amendment[] significantly altered our system of government [and] . . . unambiguously overruled this Court’s contrary holding in *Dred Scott* . . .”).

33. U.S. CONST. amend XIX (requiring that the right of citizens to vote not be denied based on gender).

34. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 140–45 (1998) [hereinafter AMAR, *BILL OF RIGHTS*] (“[A]s a matter of textual exegesis and application of lawyerly rules of construction, Marshall’s argument [in *Barron*] is hard to beat.”); Akhil Reed Amar & Jed Rubenfeld, *A Dialogue*, 115 *YALE L.J.* 2015, 2023 (2006) (discussing *Minor* in its historical context).

35. See AMAR, *BILL OF RIGHTS*, *supra* note 34, at 181–82 (discussing Congressman John Bingham’s sentiment in 1859 that *Dred Scott* had “gone too far”); see also Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 *HARV. L. REV.* 26, 62 (2000) (“Chief Justice Taney’s infamous opinion in *Dred Scott* . . . was an outlandish reading of the [Constitution] . . .”).

36. Abraham Lincoln, *Speech at Chicago, Illinois* (July 10, 1858) [hereinafter *Speech at Chicago*], in 2 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 495 (Roy P. Basler ed., 1953).

37. *THE OXFORD ENGLISH DICTIONARY* 522 (1933) (listing 1871 as the first year the word *astonisher* was used, well after Lincoln’s use of the word in 1858).

38. *Gettysburg Address*, *supra* note 8.

the Sedition Act of 1798³⁹ or Watergate⁴⁰—treated the Constitution’s text and structure with respect or with contempt.

Second, *Dred Scott* ran counter to the Northwest Ordinance, whose free soil spirit had been declared unconstitutional.⁴¹ Lincoln, from the original Northwest, rose to fame as a result of his early criticism of *Dred*, became President on an anti-*Dred* platform,⁴² and in his opening sentence at Gettysburg, challenged *Dred*’s dismissive treatment of the equality language of the Declaration (another one of our six icons).⁴³ So *Dred* ran counter not only to the Northwest Ordinance, but also the Gettysburg Address, the Declaration of Independence, Dr. King’s speech, and *Brown*.

Similarly, *Plessy* ran counter to *Brown* precisely because the Northwest Ordinance, the Gettysburg Address, the Declaration, and the *Brown* opinion are iconic elements of America’s symbolic Constitution. Their opposites, naturally enough, come in for special revulsion.

Earlier we saw the significance of the written Constitution. Now we should grasp the significance of the unwritten Constitution, the symbolic Constitution. These symbols connect to each other.

For some other examples of this symbolic connection, here are some recent Supreme Court opinions pairing the anti-canon cases. Here’s Justice Thomas linking *Dred Scott* and *Plessy* in *Parents Involved*: “[I]f our history has taught us anything, it has taught us to beware of elites bearing racial theories. . . . Can we really be sure that the racial theories that motivated *Dred Scott* and *Plessy* are a relic of the past . . . ?”⁴⁴ Earlier opinions authored by Justices Powell,⁴⁵ Black,⁴⁶ Douglas,⁴⁷ and Chief Justice Warren⁴⁸ also paired *Dred* and *Plessy*.

Opponents of substantive due process have also evoked *Dred* and *Lochner* as Exhibits A and B. In *Planned Parenthood of Southeastern*

39. Sedition Act, ch. 74, 1 Stat. 596 (1798) (expired 1801).

40. Akhil Reed Amar, *America’s Constitution, Written and Unwritten*, 57 SYRACUSE L. REV. 267, 274 (2007) (noting President Nixon’s view that “[w]hen the President does it, that means it is not illegal”).

41. Ordinance of 1787: The Northwest Territorial Government, 1 U.S.C., at LV (2006); see also AMAR, *supra* note 5, at 260, 264–68.

42. See ERIC FONER, *THE FIERY TRIAL: ABRAHAM LINCOLN AND AMERICAN SLAVERY* 94–95, 99–100 (2010). See also Speech at Chicago, *supra* note 36.

43. See Gettysburg Address, *supra* note 8, at 23 (“Four score and seven years ago our fathers brought forth on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that *all men are created equal*.” (emphasis added)).

44. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 780–82 (2007) (Thomas, J., concurring).

45. *Fullilove v. Klutznick*, 448 U.S. 448, 516 (1980) (Powell, J., concurring).

46. *Cohen v. Hurley*, 366 U.S. 117, 142 n.23 (1961) (Black, Douglas & Warren, JJ., dissenting), *overruled by Spevak v. Klein*, 385 U.S. 511 (1967).

47. *Id.*

48. *Id.*

Pennsylvania v. Casey,⁴⁹ Justice Scalia, joined by Chief Justice Rehnquist and Justices White and Thomas, declared:

Both *Dred Scott* and one line of the cases resisting the New Deal rested upon the concept of “substantive due process” that the Court praises and employs today. Indeed, *Dred Scott* was “very possibly the first application of substantive due process in the Supreme Court, the original precedent for *Lochner v. New York* and *Roe v. Wade*.”⁵⁰

Plessy and *Lochner* have also operated in tandem in modern case law as illustrations of the need for the Court to overrule its erroneous precedents. Here is another quote from the *Planned Parenthood* dissent:

The “separate but equal” doctrine lasted 58 years after *Plessy*, and *Lochner*’s protection of contractual freedom lasted 32 years. However, the simple fact that a generation or more had grown used to these major decisions did not prevent the Court from correcting its errors in those cases, nor should it prevent us from correctly interpreting the Constitution here.⁵¹

If this analysis is right, we now begin to have an answer to the question that Professor Larson proposed to us at the very outset in his wonderful remarks. *Lochner* should be viewed as a less demonic precedent than *Dred* and *Plessy* because it’s not visibly paired against a symbolic hero. In fact, one can find those who praise *Lochner*, and even some who call for its revival.⁵² But one does not hear such calls on the Court itself. That’s the difference between the kooky academics and the grounded Justices. And in modern court opinions, *Dred*, *Plessy*, and *Lochner* all function as vilified anti-precedents. They are typically cited either to assert how different these cases are from the view being put forth by the citing Justice, or as epithets and insults to hurl against the Justices on the other side who are, according to the citer, making a horrible mistake reminiscent of one of these three disgraced decisions.⁵³

49. 505 U.S. 833 (1992).

50. *Id.* at 998 (Scalia, J., concurring in part, dissenting in part) (citation omitted).

51. *Id.* at 957 (Rehnquist, C.J., concurring in part, dissenting in part).

52. See, e.g., AMAR, *supra* note 5, at 475 (discussing Bruce Ackerman’s view that *Lochner* “rests on a highly plausible defense of freedom of contract”).

53. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 773–78 (2007) (Thomas, J., concurring) (comparing dissent to segregationists by showing similarities to the

Almost none of the countless citations to these three cases over the last half-century has been remotely favorable, and most have been highly derogatory. Those are just some general observations to illustrate that we have a canon (a symbolic Constitution, these iconic texts outside the terse text that we call the written Constitution), and we have an anti-canon, and we pretty much know what cases fall in each category.

One of the things that I emphasized about *Dred* is that Lincoln from day one said it was outrageous, a legal astonisher.⁵⁴ So modern commentators are not putting forth an anachronistic view of *Dred*. Erwin Chemerinsky made a similar observation in opposition to *Korematsu*—that Justice Jackson and Justice Murphy immediately condemned the decision.

I want to read you what one Justice, John Harlan, said in his dissent in *Plessy v. Ferguson*.⁵⁵ Initially, note that Harlan was alone in dissent. Think about the audacity of someone to be alone against every other Justice. He says to the rest of them, in effect, “You are all wrong, and I’m right, I’m as right as right can be. History will prove that.”⁵⁶ Harlan is a great dissenter, not just in this case, but in a whole bunch of others.⁵⁷ He famously dissents in *Lochner*,⁵⁸ as well as in the case that held the federal income tax unconstitutional, which was overruled by a constitutional amendment.⁵⁹ Harlan argues that the tax decision will be a disaster for the country.⁶⁰ He also dissents when the Court refuses to apply the Bill of Rights against the states.⁶¹ Similarly, Harlan dissents when Justice Holmes has a very, very narrow conception of freedom of the press in a case called *Patterson v. Colorado*.⁶²

arguments made in *Plessy*); *Casey*, 505 U.S. at 984 (Scalia, J., concurring in part, dissenting in part) (quoting Justice Curtis’s dissent in *Dred Scott*).

54. See *supra* text accompanying note 36.

55. *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

56. See *id.* at 559; AMAR, *supra* note 5, at 383.

57. See, e.g., *Patterson v. Colorado*, 205 U.S. 454, 463 (1907) (Harlan, J., dissenting); *Lochner v. New York*, 198 U.S. 45, 65 (1905) (Harlan, J., dissenting); *Plessy*, 163 U.S. at 552 (Harlan, J., dissenting).

58. *Lochner*, 198 U.S. at 65 (Harlan, J., dissenting).

59. *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429, 652 (1895) (Harlan, J., dissenting), *overruled by* *South Carolina v. Baker*, 485 U.S. 505 (1988); see also AMAR, *supra* note 5, at 406.

60. *Pollock*, 157 U.S. at 638–39 (White, J., dissenting). Justice White’s dissenting opinion, with which Justice Harlan concurs, reads:

The disastrous consequences to flow from disregarding settled decisions, thus cogently described, must evidently become greatly magnified in a case like the present, when the opinion of the court affects fundamental principles of the government by denying an essential power of taxation long conceded to exist, and often exerted by congress.

Id.

61. *Plessy*, 163 U.S. at 552–64 (Harlan, J., dissenting).

62. *Patterson*, 205 U.S. at 463 (Harlan, J., dissenting).

Perhaps most significantly here, he dissents in the *Civil Rights Cases* of 1883,⁶³ where every other Justice strikes down the Civil Rights Act of 1875.⁶⁴ If Harlan is right in *Plessy*, I think he's right in the *Civil Rights Cases*. That's important because that case belongs on the bad list for today's Court. Led by former Chief Justice Rehnquist, the Court revived that reviled case, which is like citing *Plessy* with approval—which, of course, William Rehnquist did as a law clerk to Justice Robert Jackson in the *Brown* case, and then said, “Oh, that was not me, that was Robert Jackson.”⁶⁵ It was William Rehnquist.⁶⁶ Historian Richard Kluger proves that beyond all doubt.⁶⁷ You can see the revival of this *Plessy* vision in later opinions by Rehnquist himself when he cites, with approval, the *Civil Rights Cases* of 1883 in his Violence Against Women Act opinion in *United States v. Morrison*.⁶⁸

Here is what Justice Harlan, the Great Dissenter, an iconic epic dissenter, proclaims: “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*.”⁶⁹ Alone in dissent, he is saying, you guys have done another *Dred Scott*. To be right about that is like Babe Ruth's called shot.

Now, why is Harlan so obviously right? You begin to see now how *Plessy* connects back to *Dred Scott* and forward to *Brown*, which is iconic and basically embraces the Harlan dissent.⁷⁰ It connects to *Korematsu v. United States*,⁷¹ because the governing precedent at the time of *Korematsu*

63. 109 U.S. 3, 26 (1883) (Harlan, J., dissenting).

64. *Id.* at 25 (majority opinion).

65. See Adam Liptak, *The Memo That Rehnquist Wrote and Had to Disown*, N.Y. TIMES, Sept. 11, 2005, www.nytimes.com/2005/09/11/weekinreview/11lipt.html:

In 1971, Newsweek magazine revealed that in 1952, Mr. Rehnquist, then a law clerk to Justice Robert H. Jackson, prepared a memorandum called “A Random Thought on the Segregation Cases.” It was written in the first person and bore Mr. Rehnquist's initials. It urged Justice Jackson to reject arguments made by lawyers in *Brown v. Board of Education*, the landmark school desegregation case, and to uphold *Plessy v. Ferguson*, the 1896 Supreme Court decision holding that “separate but equal” facilities were constitutional.

Id.

66. *Id.*

67. RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 609 (2004).

68. 529 U.S. 598, 602 (2000).

69. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), *overruled by Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

70. AMAR, *supra* note 5, at 476 (“*Brown* was of course preceded by *Plessy*; and [the majority in] *Plessy* in turn blessed state segregation laws . . .”).

71. 323 U.S. 214 (1944).

was *Plessy*, not *Brown*.⁷² That's what Bob Pushaw reminded you of, when *Korematsu* is decided, *Brown*'s not the law of the land, *Plessy* is. When you read Justice Black's opinion, he uses the word "segregation."⁷³ The only thing that was upheld in *Korematsu* was not the internment order itself, but an evacuation order.⁷⁴ President Roosevelt ordered all Japanese-Americans to leave the West Coast. You have to stay the heck away from the Golden Gate Bridge. You have to separate yourself. You have to—and here's the word he uses: "segregate."⁷⁵ So what's the law at the time of *Korematsu*? It's *Plessy*, which holds that racial segregation—separate but equal—is okay. And by the way, we really don't care that much about equal. That's *Plessy*, that's *Korematsu*. Now, you begin to see these linkages between anti-canon and canon: *Dred*, *Plessy*, *Korematsu*, on the one hand, and folks like Lincoln and Harlan on the other.

Harlan's argument in *Plessy* makes four points. First, he takes a legal realist tack: He knows it when he sees it, and he knows what this is all about—degrading black people. He says: We all know the social meaning of this law.⁷⁶ Harlan shares that "[t]he destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law."⁷⁷ So the Louisiana law is about dividing us, even though we are one people.⁷⁸ Here you begin to hear echoes of Martin Luther King's Dream speech,⁷⁹ which builds on Harlan's

72. *Brown* was not decided until 1954, ten years after the *Korematsu* decision. *Id.*; *Brown*, 347 U.S. 483.

73. *Korematsu*, 323 U.S. at 223 ("[Congress] decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast . . .").

74. *Id.* at 223–24. The Supreme Court upheld the exclusion of Japanese citizens from certain areas of the West Coast at the beginning of the war with Japan during World War II, finding that such precautionary measures were necessary to prevent invasion, espionage, or worse. *Id.* at 216–18, 223–24.

75. *Id.* at 223.

76. *Plessy v. Ferguson*, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting), *overruled by Brown v. Bd. of Educ.*, 347 U.S. 483 (1954):

The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent amendments of the Constitution, by one of which the blacks of this country were made citizens of the United States and of the States in which they respectively reside, and whose privileges and immunities, as citizens, the States are forbidden to abridge.

Id.

77. *Id.*

78. *Id.* In arguing against the Louisiana law which supports segregation, Justice Harlan avers, "[t]he arbitrary separation of citizens, on the basis of race, . . . is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution." *Id.* at 562.

79. I Have a Dream Speech, *supra* note 9.

insights. The state law degrades black people,⁸⁰ whereas the core meaning of the Reconstruction Amendments is about their equality.⁸¹

One might know it as a human being, but how do you prove it as a judge? The majority Justices in *Bush v. Gore*⁸² all knew the Florida court was cheating; they just knew it.⁸³ One problem: They didn't prove it legally, and it turned out that they were wrong.⁸⁴ By contrast, Justice Harlan proves his point using scrutiny,⁸⁵ as Professor Chemerinsky also urged us to do. So what happens when you scrutinize?

In *Korematsu*, Professor Chemerinsky's answer would be that, because the government was not going after Italian-Americans and German-Americans, but only Japanese-Americans, the policy must be racist. And the government's counter is to emphasize that it is not targeting Chinese-Americans, or Filipino-Americans, or Vietnamese-Americans. In other words, it's not quite racial, it's different. And it's because of Pearl Harbor, that's the difference—a sneak attack by Japan. Thus, scrutiny can be tricky.

So what does Harlan do? He observes that there is an exception to the segregation law.⁸⁶ You're allowed to have a black person in the white car as long as she's a nanny.⁸⁷ What's up with the nanny exception?

Here's what's up, the social meaning is clear: you can have a black person in the car as long as it's obvious to everyone that she's your social subordinate, that she's your domestic, that she's your servant. So that's fine. But if you were friends, that's not okay. In short, Harlan uses careful techniques of scrutiny, of over- and under-inclusiveness.

A similar situation was presented in *Loving v. Virginia*,⁸⁸ where a state anti-miscegenation law had the Pocahontas exception.⁸⁹ Chief Justice Earl Warren wrote the opinion invalidating this law.⁹⁰ The idea was that, if

80. *Plessy*, 163 U.S. at 560 (Harlan, J., dissenting).

81. AMAR, *supra* note 5, at 407 (noting that equality was among the major themes of the Reconstruction Amendments).

82. 531 U.S. 98 (2000) (per curiam).

83. See Akhil Reed Amar, *Bush, Gore, Florida, and the Constitution*, 61 FLA. L. REV. 945, 949–50 (2009) (“[M]any things both large and small that the Rehnquist Court did in the *Bush v. Gore* litigation make the most sense if the U.S. Justices had in fact believed that they were dealing with a lawless, partisan state bench trying to steal the presidency for its preferred candidate.” (footnote omitted)).

84. See *id.* at 955–56.

85. See *Plessy*, 163 U.S. at 553 (Harlan, J., dissenting).

86. *Id.*

87. *Id.* (“Only ‘nurses attending children of the other race’ are excepted from the operation of the statute.”).

88. 388 U.S. 1 (1967).

89. *Id.* at 5 n.4.

90. *Id.* at 2.

you're a descendant of Pocahontas, then it's alright, because the Virginia aristocracy claimed, at least, to have descended from Pocahontas and John Rolfe.⁹¹ So Warren employs scrutiny and he recognizes, realistically, what the state is doing.

Now, let us turn to Justice Harlan's three other legal arguments. The first is based on the Fourteenth Amendment Equal Protection Clause. He focuses not just on equal "protection," but also equal "citizenship," as the first sentence of the Fourteenth Amendment provides.⁹² Harlan stresses that all citizens are equal under law.⁹³ That principle of equality, by the way, applies against the federal government, too. It's called reverse incorporation.⁹⁴ Harlan continues: "In respect of civil rights, all citizens are equal before the law."⁹⁵ At another point, he appeals to the language of an opinion he wrote earlier in *Gibson v. Mississippi*: "All citizens are equal before the law."⁹⁶ Harlan is saying, what part of equal don't you get? Everyone understands that this is unequal. The Fourteenth Amendment says equal, but this law is unequal.

Second, Harlan makes a brilliant argument under the Thirteenth Amendment, calling this racial separation a "badge of servitude . . . [that] practically[] puts the brand of servitude and degradation upon a large class of our fellow-citizens, our equals before the law."⁹⁷ When he uses the word "brand,"⁹⁸ he's not talking about Coke versus Pepsi. He's referring to how human beings under slavery were branded like cattle.⁹⁹

The Thirteenth Amendment doesn't prohibit badges of slavery by its terms.¹⁰⁰ So why is the Thirteenth Amendment relevant? Here's why, and this is very important: Because Congress had already prohibited race

91. *Id.* at 5 n.4.

92. *Plessy*, 163 U.S. at 554–55 (Harlan, J., dissenting). The first sentence of the Fourteenth Amendment reads, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. CONST. amend. XIV.

93. *Plessy*, 163 U.S. at 556 (Harlan, J., dissenting).

94. See Akhil Reed Amar, *Constitutional Rights in a Federal System: Rethinking Incorporation and Reverse Incorporation*, in BENCHMARKS: GREAT CONSTITUTIONAL CONTROVERSIES IN THE SUPREME COURT 71, 79 (Terry Eastland ed., 1995) (Reverse incorporation means that "the federal government is obligated to abide by the same constitutional duty of equal protection that is imposed upon the states.").

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

96. *Gibson v. Mississippi*, 162 U.S. 565, 591 (1896); see also *Plessy*, 163 U.S. at 556 (Harlan, J., dissenting) (quoting *Gibson*).

97. *Plessy*, 163 U.S. at 562 (Harlan, J., dissenting).

98. *Id.*

99. See Frederick Douglass, Address Delivered in Taunton, England: The Horrors of Slavery and England's Duty to Free the Bondsman (Sept. 1, 1846), in THE FREDERICK DOUGLASS PAPERS: SERIES ONE—SPEECHES, DEBATES, AND INTERVIEWS 371 (John W. Blassingame et al. eds., 1979) ("The process of branding was this—A person was tied to a post, and his back, or such other part as was to be branded, laid bare; the iron was then delivered red hot (sensation), and applied to the quivering flesh, imprinting upon it the name of the monster who claimed the slave.").

100. See U.S. CONST. amend. XIII.

discrimination in a statute passed in 1875 that forbade racial inequality in hotels, motels, theaters, inns, steam ships, and railroads.¹⁰¹ The Civil Rights Act of 1964 was originally passed in 1875, and is in large part Charles Sumner's Civil Rights Bill.¹⁰² And what happened to it? It got struck down by the Supreme Court, eight-to-one, in the *Civil Rights Cases* of 1883,¹⁰³ with Justice Harlan dissenting.¹⁰⁴ Why? Because the Court said the Fourteenth Amendment is only about state action, and this law is regulating private action.¹⁰⁵ Harlan points out that the first sentence of the Fourteenth Amendment doesn't say "no state shall," but rather that everyone's equal, everyone's a citizen.¹⁰⁶ What it means to be a citizen is to have rights that white people are bound to respect. This amendment overrules *Dred Scott*.¹⁰⁷ *Dred Scott* actually wasn't just about government action, it was about societal understanding.¹⁰⁸ An amendment designed to overturn *Dred Scott* allows Congress to pass laws regulating even private race discrimination.¹⁰⁹ That's one of his arguments. His second argument in the *Civil Rights Cases* is that the Thirteenth Amendment has no state action requirement.¹¹⁰ Congress has the power to prohibit all the relics, badges, and incidents of slavery.¹¹¹ Race discrimination is one of those.¹¹²

Here's what Justice Harlan is really saying in *Plessy*: I was right in the *Civil Rights Cases* of 1883. You should have upheld that congressional statute prohibiting badges of servitude. If we did so, the case at hand is a simple preemption case. Congress, in effect, already prohibited this sort of thing. We don't even need to reach the Constitution.

101. Civil Rights Act of 1875, ch. 114, § 1, 18 Stat. 335.

102. *Id.*; see also Ronald B. Jager, *Charles Sumner, the Constitution, and the Civil Rights Act of 1875*, 42 NEW ENG. Q. 350, 363 (1969) ("[O]n December 1, 1873, [Sumner] made one last eloquent plea on behalf of civil rights. . . . [but] did not live to see the Senate pass the bill substantially as he had presented it.").

103. *The Civil Rights Cases*, 109 U.S. 3, 25–26 (1883).

104. *Id.* at 26 (Harlan, J., dissenting).

105. *Id.* at 11, 17–18, 24 (majority opinion).

106. *Id.* at 46–48 (Harlan, J., dissenting).

107. AMAR, *supra* note 5, at 380 ("The Fourteenth Amendment's text began by repudiating the racialist vision of American identity that had animated Chief Justice Taney's infamous *Dred Scott* decision.").

108. *See id.* at 381–82.

109. *The Civil Rights Cases*, 109 U.S. at 30–32 (Harlan, J., dissenting).

110. *Id.* at 35–36.

111. *Id.* at 35.

112. *Plessy v. Ferguson*, 163 U.S. 537, 562 (1896) (Harlan, J., dissenting) ("The arbitrary separation of citizens, on the basis of race, . . . is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution."), *overruled by Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

Today's Court is more inclined to strike down civil rights laws than previous Courts were. The Warren Court never struck down civil rights laws,¹¹³ but William Rehnquist's Court did strike down civil rights laws,¹¹⁴ and the Roberts Court is tempted to strike down civil rights laws. If you think Harlan was right in *Plessy*, if you think *Plessy* belongs in the hall of shame, the *Civil Rights Cases* of 1883 are right there with it, and you should know that, because they're being revived.

Harlan's final argument is rooted in the Fifteenth Amendment. He again uses the legal realist idea: it's just not equal. He invokes the Fourteenth Amendment; not just its equal protection language, but its citizenship language.¹¹⁵ He evokes the Thirteenth Amendment vision.¹¹⁶ The Fifteenth Amendment is also about racial equality.¹¹⁷ Harlan characterizes the Fifteenth Amendment as being not just about voting equality, but also equality in a jury box, because people vote in a jury box.¹¹⁸ Equality in a political assembly, because people vote in a legislature.¹¹⁹ Equality on the battlefield, where blacks and whites shed their blood together.¹²⁰ These are political rights, not just narrow civil rights. Here's what he's saying—that the Fifteenth Amendment is intrinsically integrationistic.¹²¹ We must have blacks and whites together in a jury box, or in the legislative assembly.¹²² He talks about brother jurors,¹²³ and people who are brothers in arms who bled together in the Civil War.¹²⁴

In closing, Harlan's vision is not just of liberty and equality, but of genuine fraternity. It's an integrationist vision. It's a vision of people coming together. Here we come not just to *Brown v. Board of Education*, but also to Dr. King's speech, which was also mentioned as iconic. How does Dr. King end? He talks about blacks and whites, Jews and Gentiles,

113. See, e.g., *Katzenbach v. McClung*, 379 U.S. 294, 305 (1964) (“The Civil Rights Act of 1964, as here applied, we find to be plainly appropriate We find it in no violation of any express limitations of the Constitution and we therefore declare it valid.”); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (similarly upholding the Civil Rights Act of 1964).

114. See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000) (holding that the Fourteenth Amendment did not provide Congress with the authority to enact the Violence Against Women Act); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding that the Freedom Restoration Act exceeded Congress's enforcement powers).

115. *Plessy*, 163 U.S. at 555 (Harlan, J., dissenting).

116. *Id.*

117. U.S. CONST. amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”).

118. See *Plessy*, 163 U.S. at 562–63 (Harlan, J., dissenting).

119. See *id.* at 563–64.

120. See *id.* at 561; see also AMAR, *supra* note 5, at 358 (discussing black Americans' involvement in the Civil War).

121. See AMAR, *supra* note 5, at 399–400.

122. See *id.*; *Plessy*, 163 U.S. at 562–64 (Harlan, J., dissenting).

123. *Plessy*, 163 U.S. at 562 (Harlan, J., dissenting).

124. *Id.* at 561.

Catholics and Protestants, holding hands and singing together in the words of the great Negro spiritual, “Free at last! Free at last! Thank God Almighty, we are free at last!”¹²⁵

125. I Have a Dream Speech, *supra* note 9.
