

# THE CASE FOR EXPANDING THE ANTICANON OF CONSTITUTIONAL LAW

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The “anticanon” of constitutional law is an underappreciated constraint on judicial discretion. Some past decisions are so reviled that no judge can issue analogous rulings today, without suffering massive damage to their reputation. This Essay argues for expanding the anti-canon and proposes three worthy new candidates: *The Chinese Exclusion Case*, *Euclid v. Ambler Realty*, and *Berman v. Parker*. The three rulings all share in spades the main characteristics of other anti-canonical decisions: (1) terrible legal reasoning, (2) enormously harmful real-world effects, and (3) facilitating racial and ethnic discrimination and oppression.

Part I outlines the nature of the anticanon and how cases can “qualify” for it. Part II makes the case for adding new cases to the anticanon. Finally, Part III explains why *The Chinese Exclusion Case*, *Euclid*, and *Berman* would be worthy additions to the Supreme Court’s Hall of Shame.

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## INTRODUCTION

Many lawyers are familiar with the idea of “canonical” constitutional law cases that almost everyone regards as great, admirable

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milestones in legal history. Almost all mainstream jurists and legal thinkers support these decisions, and those who reject them are seen as disreputable extremists, or worse. *Brown v. Board of Education*<sup>1</sup> is perhaps the quintessential example.<sup>2</sup> Legal scholars have also developed the concept of the “anticanon”—cases that are almost universally regarded as terrible mistakes, condemned by respectable mainstream legal opinion.<sup>3</sup> Richard Primus called such cases “the set of the most important constitutional texts that we . . . regard as . . . repulsive.”<sup>4</sup> The anticanon is a kind of judicial Hall of Shame.

In the closest thing we have to a canonical article about the anticanon, Professor Jamal Greene identifies *Dred Scott v. Sandford*,<sup>5</sup> *Plessy v. Ferguson*,<sup>6</sup> *Lochner v. New York*,<sup>7</sup> and *Korematsu v. United States*<sup>8</sup> as the most widely recognized “anticanonical” rulings.<sup>9</sup> A few other cases have achieved almost comparable levels of opprobrium. *Buck v. Bell*,<sup>10</sup> the case upholding the constitutionality of mandatory sterilization of the mentally ill, is a plausible example.

In this Essay, I state the case for making new additions to the anticanon. By doing so, we can impose useful constraints on judicial discretion and forestall dangerous future errors. At the very least, considering potential additions to this list can help us think more systematically about what makes for a truly horrendous constitutional ruling, as opposed to a mere “ordinary” judicial error.

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1. 347 U.S. 483 (1954).

2. *Id.*

3. For the leading analysis of the idea of the anticanon, see Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011).

4. Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 254 n.41 (1998).

5. 60 U.S. (19 How.) 393 (1857).

6. 163 U.S. 537 (1896).

7. 198 U.S. 45 (1905).

8. 323 U.S. 214 (1944).

9. Greene, *supra* note 3, at 380–83. For other discussions of the anticanon, see, for example, Deborah Pearlstein, *The Executive Branch Anticanon*, 89 FORDHAM L. REV. 597 (2020); Andrew Kaufman, *Lochner for the Executive Branch: The Torture Memo as Anticanon*, 7 HARV. L. & POL’Y REV. 199 (2013); Akhil Reed Amar, *Plessy v. Ferguson and the Anti-Canon*, 39 PEPP. L. REV. 75 (2011); Mark A. Graber, *Hollow Hopes and Exaggerated Fears: The Canon/Anticanon in Context*, 125 HARV. L. REV. F. 33 (2011); Sanford M. Levinson, *Is Dred Scott Really the Worst Opinion of All Time? Why Prigg Is Worse than Dred Scott (But Is Likely to Stay Out of the “Anticanon”)*, 125 HARV. L. REV. F. 23 (2011); Jack M. Balkin, *“Wrong the Day It Was Decided”: Lochner and Constitutional Historicism*, 85 B.U. L. REV. 677, 680–82 (2005); J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1018–19 (1998); Ian Bartrum, *The Constitutional Canon as Argumentative Metonymy*, 18 WM. & MARY BILL RTS. J. 327, 329 (2009); Primus, *supra* note 4.

10. 274 U.S. 200 (1927).

Part I outlines criteria for inclusion in the anticanon. While historical happenstance surely plays a significant role, I suggest these cases have systematic commonalities. The crucial factors are that these rulings exhibit a perceived combination of terrible legal reasoning, large-scale harmful real-world effects, and—in most cases—the promotion of racial or ethnic oppression. The presence of “only” one or two of these conditions is not enough to make the legal Hall of Shame. At least two are needed, and possibly even all three. I also suggest that the focus on these factors is normatively defensible. Rulings that feature all three of these characteristics are highly likely to be worse than ones that do not.

Part II explains how the anticanon plays a useful role in constraining judicial discretion, thereby reducing the risk of future catastrophic errors. If judges and other influential legal actors agree that a given ruling is anticanonical, they will have strong incentives to avoid making similar terrible mistakes in the future. The constraint here is not completely foolproof. Among other things, there is often disagreement over the true meaning of an anticanonical ruling, and the error it exemplifies. But, as we shall see, it is a useful restriction, nonetheless.

Finally, Part III outlines three potential additions to the anticanon: *Chae Chan Ping v. United States (The Chinese Exclusion Case)*<sup>11</sup>—the case ruling that the federal government has a general power to restrict immigration,<sup>12</sup> *Euclid v. Ambler Realty*<sup>13</sup>—upholding the constitutionality of exclusionary zoning,<sup>14</sup> and *Berman v. Parker*<sup>15</sup>—the first Supreme Court case holding that virtually any government interest qualifies as a “public use” authorizing the taking of private property by eminent domain under the Fifth Amendment.<sup>16</sup>

All three of these decisions are binding and influential precedents to this day. But, they all share the three criteria for anticanon status: terrible reasoning, enormously harmful real-world effects, and facilitation of racial and ethnic oppression.

This Essay cannot by itself elevate—or, more accurately, depress—these cases to anticanon status. Still less can it provide a comprehensive assessment of which decisions might deserve inclusion on that list. But I hope to at least explain why expansion of the anticanon may be desirable and begin a discussion about which cases should be added.

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11. *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581 (1889).

12. *Id.* at 609.

13. 272 U.S. 365 (1926).

14. *Id.* at 394–97.

15. 348 U.S. 26 (1954).

16. *Id.* at 32–36.

## I. WHAT MAKES AN ANTICANONICAL CASE?

How does a case join the anticanon, reaching what Akhil Amar calls “the lowest circle of constitutional hell[?]”<sup>17</sup> It may be that the composition of the anti-canon is simply a matter of historical accident. Legal elites and others found a particular precedent to be a useful tool for making some point, and thereby gradually elevated—or lowered—its stature.<sup>18</sup> In his influential account of the anticanon, Professor Jamal Greene argues that several other cases are at least as bad as the anticanonical ones yet have not been treated the same way.<sup>19</sup>

Historical accident and the needs of legal elites surely play a key role in the way that precedents are viewed. For example, my George Mason University colleague David Bernstein has persuasively argued that *Lochner v. New York*<sup>20</sup> does not deserve most of its bad reputation, which is primarily a matter of the case’s treatment by later judges and legal commentators, rather than an objective assessment of how bad it was at the time it was decided.<sup>21</sup>

Nonetheless, anticanonical cases tend to have common features, at least in the way they are perceived. Specifically, the four anticanonical cases are generally understood to feature a combination of terrible legal reasoning, horrific real-world consequences, and (with the possible exception of *Lochner*) promotion of racial discrimination and oppression. This combination of flaws gives these cases a status they would not have otherwise attained, differentiating them from dubious decisions that are considered less awful, even if still very bad.

It is not hard to find these three factors at work in the anticanonical cases. All four have long been criticized for supposedly featuring terrible reasoning. *Dred Scott* has been roundly excoriated for ignoring extensive evidence that Congress had the power to ban slavery in the territories, and that free Blacks, at least, could be citizens of the United States, even if that status was considered compatible with various types of racial discrimination.<sup>22</sup>

*Plessy v. Ferguson* has likewise been criticized for severely flawed reasoning, including ignoring the oppressive purpose of Louisiana’s

17. Amar, *supra* note 9, at 76.

18. For this sort of take on the anticanon, see Greene, *supra* note 3, at 468–72.

19. *Id.* at 427–35.

20. 198 U.S. 45 (1908).

21. DAVID E. BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM 116–17 (2011).

22. Both points are well made in Justice Curtis’ powerful dissent in *Dred Scott* and have been taken up by later critics. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), 571–633 (Curtis, J., dissenting).

segregation laws,<sup>23</sup> ignoring that the right to freedom of contract in economic transactions was one of the “civil rights” the Fourteenth Amendment protected against racial discrimination by government, and much else, besides.<sup>24</sup> Justice John Marshall Harlan’s dissent, which first made many of these points, has attained a kind of canonical status as a critique of the ruling.<sup>25</sup>

*Korematsu v. United States*<sup>26</sup> was similarly criticized for poor reasoning, including ignoring evidence that the internment of Japanese-Americans was motivated by racism rather than genuine national security considerations, and that they posed little or no threat.<sup>27</sup> When the Supreme Court finally repudiated *Korematsu* in 2018 (long after it had already attained its anticanonical status), Chief Justice John Roberts described the case as “gravely wrong the day it was decided” and the internment it upheld as “objectively unlawful and outside the scope of Presidential authority,” which implies an extremely negative view of the majority’s legal reasoning.<sup>28</sup>

*Lochner*, too, is widely viewed as an example of terrible reasoning. Justice Oliver Wendell Holmes’s caustic dismissal of the majority for supposedly reading their own preferences into the Constitution, without any legal basis for doing so,<sup>29</sup> has attained a kind of canonical status of its own, paralleling the fame of Justice Harlan’s dissent in *Plessy v. Ferguson*.<sup>30</sup>

It is, likewise, obvious that all four decisions are seen as having terrible consequences. *Dred Scott* facilitated the expansion of slavery into newly acquired territories, denied even free Blacks the rights of American citizens, and is often blamed for helping precipitate the Civil War.<sup>31</sup> *Plessy* validated massive state-imposed segregation and racial

23. The majority notoriously held that the segregation laws were “enacted in good faith for the promotion for the public good, and not for the annoyance or oppression of a particular class.” *Plessy v. Ferguson*, 163 U.S. 537, 550 (1896).

24. For an overview of these and other criticisms, see CHARLES LOFGREN, *THE PLESSY CASE: A LEGAL AND HISTORICAL INTERPRETATION* (1987).

25. See Anita S. Krishnakumar, *On the Evolution of the Canonical Dissent*, 52 *RUTGERS L. REV.* 781, 802 (2000).

26. 323 U.S. 214 (1944).

27. See, e.g., PETER IRONS, *JUSTICE AT WAR: THE STORY OF THE JAPANESE-AMERICAN INTERNMENT CASES* (1993).

28. *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

29. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (accusing the majority of enacting a “shibboleth” of liberty, and avowing that “[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics”).

30. See Krishnakumar, *supra* note 25, at 802 (drawing this parallel).

31. For a concise summary of the latter claim, see *Dred Scott Still Resonates Today*, NAT’L CONST. CTR. (Mar. 6, 2021), <https://constitutioncenter.org/blog/dred-scott-decision-still-resonates-today-2> [<https://perma.cc/6D5G-DZVJ>].

discrimination that went on for decades, and is considered as the most significant judicial endorsement of Jim Crow.<sup>32</sup> *Korematsu* upheld the internment of over 100,000 Japanese-Americans for years, thereby causing great suffering.<sup>33</sup> *Lochner* is widely viewed as having facilitated severe mistreatment of workers by employers.<sup>34</sup> The term “Lochner Era” has become a byword for supposedly harmful judicial commitment to “laissez-faire” principles that facilitated exploitation of workers.<sup>35</sup>

Finally, at least three of the four anticanon cases are widely—and correctly—understood as having facilitated racial discrimination and oppression. *Dred Scott*, of course, ruled that Congress lacked the power to ban slavery in federal territories, and also notoriously claimed that, under the Constitution, Blacks were regarded as “so far inferior that they had no rights which the white man was bound to respect.”<sup>36</sup> *Plessy v. Ferguson* upheld Jim Crow-era segregationist measures and generally signaled that racial discrimination by state governments would get relatively weak judicial scrutiny.<sup>37</sup> *Korematsu*, of course, upheld the racially discriminatory—and racially motivated—internment of over 100,000 Japanese-Americans.<sup>38</sup> Its racist credentials are undeniable.

*Lochner* is an exception on this point. The case struck down a New York state law imposing a maximum-hours limitation and involved a white baker who employed white workers.<sup>39</sup> At least on the surface, it does not seem as if the ruling was either motivated by racism or resulted in increased racial oppression. Nonetheless, it is notable that some prominent scholars—including Owen Fiss, Cass Sunstein, and Derrick Bell—have sought to link *Lochner* to *Plessy* and racial oppression more generally, arguing that both were efforts by the Court to protect existing social and economic hierarchies against potential challenge.<sup>40</sup> Such

32. See *Plessy v. Ferguson*, 163 U.S. 537, 550–51 (1896); LOFGREN, *supra* note 24, at 200–01.

33. For an overview, see ROGER V. DANIELS, *PRISONERS WITHOUT TRIAL: JAPANESE-AMERICANS IN WORLD WAR II* (rev. ed. 2004).

34. For descriptions of this view and its widespread acceptance, see, for example, PAUL KENS, *LOCHNER V. NEW YORK: ECONOMIC REGULATION ON TRIAL* 144, 147 (1998); BERNSTEIN, *supra* note 21, at 23.

35. BERNSTEIN, *supra* note 21, at 116–17.

36. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857).

37. *Plessy*, 163 U.S. at 550.

38. *Korematsu v. United States*, 323 U.S. 214, 223–24 (1944).

39. For detailed descriptions of the facts, see KENS, *supra* note 34, at 27; and BERNSTEIN, *supra* note 21, at 24–27.

40. See, e.g., Owen M. Fiss, *Troubled Beginnings of the Modern State, 1888–1910*, in 8 *THE OLIVER WENDELL HOLMES DEVISE: THE HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 361–63, 366 (Stanley N. Katz ed., 1993); Cass R. Sunstein, *THE PARTIAL CONSTITUTION* 48 (1993); Derrick Bell, *Does Discrimination Make Economic Sense? For Some It Did—and Still Does*, 15 *HUM. RTS.* 38, 42 (1988).

efforts to connect *Lochner* with racial oppression testify to the role of the latter as a key criterion for inclusion in the anticanon.

Whether *Lochner* reinforced or actually mitigated racism is contestable. David Bernstein has argued—correctly in my view—that the latter is more accurate than the former, because *Lochner*'s principles were at odds with those of *Plessy*; freedom of contract allowed market pressures to counteract some of the effects of racial prejudice.<sup>41</sup> My point here is not to resolve this debate but to highlight the importance of the issue to criteria of inclusion for the anticanon.

Agreement on the distinctive awfulness of these four cases is not completely universal. While almost no one today defends *Dred Scott* as correctly decided, some have argued that its legal reasoning is not as bad as traditionally thought.<sup>42</sup> Richard Posner, one of the most influential jurists and legal scholars of the modern era, has argued that *Korematsu* was defensible in the context of a wartime emergency and the limited information known to the Court at the time, and possibly even correct.<sup>43</sup>

*Lochner* has attracted the most revisionist scholarship of the four, with critics of the conventional wisdom arguing not only that it was reasonable and not as bad as commonly thought,<sup>44</sup> but actually correct.<sup>45</sup> While I have little sympathy for efforts at even partial rehabilitation of *Dred Scott*, *Plessy*, and *Korematsu*, I believe *Lochner* revisionism has considerable merit.

For present purposes, however, my point is not to assess the traditional view of these four rulings, but to emphasize that all four are part of the anticanon primarily because they are at least perceived as having the attributes of awful reasoning, terrible effects, and—in at least three of the four cases—links to racial oppression.

One possible critique of these criteria for the anticanon is the idea that a true anticanonical case must be paired with a “canonical” counterpart that repudiated it.<sup>46</sup> This theory, however, would—perhaps unwittingly—exclude *Dred Scott* (which was never overruled by the

41. See David E. Bernstein, *Plessy Versus Lochner: The Berea College Case*, 25 J. SUP. CT. HIST. 93, 94 (2000); David E. Bernstein, *Roots of the ‘Underclass’: The Decline of Laissez-Faire Jurisprudence and the Rise of Racist Labor Legislation*, 43 AM. U. L. REV. 85, 97 (1993).

42. See, e.g., MARK GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* (2008).

43. RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 293–95 (2003).

44. See BERNSTEIN, *supra* note 21, at 9, 16, 21–22.

45. See, e.g., BERNARD SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 113–14 (1980); DAVID MAYER, *LIBERTY OF CONTRACT: REDISCOVERING A LOST CONSTITUTIONAL RIGHT* 58–60 (2011).

46. See Primus, *supra* note 4, at 254.

Court, but superseded by the enactment of the Fourteenth Amendment), and *Korematsu*, which was finally repudiated only in *Trump v. Hawaii*,<sup>47</sup> itself a decidedly noncanonical case that has been the object of severe criticism, most of it, in my view, justified.<sup>48</sup>

Jamal Greene, author of the most influential academic analysis of the anticanon, suggests four other cases that are comparably bad<sup>49</sup> but have not achieved anticanonical status: *Prigg v. Pennsylvania*,<sup>50</sup> *Giles v. Harris*,<sup>51</sup> *Gong Lum v. Rice*,<sup>52</sup> and *Bowers v. Hardwick*.<sup>53</sup> Greene's criticisms of these four rulings are, in my view, largely justified. All of them feature dubious reasoning, and all upheld significant injustices. But the scale of these wrongs is not as great as the perceived flaws of the four anticanon cases.

*Prigg* was a badly flawed 1842 ruling upholding the constitutionality of the Fugitive Slave Act of 1793, which blocked states from using "personal liberty" laws to impede the forcible recovery of supposed slaves who had escaped to free states.<sup>54</sup> But the case for the idea that it was as bad as *Dred Scott* or *Plessy* is undercut by the initial plausibility of the argument that the Fugitive Slave Clause,<sup>55</sup> perhaps combined with the Necessary and Proper Clause's grant of authority to enact "necessary and proper" legislation that "carr[ies] into [e]xecution" other powers granted to the federal government,<sup>56</sup> gave Congress the power to enact legislation to compel the return of supposed fugitive slaves. In addition, the practical effect of *Prigg*—while awful—was probably not as great as that of *Dred Scott* or *Plessy*, because it mainly impacted only the relatively small proportion of slaves who were able to flee to free states.<sup>57</sup> By contrast, *Dred Scott* permitted the expansion of slavery to vast new

47. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

48. For my critique of *Trump v. Hawaii*, see Ilya Somin, Opinion, *Donald Trump's 'Travel Ban' Is Still a 'Muslim Ban' No Matter What the Supreme Court Ruled*, USA TODAY, <https://www.usatoday.com/story/opinion/2018/06/26/supreme-court-rulingtravel-ban-ignores-religious-discrimination-column/734697002> [<https://perma.cc/BSD8-DQU6>] (June 26, 2018, 4:10 PM).

49. Greene, *supra* note 3, at 383, 428–34.

50. 41 U.S. (16 Pet.) 539 (1842).

51. 189 U.S. 475 (1903).

52. 275 U.S. 78 (1927).

53. 478 U.S. 186 (1986).

54. For an argument that *Prigg* was worse than *Dred Scott*, see Levinson, *supra* note 9, at 1023–24.

55. U.S. CONST. art. IV, § 2, cl. 3.

56. *Id.* art. I, § 8, cl. 18.

57. Only about 100,000 slaves were able to escape in the entire period between 1810 and 1850, including many through the "Underground Railroad" system of trails and safe houses. See Renford Reese, *Canada: The Promised Land for US Slaves*, 35 W.J. BLACK STUD. 208 (2011).



territories and denied constitutional rights of any kind even to free Blacks.<sup>58</sup> *Plessy* authorized a vast range of different types of racial discrimination, affecting many millions of people.<sup>59</sup>

*Gong Lum* ruled that Mississippi could force Chinese students to attend Black rather than white schools in the state's segregated school system.<sup>60</sup> This case was of less significance than *Plessy* because it only challenged the classification of a small minority within the system of racial segregation, rather than the constitutionality of the system itself.<sup>61</sup> As legal reasoning, it is at least plausible to argue that if a state can have segregated schooling at all (a point not contested in the case), it can also determine which groups should go to which schools, including deciding whether Asians are better placed with Blacks or with whites. *Gong Lum* is a repulsive ruling, but one largely derivative of *Plessy's* reasoning. The Court in fact relied heavily on *Plessy* and other previous cases upholding segregation in making its decision, arguing that the separation of "yellow races" from whites presented much the same "question" as "the establishment of separate schools as between white pupils and black pupils."<sup>62</sup>

*Giles v. Harris*, which upheld laws that had the effect of disenfranchising Black voters, is similarly repugnant, but it is also similarly derivative and less sweeping than *Dred Scott* or *Plessy*. Finally, *Bowers v. Hardwick*, while in my view badly wrong, is somewhat more plausible than *Dred Scott* or *Plessy*, at least on originalist and textualist grounds, given the long—and for a long time largely unchallenged—history of the anti-sodomy laws it upheld.<sup>63</sup> Because *Bowers* was decided in 1986, at a time when enforcement of these laws was rapidly waning,<sup>64</sup> its practical impact was relatively limited, especially compared to rulings upholding oppressive laws that federal and state governments were eager to enforce. The latter surely describes *Plessy*, *Dred Scott*, and *Korematsu*.

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58. See *Dred Scott v. Sandford*, 60 U.S. 393, 421–23, 426–27, 447–52 (1857).

59. See *Plessy v. Ferguson*, 163 U.S. 537, 550–52 (1896) (“[W]e cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children . . . or the corresponding acts of state legislatures.”).

60. See *Gong Lum v. Rice*, 275 U.S. 78, 83–87 (1927).

61. See *id.* at 86–87.

62. *Id.* at 85–87.

63. The majority opinion emphasizes this history heavily. See *Bowers v. Hardwick*, 478 U.S. 186, 192–94 (1986).

64. By 1985, twenty-five states had repealed anti-sodomy laws criminalizing sex between consenting adults, and many others removed its status as a felony. WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 160 (1999).

While the four cases highlighted by Greene are less egregious than *Dred Scott*, *Plessy*, and *Korematsu*, it does not necessarily follow that they should *not* be part of the anticanon. Perhaps the standards for inclusion should be somewhat lower. Still, less does it follow that the four current anti-canonical cases are the only ones that belong. The point of this Essay, after all, is that expansion of the list is justifiable and perhaps necessary. It does not necessarily even follow that all four of the current occupants of the “the lowest circle of constitutional hell”<sup>65</sup> deserve to be there. I myself would prefer to remove *Lochner* from the list.

My point in this Part is simply that these four are not purely arbitrary selections, but rather represent a conjunction of three traits they possess—or at least are perceived to possess—to a greater extent than other rulings. And these three traits are reasonable criteria for inclusion.

It is hard to deny that poor legal reasoning should be a criterion for inclusion in the anticanon. At the same time, it is also hard to deny that this flaw is not by itself sufficient justification for consignment to constitutional “hell.” Many rulings are poorly reasoned. But that is not sufficient for damnation if they address unimportant issues or have little effect. Badly reasoned cases that have large-scale horrible effects are worse than those that have few or none or perhaps even have beneficial consequences.

Similarly, decisions that have harmful effects are defensible—or at least not hellacious—if based on sound reasoning. For example, as Akhil Amar points out,<sup>66</sup> few condemn the Supreme Court’s 1833 ruling in *Barron v. City of Baltimore*,<sup>67</sup> which denied the applicability of the Bill of Rights to the states.<sup>68</sup> Even though it likely caused considerable harm, it was also probably a correct interpretation of the pre-Civil War Constitution, prior to the enactment of the Fourteenth Amendment, which “incorporated” the Bill of Rights against state governments.<sup>69</sup>

Finally, the reinforcement of racial discrimination and oppression is significant because that form of injustice is the closest thing we have to a massive original sin in American constitutional law and perhaps in our society more generally. Given the history of slavery based on race, segregation, immigration restrictions,<sup>70</sup> and other horrific injustices of

65. Amar, *supra* note 9, at 76.

66. *Id.* at 77–78.

67. 32 U.S. 243 (1833).

68. *See id.* at 247–50.

69. U.S. CONST. amend. XIV, § 1, cl. 2; *see also, e.g., Malloy v. Hogan*, 378 U.S. 1, 4–6 (1964).

70. For a recent overview of the role of racial and ethnic prejudice in the history of American immigration restrictions, see ERIKA LEE, *AMERICA FOR AMERICANS: A HISTORY OF XENOPHOBIA IN THE UNITED STATES* 3–15 (2019).

this type, it is arguable that rulings promoting racial oppression deserve special opprobrium—perhaps greater than that applied to poorly reasoned decisions that facilitate other large-scale evils.

## II. THE VALUE OF ADDING TO THE ANTICANON

Even if the anticanon is not arbitrary and is based on plausible criteria, the value of adding cases to the list is not obvious. Perhaps the current list is fine, and we should leave it alone. But adding new cases to the anticanon has two potential benefits: reducing the risk of future judicial error and improving our understanding of constitutional history.

The title of the Symposium of which this Essay is a part, is “Controlling the Supreme Court: Now and ‘far into the future.’” The anticanon is a mechanism of such control. If a case is considered anticanonical, strong professional and political norms constrain current and future judges from reaching similar conclusions. Indeed, people who endorse the reasoning of anticanonical cases are unlikely to be appointed to judicial positions in the first place, given the opprobrium attached to such views.<sup>71</sup>

This constraint is not absolute. Sometimes, there is disagreement over what exactly an anticanonical case stands for and what we must do to avoid repeating its mistakes. For example, there is a longstanding debate over whether repudiation of *Plessy v. Ferguson* requires constitutional enforcement of color-blindness as famously advocated in Justice John Marshall Harlan’s dissenting opinion<sup>72</sup> or whether it merely requires judicial invalidation of laws enforcing racial subordination, while upholding race-conscious affirmative action programs intended to remedy past and present racial injustice.<sup>73</sup> Similarly, conservatives and liberals have deep disagreements about the lessons to be learned from *Lochner*.<sup>74</sup>

But despite such disagreements, for each anticanonical case there is a core element that gets almost universal condemnation, resulting in broad agreement that it should not be repeated. Thus, while there is disagreement over whether rejecting *Plessy* requires striking down

71. See Greene, *supra* note 3, at 392 n.68.

72. See *Plessy v. Ferguson*, 163 U.S. 537, 559 (Harlan, J., dissenting) (“Our Constitution is color-blind . . .”).

73. See, e.g., Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2436, 2439–41, 2452–55 (1994); Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIA. L. REV. 9, 9–14, 25–28 (2003); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFS. 107, 135–36, 142–46 (1976).

74. For an overview of these competing views on *Lochner*, see BERNSTEIN, *supra* note 21, at 108–23.

affirmative action programs, almost all modern jurists agree that it requires judicial invalidation of invidious discrimination against racial and ethnic minorities. Similarly, while right and left differ over whether rejection of *Lochner* also entails rejection of “noneconomic” substantive due process rights, such as the right to abortion, they generally do agree that it requires rejection of strong Due Process Clause judicial scrutiny of economic regulations. In the case of *Korematsu*, there is broad agreement that its rejection requires invalidation of race-based detention policies, even in wartime. This core of agreement on anticanonical cases imposes meaningful constraints on future judicial discretion, even if there are also aspects of these rulings that remain contested.

In principle, of course, the constraint could be lifted by the removal of a case from the anticanon. Future generations might one day conclude that *Lochner*, *Plessy*, or *Korematsu* are not as bad as traditionally thought or even that they might have been correctly decided. As noted in Part I, there have been attempts to rehabilitate the reputation of *Korematsu* and *Lochner*, and I myself am among those who believe the latter gets a bum rap.<sup>75</sup> *Dred Scott* may be less susceptible to such resurrection, because it was reversed by a constitutional amendment.

So far, however, none of the anticanonical cases has even come close to being rehabilitated to the extent that a person who is known to support it stands a chance of being appointed and confirmed to any federal court. *Dred Scott*, *Plessy*, *Lochner*, and *Korematsu* have all spent decades in judicial hell, with little or no hope of ever getting out. Once “achieved,” anticanonical status is extraordinarily hard to escape. Such escape can never be completely ruled out, of course. But its extreme difficulty reinforces the point that the anticanon is a significant constraint on current and future judicial decision-making.

If current anticanonical cases impose constraints, the same is likely to be true of additions to the list. If the additions are genuinely awful, their inclusion in the anticanon can help avoid future errors of the same kind, just as the inclusion of *Plessy* helps avoid future judicial upholding of racial discrimination.

If I succeed in persuading the legal profession to add *The Chinese Exclusion Case* to the list of anticanonical cases, that would likely lead to much stronger judicial review of immigration restrictions, particularly those that seem to be motivated by various types of discrimination that are considered unconstitutional in other contexts.<sup>76</sup> If we add *Berman v. Parker*, courts will impose tighter constraints on the use of eminent domain.<sup>77</sup>

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75. See *supra* Part I.

76. See *infra* Section III.A.

77. See *infra* Section III.C.

The additional constraints will be less significant if the cases in question have already been overruled or superseded by constitutional amendment. For example, adding *Prigg v. Pennsylvania* would have only minor effect, at best,<sup>78</sup> given that slavery was legally abolished by the Thirteenth Amendment.<sup>79</sup>

Even in such cases, however, additions can have an impact by making revival of the precedent in question less likely. An overruled precedent that remains contested is more likely to be revived than one that is almost universally reviled as a part of the anticanon. For example, *Roe v. Wade*<sup>80</sup> might well be revived by a future, more liberal Supreme Court, despite its recent overruling by a conservative majority.<sup>81</sup> Things would be different in the currently unlikely event that pro-lifers succeed in elevating *Roe* to the anticanon.

The constraint imposed by anticanonical status is even more significant in the case of decisions that have not been officially overruled and thus could still serve as precedents. The anticanonical status of *Korematsu* undermined its precedential value long before it was officially repudiated by the Supreme Court (though technically still not actually overruled).<sup>82</sup> If *Korematsu* were not in such bad odor, it might have been a useful precedent for presidents seeking judicial endorsement of sweeping restrictions on civil liberties, based on supposed national security needs.<sup>83</sup> Yet, the case's awful reputation prevented reliance on it. For example, *Korematsu* is notable for its total absence in the Trump Administration's brief in *Trump v. Hawaii*, the case involving Trump's travel ban against entry into the United States by residents of several Muslim-majority countries.<sup>84</sup> Although the Court had not yet explicitly repudiated *Korematsu* (which only happened in its opinion in *Trump v. Hawaii* itself), even the Trump Administration knew that reliance on its supposed precedential value could only hurt their case.

Similarly, if a broad consensus develops around the idea that a still-extant precedent deserves anticanonical status, that would greatly increase the odds that the Supreme Court might overrule or at least severely limit it. At the very least, courts and litigants would hesitate to rely on it as a precedent legitimating future decisions upholding similar policies.

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78. See *supra* Part I (discussing *Prigg*).

79. U.S. CONST. amend. XIII.

80. 410 U.S. 113 (1973).

81. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022).

82. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

83. See *Korematsu v. United States*, 323 U.S. 214, 218–20 (1944).

84. See generally Brief for the Petitioners, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (No. 17-965).

The reduction of future judicial error is the most important potential benefit of adding to the anticanon. But it can also have the advantage of helping to develop a more accurate understanding of constitutional history. The current anticanonical cases play an outsize role in our understanding of the negative aspects of that record. But it may be that there are other decisions whose impact has been comparably bad, or even worse. If so, recognizing their status can improve historical understanding. That is both valuable in itself and potentially an additional tool for reducing future errors. The better we understand past wrongs, the better we can avoid future mistakes of the same kind.

At the very least, new anticanonical cases are likely to get more extensive coverage in law school and undergraduate classes, which might make future generations of lawyers and policymakers more aware of the harm these cases caused and thereby better prepare them to avoid future harm of the same kind.

### III. THREE PROPOSED ADDITIONS TO THE ANTICANON

This Part outlines the case for adding three prominent Supreme Court decisions to the anticanon: *The Chinese Exclusion Case*, *Berman v. Parker*, and *Euclid v. Ambler Realty*. I suggest that they amply meet the three criteria of bad legal reasoning, terrible real-world effects, and promotion of racial and ethnic oppression. Here, I do not attempt to advance a comprehensive critique of the three decisions. Nor do I provide a complete analysis of whether and how the Supreme Court should overrule them. But I do seek to make a preliminary case for regarding them as among the Supreme Court's very worst decisions. At the very least, I hope to persuade legal scholars to increase the attention allocated to them and give them more coverage in introductory law school courses.

#### A. The Chinese Exclusion Case

*The Chinese Exclusion Case* is the 1889 decision in which the Supreme Court first decided that the federal government had a general power to exclude immigrants for virtually any reason it wanted.<sup>85</sup> It upheld the Chinese Exclusion Act of 1882, which forbade the migration of most Chinese people to the United States.<sup>86</sup>

The Court's legal reasoning was badly flawed. The Court did not try to link this sweeping power to anything in the text of the Constitution. Instead, they upheld it based on the idea that the power to exclude

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85. See *The Chinese Exclusion Case*, 130 U.S. 581, 609 (1889).

86. See *id.* at 603–09.

migrants is one that every sovereign nation must be assumed to have.<sup>87</sup> The Court ruled that the authority to “exclude aliens from its territory . . . is an incident of every independent nation,” and therefore an “incident of sovereignty belonging to the government of the United States . . . .”<sup>88</sup>

By reasoning in this way, the Court completely ignored the many flaws in this theory.<sup>89</sup> The justices also ignored the insistence of leading Founding Fathers, such as James Madison (the “Father of the Constitution”)<sup>90</sup> and Thomas Jefferson, that no such power was ever granted to the federal government.<sup>91</sup> In his Report of 1800, addressing this very issue, Madison specifically warned against the theory the 1889 Court adopted:

The reasoning here used, would not in any view, be conclusive; because there are powers exercised by most other governments, which, in the United States are withheld by the people, both from the general government and from the state governments. Of this sort are many of the powers prohibited by the Declarations of right prefixed to the Constitutions, or by the clauses in the Constitutions, in the nature of such Declarations. Nay, so far is the political system of the United States distinguishable from that of other countries, by the caution with which powers are delegated and defined; that in one very important case, even of commercial regulation and revenue, the power is absolutely locked up against the hands of both governments.<sup>92</sup>

In other words, the fact that a given power is enjoyed by the governments of other nations is no reason to assume that the U.S. federal government must have it. The whole point of the American experiment was to set up a new and better form of government, not merely imitate those that came before.<sup>93</sup> The 1889 Court did not even attempt to address Madison’s point.

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87. *See id.*

88. *Id.* at 603, 609.

89. *See infra* Section III.A.

90. *But see* David S. Schwartz & John Mikhail, *The Other Madison Problem*, 89 *FORDHAM L. REV.* 2033, 2034–38 (2021).

91. *See* Thomas Jefferson, *Jefferson’s Draft*, in 30 *THE PAPERS OF THOMAS JEFFERSON* 536, 536–38 (Barbara B. Oberg ed., 2003) (stating Jefferson’s position in the Kentucky Resolution of 1798); DAVID N. MAYER, *THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON* 203–04 (1994).

92. James Madison, *The Report of 1800, [7 January] 1800*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Madison/01-17-02-0202> [<https://perma.cc/8LL4-AF9P>] (last visited Feb. 18, 2023).

93. *See* THE DECLARATION OF INDEPENDENCE paras. 1–2 (U.S. 1776).

The effects of the Court's decision were massive. In the short run, it upheld the deeply racist Chinese Exclusion Act of 1882, which—as the name implies—barred most would-be Chinese immigrants from entering the United States.<sup>94</sup> As a result, many thousands of people were condemned to a lifetime of poverty and oppression.<sup>95</sup> In the medium to long term, the decision facilitated other exclusionary immigration legislation, much of it also motivated by racial and ethnic bigotry, such as the Immigration Act of 1924, which barred most European immigrants, in large part because of prejudice against Jews and southern and eastern Europeans.<sup>96</sup>

*The Chinese Exclusion Case* also helped lay the foundation for the “plenary power” doctrine, which to this day exempts immigration restrictions from most of the individual rights constraints that apply to virtually all other exercises of federal power.<sup>97</sup> That has led to a pattern of constitutional double-standards in immigration law that still authorize a variety of injustices that courts would strike down as unconstitutional in virtually any other context.<sup>98</sup>

When it comes to racism, *The Chinese Exclusion Case* is difficult to beat. As already noted, the legislation it upheld was itself motivated by racism, and the ruling had the predictable effect of setting a precedent for future racist immigration restrictions. But it is important to recognize that the racism here was not limited to the law the Court upheld. It was also explicitly present in the Court's own reasoning. Justice Stephen

94. On the history of the Chinese Exclusion Act, see, for example, LEE, *supra* note 70, at 92–99; ERIKA LEE, *AT AMERICA'S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1882–1943*, at 24–30 (2003).

95. On the enormous scale of the effects of the law, see LEE, *supra* note 94, at 24–26; SUCHENG CHAN, *ENTRY DENIED: EXCLUSION AND THE CHINESE COMMUNITY IN AMERICA, 1882–1943* (1991); Wenxian Zhang, *Standing Up Against Racial Discrimination: Progressive Americans and the Chinese Exclusion Act in the Late Nineteenth Century*, 56 *PHYLON* 8, 8–9 (2019).

96. See DANIEL OKRENT, *THE GUARDED GATE: BIGOTRY, EUGENICS, AND THE LAW THAT KEPT TWO GENERATIONS OF JEWS, ITALIANS, AND OTHER EUROPEAN IMMIGRANTS OUT OF AMERICA* 336–46 (2019).

97. See Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of the Plenary Power over Foreign Affairs*, 81 *TEX. L. REV.* 1, 7–15, 123–34 (2002); Matthew J. Lindsay, *Immigration As Invasion: Sovereignty, Security and the Origins of the Federal Immigration Power*, 45 *HARV. C.R.-C.L. L. REV.* 1, 24–33, 40–46 (2010); Gabriel Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 *GEO. IMMIGR. L. REV.* 257, 257–62 (2000). The exceptional nature of immigration power in this respect was reinforced in *Trump v. Hawaii*, 138 S. Ct. 2392, 2407–15, 2418–23 (2018).

98. See, e.g., Ilya Somin, *Immigration Law Defies the American Constitution*, *ATLANTIC*, <https://www.theatlantic.com/ideas/archive/2019/10/us-immigration-laws-unconstitutional-double-standards/599140> [https://perma.cc/8UFJ-TQC4] (Oct. 3, 2019, 1:05 PM).



Field's stated that "[t]he differences of race added greatly to the difficulties of the situation" the Chinese Exclusion Act was intended to address.<sup>99</sup> Field also describes the Chinese as unassimilable people who threaten to "overrun" the country, and avows that the government must have the power to bar "the presence of foreigners of a different race in this country, who will not assimilate with us."<sup>100</sup>

The embrace of racism here is much more explicit than anything in *Plessy v. Ferguson*, where the majority was careful to (disingenuously) claim that the law in question was not intended to oppress Blacks or "a[ny] particular class" and that "the enforced separation of the two races" does not "stamp[] the colored race with a badge of inferiority" except insofar as "the colored race chooses to put that construction upon it."<sup>101</sup> It is notable, however, that *The Chinese Exclusion Case* was brought to us by most of the same justices who decided *Plessy* just seven years later and embodies many of the same types of bigoted assumptions.<sup>102</sup>

In sum, *The Chinese Exclusion Case* upheld blatantly racist legislation that cut off many thousands of people from freedom and opportunity, set a precedent for similar laws denying migration rights to millions more, and continues to wreak harm to this day in the form of constitutional double standards that exempt immigration restrictions from normal constitutional constraints.<sup>103</sup> Its victims include people fleeing tyranny and oppression of many different kinds, including Jews seeking to escape Nazi Germany, among others.<sup>104</sup>

The enormous scale of the harm caused, combined with the racial and ethnic bigotry that motivated much of it, makes *The Chinese Exclusion Case* a worthy companion to *Plessy*, *Dred Scott*, and *Korematsu*.

I would be happy to see *The Chinese Exclusion Case* completely overruled in a decision that adopts Thomas Jefferson and James Madison's position that there is no general federal power to restrict

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99. *The Chinese Exclusion Case*, 130 U.S. 581, 595 (1889).

100. *Id.* at 595, 606.

101. *Plessy v. Ferguson*, 163 U.S. 537, 550–51 (1896).

102. This point is emphasized in Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 2, 5 (1998).

103. *Id.*

104. The laws that excluded most such refugees in the 1930s were based on *The Chinese Exclusion Case* precedent. See LEE, *supra* note 70, at 96–99, 144–45 (discussing how Jews were excluded based on the 1924 Immigration Act, which in turn was based on models pioneered by the Chinese Exclusion Act).

immigration.<sup>105</sup> Such an outcome is, obviously, highly unlikely. But there are a number of more moderate ways to curtail this terrible precedent.<sup>106</sup> The most obvious is to overrule the holding that the power to restrict immigration is a virtually unlimited, nontextual power and instead lodge immigration restriction in Congress' power to regulate foreign commerce (as advocated by a number of legal scholars).<sup>107</sup>

In this scenario, Congress would still have broad power to restrict immigration. But that authority would be limited in the same ways as Congress' power to regulate interstate commerce (listed in the same phrase in the Constitution).<sup>108</sup> The Supreme Court has enforced some structural limits on the latter.<sup>109</sup> More importantly, an immigration-restriction authority based on the Foreign Commerce Clause would be subject to the same individual rights limitations as other exercises of federal power. That means no more judicial deference to immigration restrictions that discriminate on the basis of race, ethnicity, religion, gender, political views, and other categories that would be prohibited in other contexts.<sup>110</sup> It also means immigration detention and deportation would be constrained by the same constitutional due process rights that apply to other laws.<sup>111</sup> Even this more limited overruling of *The Chinese Exclusion Case* is highly unlikely to happen in the near future, But it is at least an option that deserves serious consideration.

### B. Village of Euclid v. Ambler Realty

*Village of Euclid v. Ambler Realty* upheld restrictive zoning against claims that the policies severely restricting the construction of new

105. See Ilya Somin, Rethinking the Scope of Federal Power over Immigration (unpublished manuscript) (on file with author) [hereinafter Somin, Rethinking the Scope] (arguing there is no general federal power to restrict migration); Ilya Somin, *Does the Constitution Give the Federal Government Power over Immigration?*, CATO UNBOUND (Sept. 12, 2018), <https://www.cato-unbound.org/2018/09/12/ilya-somin/does-constitution-give-federal-government-power-over-immigration/> [<https://perma.cc/6E9U-3BWU>] (same).

106. For an overview of alternative bases for the power to restrict immigration, see Somin, Rethinking the Scope, *supra* note 105.

107. See, e.g., Jennifer Gordon, *Immigration as Commerce: A New Look at the Federal Immigration Power and the Constitution*, 93 IND. L.J. 653, 654, 671–73, 689–93 (2018).

108. U.S. CONST. art. I, § 8, cl. 3 (giving Congress the power “[t]o regulate [c]ommerce with foreign [n]ations, and among the several [s]tates, and with the Indian [t]ribes”).

109. See, e.g., *United States v. Lopez*, 514 U.S. 549, 559, 567 (1995) (holding that a restriction cannot encompass most regulation of “noneconomic” activity); *United States v. Morrison*, 529 U.S. 598, 617 (2000) (same).

110. Gordon, *supra* note 107, at 654–55.

111. See *id.* at 666, 697–98, 704.

housing and commercial facilities violated the Takings Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment.<sup>112</sup> The ruling opened the door to policies that locked millions of people out of areas where they might otherwise have found better housing and job opportunities.<sup>113</sup> It continues to cause great harm.

The legal reasoning in Justice George Sutherland's majority opinion for the Court is mediocre, at best. That may be because Sutherland and his conservative colleagues on the Court were ready to strike down the zoning restrictions at issue, until a late-filed brief by Alfred Bettman of the National Conference on City Planning, apparently changed some of their minds by pointing out that doing so might make it easier for poor and working-class people to move to affluent neighborhoods.<sup>114</sup> Ultimately, three conservative justices still dissented, but Justice Sutherland and Chief Justice William Howard Taft cast crucial votes for the majority.<sup>115</sup>

Justice Sutherland's analysis is notable for its evasion of most of the crucial arguments for the other side. He contends that zoning restrictions on construction of multi-family housing and new commercial enterprises are justified by the "police power," which gives government the authority to enact regulations that protect the health, safety, and welfare of the public.<sup>116</sup> There is indeed a long line of precedent indicating that at least some police power measures are exempt from takings liability.<sup>117</sup> He also cites a variety of state court decisions upholding zoning restrictions on police power grounds.<sup>118</sup>

But Justice Sutherland ignored the fact that the real purpose of *Euclid's* zoning ordinance was primarily to keep poor people out, and that it went far beyond any plausible health and safety rationale. This reality was well-articulated by the district court opinion in the case, which struck down the law:

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112. 272 U.S. 365, 397 (1926).

113. See *infra* note 121 and accompanying text.

114. See Alfred McCormack, *A Law Clerk's Recollections*, 46 COLUM. L. REV. 710, 712 (1946) (suggesting that Sutherland changed his mind after reading the brief and discussing the case with the then-dissenting justices); Richard H. Chused, *Euclid's Historical Imagery*, 51 CASE W. RESV. L. REV. 597, 613–14 (2001) (discussing how Sutherland adopted the imagery and phrasing of Bettman's brief in his opinion).

115. See *Euclid*, 272 U.S. at 379, 397.

116. *Id.* at 390–97.

117. See, e.g., Daniel Rodriguez, *The Inscrutable (yet Irrepressible) State Police Power*, 9 N.Y.U. J.L. & LIBERTY 662 (2015); D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 U. MIA. L. REV. 471 (2004).

118. *Euclid*, 272 U.S. at 390–94.

Obviously, police power is not susceptible of exact definition. It would be difficult, even if it were not unwise, to attempt a more exact definition than has been given. And yet there is a wide difference between the power of eminent domain and the police power; and it is not true that the public welfare is a justification for the taking of private property for the general good. The broad language found in the books must be considered always in view of the facts, and when this is done, the difficulty disappears. A law or ordinance passed under the guise of the police power which invades private property as above defined can be sustained only when it has a real and substantial relation to the maintenance and preservation of the public peace, public order, public morals, or public safety. The courts never hesitate to look through the false pretense to the substance . . . .

The plain truth is that the true object of the ordinance in question is to place all the property in an undeveloped area of 16 square miles in a strait-jacket. The purpose to be accomplished is really to regulate the mode of living of persons who may hereafter inhabit it. In the last analysis, the result to be accomplished is to classify the population and segregate them according to their income or situation in life. The true reason why some persons live in a mansion and others in a shack, why some live in a single-family dwelling and others in a double-family dwelling, why some live in a two-family dwelling and others in an apartment, or why some live in a well-kept apartment and others in a tenement, is primarily economic. It is a matter of income and wealth, plus the labor and difficulty of procuring adequate domestic service. Aside from contributing to these results and furthering such class tendencies, the ordinance has also an esthetic purpose; that is to say, to make this village develop into a city along lines now conceived by the village council to be attractive and beautiful.<sup>119</sup>

Justice Sutherland has no real answer to this crucial point. Sadly, it may well be that this illicit and unconstitutional purpose was also the reason why he changed his mind and voted to uphold the *Euclid* zoning rules.

The district court also offered another crucial reason why severe zoning restrictions should be considered takings, requiring “just compensation” under the Fifth Amendment:

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119. *Ambler Realty Co. v. Village of Euclid*, 297 F. 307, 314, 316 (N.D. Ohio 1924), *rev'd*, 272 U.S. 365 (1926).

The argument supporting this ordinance proceeds, it seems to me, both on a mistaken view of what is property and of what is police power. Property, generally speaking, defendant's counsel concede, is protected against a taking without compensation, by the guaranties of the Ohio and United States Constitutions. But their view seems to be that so long as the owner remains clothed with the legal title thereto and is not ousted from the physical possession thereof, his property is not taken, no matter to what extent his right to use it is invaded or destroyed or its present or prospective value is depreciated. This is an erroneous view. The right to property, as used in the Constitution, has no such limited meaning. As has often been said in substance by the Supreme Court: "There can be no conception of property aside from its control and use, and upon its use depends its value."<sup>120</sup>

The idea that the "property" protected by the Takings Clause protects the right to use as well as the right of ownership, as such, has deep roots in American legal history.<sup>121</sup> Sutherland fails to deal with this point, too.

The effects of *Euclid* and later cases building on it were enormous. State and local governments all over the country cited it as justification for enacting zoning restrictions intended to keep out the poor, and often also deliberately targeting racial and ethnic minorities.<sup>122</sup>

Today, scholars across the political spectrum recognize that exclusionary zoning was (and remains) one of the main causes of racial and class segregation in the United States.<sup>123</sup> In the twenty-first century, zoning restrictions are rarely motivated by racial bigotry in the same

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120. *Id.* at 317 (citing *Block v. Hirsch*, 256 U.S. 135, 165 (1921)). For a more detailed discussion of the lower court opinion in *Euclid*, see Richard Chused, *Strategic Thinking About Racism in American Zoning*, 66 N.Y. L. SCH. L. REV. 307, 311–15 (2022).

121. For a valuable overview, see Eric Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1553–70 (2003).

122. For an overview of these effects, including the racial impact, see RICHARD ROTHSTEIN, *THE COLOR OF LAW: THE FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 52–57 (2017).

123. *See, e.g., id.*; David Schleicher, *Stuck! The Law and the Economics of Residential Stagnation*, 127 YALE L.J. 78, 114–17 (2018); Chang-Tai Hsieh & Enrico Moretti, *Housing Constraints and Spatial Misallocation*, AM. ECON. J.: MACROECONOMICS, Apr. 2019, at 1, 2–3. For recent overviews of the evidence, see Joseph Gyourko, Jonathan Hartley & Jacob Krimmel, *The Local Residential Land Use Regulatory Environment Across U.S. Housing Markets: Evidence from a New Wharton Index*, J. URB. ECON. July 2021, at 1, 1–2; Edward Glaeser, *Reforming Land Use Regulations*, BROOKINGS (Apr. 24, 2017), <https://www.brookings.edu/research/reforming-land-use-regulations/> [https://perma.cc/6LDG-36B7].

ways as back in the 1920s.<sup>124</sup> But they continue to have huge negative effects on the poor and minorities, and also to inflict serious damage on the economy, as a whole. Over the last century, *Euclid* and other precedents based on it have facilitated policies that inflicted grave harm on literally millions of people seeking opportunity, as well as many thousands of property owners and businesses.<sup>125</sup>

Unlike in *The Chinese Exclusion Case*, the justices who decided *Euclid* did not openly endorse the racism underlying the types of policies they upheld. But empowering racists was an entirely predictable consequence of their decision, and indeed one that was well understood at the time.

As with *The Chinese Exclusion Case*,<sup>126</sup> there are a number of ways the Court could overrule *Euclid*. It could potentially rule that all or most zoning restrictions are *per se* (automatic) takings, much like physical occupations of property.<sup>127</sup> Alternatively, it could subject zoning restrictions to tougher scrutiny under the Court's 1978 decision in *Penn Central Transportation Co. v. New York City*, which governs most regulatory takings.<sup>128</sup> *Penn Central* requires courts to weigh three factors in determining whether a regulation restricting property rights qualifies as a taking: (1) "[t]he economic impact of the regulation on the claimant"; (2) the "extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) the "character of the governmental action."<sup>129</sup> This formula has been heavily criticized for vagueness and arguably excessive deference to the government.<sup>130</sup> But the Court could potentially clarify that, at least in cases involving large-scale exclusionary zoning, the test will be applied in a non-deferential way that would make it easier for property owners to prevail.

Alternatively, the Court could rule that some types of zoning restrictions are *per se* takings, while others still fall under the *Penn*

124. See Chused, *supra* note 120, at 308–09.

125. For relevant evidence, see sources cited *supra* note 123.

126. See discussion *supra* Section III.A.

127. See *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021) (holding that even temporary physical occupations are *per se* takings).

128. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

129. *Id.* at 124.

130. For extensive citations to such criticisms, see David Callies, *Regulatory Takings and the Supreme Court*, 28 STETSON L. REV. 523, 523 n.1 (1999). Cf. Eric R. Claeys, *The Penn Central Test and Tensions in Liberal Property Theory*, 30 HARV. ENV. L. REV. 339, 340, 344 (2006) (arguing that the majority of the Court's justices apply the *Penn Central* test in a way that is generally deferential to the government and noting that the "conventional wisdom" among "land-use lawyers" interprets the Court's application of the test that way).

*Central* framework, a distinction perhaps based on the extent of the restrictions involved.

In this Essay, I do not try to determine which of these approaches is best. But any would be a significant improvement over the status quo.

### C. *Berman v. Parker*

*Berman v. Parker* is less famous than *Euclid*. In my experience, even many law professors have never heard of it. But the two cases have much in common. Both relied on highly dubious legal reasoning to uphold severe restrictions on property rights that predictably inflicted grave harm on the poor and minorities.

*Berman* upheld an “urban renewal” project in Washington, D.C., which used eminent domain to forcibly displace thousands of people and numerous businesses in order to transfer the property to private business interests, who were expected to redevelop it.<sup>131</sup> Most of the area in question was blighted or dilapidated.<sup>132</sup> But that does not mean that the right approach was to destroy the neighborhood to save it.

Most lawyers and legal academics have heard of *Kelo v. City of New London*,<sup>133</sup> the controversial and widely criticized 2005 ruling in which the Supreme Court ruled that, although the Fifth Amendment only permits the taking of private property for “public use,” the transfer of condemned land to private parties for “economic development” is constitutional.<sup>134</sup> But *Kelo* was largely just a modest extension of *Berman v. Parker*, which was the first case in which the Court ruled that a public use can be pretty much anything the government says it is.<sup>135</sup> Indeed, *Kelo* was actually slightly less deferential to the government than *Berman*.<sup>136</sup> In the latter case, the Court ruled that the legislature’s determination of what qualifies as a public use is “well-nigh conclusive.”<sup>137</sup> By contrast, *Kelo* states such deference does not apply to “pretextual takings,” where the official rationale for the condemnation is just a pretext for a scheme to benefit a private party.<sup>138</sup>

The *Berman* Court’s defense of this ultra-deferential approach to public use is extremely weak. In my book on *Kelo*, *The Grasping Hand*,

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131. ILYA SOMIN, *THE GRASPING HAND: KELO V. CITY OF NEW LONDON AND THE LIMITS OF EMINENT DOMAIN* 58 (rev. ed. 2016).

132. *Id.* at 84; *see also Berman v. Parker*, 348 U.S. 26, 32 (1954).

133. 545 U.S. 469 (2005).

134. SOMIN, *supra* note 131, at 2–3; *Kelo*, 545 U.S. at 484.

135. SOMIN, *supra* note 131, at 58, 112–13; *Berman*, 348 U.S. at 32–33.

136. SOMIN, *supra* note 131, at 134.

137. *Berman*, 348 U.S. at 32.

138. *Kelo*, 545 U.S. at 477–78. For a detailed discussion of this issue, see SOMIN, *supra* note 131, at 192–200.

I have outlined the strong originalist and living-constitutionalist arguments for the “narrow” definition of public use, under which the use of eminent domain is only constitutional if it is for a publicly owned project, or a private entity that has a legal obligation to serve the entire public.<sup>139</sup>

*Berman* is notable not just for its badly flawed conclusion, but also for Justice William O. Douglas’s total failure to even address the opposing position. When he writes that the legislature can authorize the taking of property for virtually any purpose, that is a conclusory statement backed by virtually nothing.

In fairness, not all the evidence I collected in my book was known in 1954.<sup>140</sup> But specialists were well aware that the narrow view of “public use” had been the dominant one throughout the nineteenth century.<sup>141</sup> In the district court opinion in the case, District Judge E. Barrett Prettyman—a prominent jurist at the time—partly ruled in favor of the property owner, and emphasized that the “extension[] of the concept of eminent domain, to encompass public purpose apart from public use, [is] potentially dangerous to basic principles of our system of government.”<sup>142</sup> Judge Prettyman was willing to uphold the taking of property that was itself a “slum” area if necessary to alleviate the slum conditions, but not the taking of unblighted land for purposes of beautifying or enhancing the area.<sup>143</sup> Douglas simply brushes aside Prettyman’s concerns without bothering to explain why they are wrong.<sup>144</sup>

The consequences of *Berman* were catastrophic. The project upheld in the case itself forcibly displaced several thousand people, nearly all of them poor Black Americans.<sup>145</sup> *Berman*’s impact as precedent authorized the use of eminent domain to forcibly displace hundreds of thousands of people—again, mostly poor minorities—for the ostensible purpose of alleviating blight and promoting “urban renewal.” These kinds of “blight” condemnations continue to this day, though on a considerably lesser scale than at their height in the 1950s and 1960s.<sup>146</sup> While the goal of these massive condemnations was to promote economic development,

139. SOMIN, *supra* note 131, at 43–55, 99–111.

140. For a detailed review of the evidence, see *id.* at chs. 2, 4.

141. See *id.* at 35–72 (discussing the relevant history).

142. *Schneider v. District of Columbia*, 117 F. Supp. 705, 716 (D.D.C. 1953), *rev’d*, *Berman v. Parker*, 348 U.S. 26 (1954).

143. *Id.* at 716–22.

144. *Berman*, 348 U.S. at 35–36.

145. Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL’Y REV. 1, 6 (2003).

146. For a detailed overview of the relevant history, see SOMIN, *supra* note 131, at 73–111.



in most cases they destroyed more economic value than they created. One of the main lessons of development economics is that secure property rights are essential to promoting investment, entrepreneurship, and growth.<sup>147</sup>

The widespread destruction and suffering caused by *Berman* had a crucial racial dimension. Almost all the people displaced by the project it upheld were poor Black Americans.<sup>148</sup> Black Americans were also a large majority of the people displaced by later urban renewal takings. Often, local governments deliberately targeted them. Thus, James Baldwin famously denounced urban renewal as “Negro removal.”<sup>149</sup>

It is worth noting that, when *Berman* was decided in 1954, Washington, D.C., was still a segregated city in which the Black population had virtually no political power and was under the near-total domination of white authorities. The same Court that decided *Berman* had also decided *Brown v. Board of Education* a few months earlier, as well as *Bolling v. Sharpe*,<sup>150</sup> which struck down racial segregation in public schools in the District of Columbia.<sup>151</sup> The justices were properly sensitive to the racism underlying the policies at issue in *Brown* and *Bolling*. But they turned a blind eye to it in *Berman*.

Legal historian Wendell E. Pritchett effectively summarizes the racial element of the case:

The role of blight terminology in restricting racial mobility has also been under-appreciated by legal scholars. Blight was a facially neutral term infused with racial and ethnic prejudice. While it purportedly assessed the state of urban infrastructure, blight was often used to describe the negative impact of certain residents on city neighborhoods. This “scientific” method of understanding urban decline was used to justify the removal of blacks and other minorities from certain parts of the city. By selecting racially changing neighborhoods as blighted areas and designating them for redevelopment, the urban renewal program enabled institutional and political elites to relocate minority populations and entrench racial segregation. *Berman* was decided just six months after *Brown v. Board of Education*, but while *Brown* receives more attention, *Berman* was equally influential in shaping American race relations. The urban

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147. *Id.* at 90 (discussing these points in detail).

148. Pritchett, *supra* note 145.

149. See *A Conversation with James Baldwin*, AM. ARCHIVE OF PUB. BROAD. (June 24, 1963), [https://americanarchive.org/catalog/cpb-aacip\\_15-0v89g5gf5r](https://americanarchive.org/catalog/cpb-aacip_15-0v89g5gf5r).

150. 347 U.S. 497 (1954).

151. *Id.* at 500.

renewal program played a crucial role in redistributing urban populations and creating additional obstacles to efforts to achieve integration.<sup>152</sup>

Why did the Supreme Court ignore the racism underlying the takings in *Berman* and the vast harm the decision predictably caused? Douglas and most of his colleagues were racial liberals who understood the horrible injustices of segregation and did what they could to end it in other contexts, most notably in *Brown*.

Their blindness was likely caused by a combination of denigration of property rights and faith in government planning.<sup>153</sup> During the Progressive and New Deal eras, most jurists and legal scholars came to believe that property rights deserved little or no judicial protection, and that they were a tool of the wealthy for oppressing the poor.<sup>154</sup> In addition, this period was characterized by great faith in the power of “scientific” government planning to solve social problems, including—in this case—rehabilitating “slums” and “blighted” neighborhoods.<sup>155</sup> This faith in expert planning comes through in several passages in Douglas’s opinion, such as the one where he analogizes urban planners to doctors treating a disease: “[t]he experts concluded that if the community were to be healthy, if it were not to revert again to a blighted or slum area, as though possessed of a congenital disease, the area must be planned as a whole.”<sup>156</sup> This, in Douglas’ eyes, is what justified the use of eminent domain to seize even property that was not blighted, such as the store at issue in the *Berman* case.

Just as laypeople should not second-guess the professional judgment of a surgeon performing an operation, so courts should not second-guess the “scientific” judgment of urban planners. The latter had to remove “diseased” neighborhoods to ensure the health of the city, much like the former had to cut out diseased tissue to cure their patients. Such medical terminology was commonly used to justify destruction of neighborhoods and forcible displacement of minority populations.<sup>157</sup>

While we today cringe at these medical analogies, New Deal-era suspicion of property rights and confidence in government planning are a big part of the reason why most scholars and legal commentators—particularly those on the left—have continued to accept both *Euclid* and *Berman*. In recent years, however, there has been growing cross-

152. Pritchett, *supra* note 145, at 6.

153. For an overview of these factors, see SOMIN, *supra* note 131, at 56, 86–87.

154. *Id.*

155. Pritchett, *supra* note 145.

156. *Berman v. Parker*, 348 U.S. 26, 34 (1954).

157. Pritchett, *supra* note 145, at 16–17.

ideological recognition of the vast harm caused by exclusionary zoning, especially to racial minorities.<sup>158</sup> The *Kelo* decision highlighted the similar dangers of unconstrained use of eminent domain, and that decision also generated massive cross-ideological opposition.<sup>159</sup>

Unlike with *Euclid* and *The Chinese Exclusion Case*,<sup>160</sup> there may be no relatively moderate way to reverse *Berman v. Parker*. While *Kelo v. City of New London* can be overruled without fully embracing the narrow definition of “public use” and thereby banning most takings that transfer property to private parties, overruling *Berman* would probably require going further than that.<sup>161</sup> The end result would likely be a restoration of the narrow definition of public use, or something close to it. In my view,<sup>162</sup> that would be a massive improvement over the status quo. But I admit it makes reversal a more challenging proposition for those who may agree that *Berman* has serious flaws but also believe there is great value in having a broad eminent domain power.

#### CONCLUSION

The anticanon of constitutional law is a valuable institution. But it could be more useful if expanded. At the very least, there is value in systematically considering the criteria for anticanonical status and whether there are worthy candidates for inclusion that have been overlooked.

To that end, I have advanced three potential candidates that seem to fit the bill well. They feature terrible legal reasoning, enormous harm, and reinforcement of racial and ethnic oppression. It is unlikely that any of the three will be overruled in the near future, though *Berman v. Parker* may be eroded if the Supreme Court overrules *Kelo v. City of New London*, as several current justices may be open to doing.<sup>163</sup>

This Essay could help begin a discussion about whether these rulings deserve far greater opprobrium than they have received so far. At the very least, law professors should give these decisions more prominent

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158. See, e.g., ROTHSTEIN, *supra* note 122.

159. SOMIN, *supra* note 131, at 135–64.

160. See discussion *supra* Sections III.A–B.

161. See SOMIN, *supra* note 131, at 238–41 (discussing the potential effects of overruling *Kelo* and *Berman*).

162. See *id.* ch. 8 (discussing why this is superior option relative to more modest reforms of eminent domain power).

163. See Ilya Somin, *Three Supreme Court Justices Signal Willingness to Reconsider Kelo v. City of New London*, REASON: THE VOLOKH CONSPIRACY (July 3, 2021, 12:30 AM), <https://reason.com/volokh/2021/07/03/three-supreme-court-justices-signal-willingness-to-reconsider-ke-lo-v-city-of-new-london> [<https://perma.cc/P94M-WG65>].

attention in introductory courses, and start treating them as contestable, rather than obviously right. The latter still seems to me a common attitude in the academy, though not nearly as much so as when I started my academic career about two decades ago. In my experience, most introductory constitutional law courses and textbooks do not even include *Euclid* and *Berman*, though *Euclid* is often covered in introductory courses on property law. Many also give short shrift to *The Chinese Exclusion Case*, which rarely gets taught in introductory constitutional law classes.<sup>164</sup> These practices should be reconsidered.

Others may, of course, propose their own potential additions to the anticanon. Their suggestions might well be different from mine. If so, that would be a good thing. Hopefully, this Essay helps spark a broader discussion of the future of the anticanon.

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164. I myself did not teach it for the first twelve years or so of my career, beginning to do so only around 2015.