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MADISON LECTURE THE COURT OF HISTORY

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INTRODUCTION

What is a court’s relationship to history? From the earliest days of the Warren Court until relatively recently, some of the loudest critics of our courts have had a ready answer: To be a court, a court must look to the past—not the present, and certainly not the future. They have argued that a court, to be a court, must look to texts already enacted, meanings already fixed, intentions already expressed, or traditions already established.¹ Whether championing originalism or tex-

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¹ See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 145 (1990) (“If the Constitution is law, then presumably its meaning, like that of all other law, is the meaning the lawmakers were understood to have intended.”); see also *id.* at 6–7 (discussing the assumed “American orthodoxy” of “original

tualism, or some mix of the two, these critics have contended that a court, to be a court, must be a *court of history*.

This answer has proved influential if the close of the Supreme Court's 2021 Term is a sign. In June of that Term, the Court in *Dobbs v. Jackson Women's Health Organization*² rejected the fundamental right to abortion by overruling *Roe v. Wade*³ and *Planned Parenthood v. Casey*.⁴ In doing so, the Court held that a right to liberty is no right at all unless it was already "deeply rooted in history" at the time of the Due Process Clause's ratification.⁵ That same week, the Court held that a federal or state limitation on the Second Amendment right to keep and bear arms is constitutional only if it was already rooted in a "historical tradition" established by the time that the Fourteenth Amendment had been ratified.⁶ And, days later, in *West Virginia v. EPA*, the Court struck down an Environmental Protection Agency plan to address climate change by holding significant exercises of agency power unlawful unless Congress clearly had those exercises already in view when the agency was first empowered.⁷

Despite the seeming ascendancy of this backward-looking answer to my opening question about how a court relates to history, and that answer's assumption that history is always past, I want to explore a different and less familiar answer. This answer views history differently by cautioning courts to attend to history's future judgment and not just to the record that history provides of what came before. It thus suggests that courts, in relating to history, must do more than excavate it: They must anticipate it, too. This answer thus suggests that history requires courts, to judge well, to look forward and not just back—to be not only just what I will call a court of history past, but also mindful of what I will refer to as the court of history future.

By looking side-by-side at the court of history past and the court of history future, I hope to give a fuller picture of what it means for a court to keep history in mind. I also hope to capture what it feels like to judge betwixt and between these two ideas of a court of history: the one that is seemingly all the rage at present and the other, which is

understanding" and criticizing the "heresy" that judges "may create new principles or destroy old ones, thus altering the principles actually to be found in the Constitution").

² 142 S. Ct. 2228, 2242 (2022).

³ 410 U.S. 113 (1973), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

⁴ 505 U.S. 833 (1992), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

⁵ *Dobbs*, 142 S. Ct. at 2258.

⁶ *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2127 (2022).

⁷ 142 S. Ct. 2587, 2609 (2022).

itself a longstanding part of American law but lately is too little acknowledged let alone defended as a source of interpretive meaning.

From my own experience as a judge, I find resonant an analogy from the world of poetry. The literary critic Harold Bloom famously argued that strong poets are plagued by the anxiety that they are merely rewriting poems that were already written. He further argued that, to assuage what he called “the anxiety of influence,” these poets creatively misread what came before them as a means of claiming for posterity that they have engaged in their own act of creation and not merely rewritten the works of others.⁸

Judges are hardly poets. Indeed, they are obliged to respect precedent—so much so that a lower federal court judge like myself has no choice but to do so, no matter what, when that precedent comes from the Supreme Court. We thus might not expect judges to suffer from a similar anxiety of influence, as we might assume that there is no need for judges to prove their creativity.

But, as we will see, judges at all levels of the judicial system are quite aware that if the stakes of a case are high enough, history may come to judge their decision harshly, no matter how faithful to the past that decision may have been. And so, judges turn out to be no more immune to the anxiety of influence than poets, for they, too, have reason to worry about the past’s grip on them whenever they have discretion to make a choice.

Might that mean that judges also will assuage the anxiety of influence through what we might call creative misreadings of what preceded them? I will address that possibility at the end by focusing on a type of misreading that is used to justify looking only backwards and that I find especially concerning. But that is getting ahead of the story. To get us where I aim to go, I’ll start in Part I by offering some examples of how judges have appealed to the court of history’s future judgment—and how they continue to do so even to this day. I’ll then explain in Part II how those appeals differ in significant ways from appeals to present-day imperatives or preferred policy outcomes. With that groundwork in place, I’ll close in Part III with some suggestions about how judges can best manage the anxiety of influence that awareness of the court of history future occasions. In that Part, I will highlight a type of misreading that occurs when judges look only backwards, but that judges must be careful to avoid, given how ahistorical that type of misreading, ironically, is.

⁸ HAROLD BLOOM, *THE ANXIETY OF INFLUENCE* 30 (1997).

I

APPEALS TO THE COURT OF HISTORY FUTURE

Do courts imagine that there is a court of history future and that they are accountable to it? I think they do.

Consider a startling passage from *Trump v. Hawaii*, the Supreme Court case that upheld President Trump's controversial executive order that, for asserted reasons of national security, barred persons from various designated countries from entering the United States.⁹ The Court rejected the claim that the measure unconstitutionally discriminated against Muslims by effectively banning persons of that one religious faith from coming to this country.¹⁰ Along the way, Chief Justice Roberts, writing for the Court, rejected Justice Sotomayor's charge in dissent that the majority was repeating the mistake that the Court had made decades before,¹¹ when it blessed a World War II-era executive order that allowed for the internment of Japanese Americans.¹²

The Chief Justice responded by distinguishing the two executive orders.¹³ But he also made this unusual statement about the earlier case, *Korematsu v. United States*,¹⁴ which the Court had never formally overruled: "*Korematsu* was gravely wrong the day it was decided" and "has been overruled in the court of history."¹⁵

The Chief Justice did not say that the history that preceded the Constitution's ratification proved *Korematsu* was no longer precedent because it was "egregiously wrong" as a matter of plain text or original meaning.¹⁶ He asserted only—as if such assertion were enough—that the history that followed *Korematsu* exposed it to be no precedent at all. It was as if that history (taught to generations of school children in *Korematsu*'s wake and culminating in congressional reparations to those interned)¹⁷ itself sufficed to reveal the "shame[]"—a

⁹ 138 S. Ct. 2392, 2404 (2018).

¹⁰ *Id.* at 2421 (reversing grant of preliminary injunction).

¹¹ *Id.* at 2423.

¹² *Id.* at 2447–48 (Sotomayor, J., dissenting).

¹³ *Id.* at 2423 (majority opinion).

¹⁴ 323 U.S. 214 (1944) (upholding wartime policy of internment of Japanese American citizens), *abrogated by* *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

¹⁵ *Trump v. Hawaii*, 138 S. Ct. at 2423.

¹⁶ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2243 (2022).

¹⁷ See Talk of the Nation, *The Legacy of Civil Rights Leader Fred Korematsu*, NPR (Jan. 31, 2012), <https://www.npr.org/2012/01/31/146149345/the-legacy-of-civil-rights-leader-fred-korematsu> [<https://perma.cc/9V8J-GGRG>] (describing Korematsu's children learning about Japanese American internment in school); Civil Liberties Act of 1988, Pub. L. 100-383, 102 Stat. 903 (providing reparations to Japanese Americans interned during World War II).

word the Chief Justice has elsewhere used to describe the case¹⁸—that *Korematsu* had brought upon the Court. It was thus as if that history warranted a judgment by the court of history future that the Supreme Court itself was bound to follow: that the decision in *Korematsu* was, henceforth, a nullity.

Notably, history does not appear in the Chief Justice’s invocation of “the court of history” as a chronicle of the past from which the Constitution’s meaning may be derived. It appears as a future “court” that can—and will—expose the wrongness of an interpretation of the Constitution once thought legitimate but only after the lights of that “court” finally shine.

Of course, the Chief Justice was relying on a judgment that, in the wake of *Korematsu*, the court of history future had already made—and so one that he could find in history’s record. But the future being what it is, the court of history future’s work is never done. Thus, an invocation of the court of history future—even if advanced only in support of following a judgment that “court” has already rendered—inevitably raises the question whether courts making decisions today must try to anticipate the court of history future’s judgments in the here and now, even though those judgments have not yet been made.

Outside the courts, the “verdictive” presentation of history, in which posterity passes judgment on the present based on what *it* knows, is often used in just that anticipatory way.¹⁹ Those facing hard decisions with high stakes frequently point not just to future bad policy consequences that are presently foreseeable, but also to history’s impending harsh judgment to explain their choices, as if that judgment itself must be avoided. Critics likewise often condemn the choices others make, not only on policy grounds, but also by asserting that those choices will fall on the wrong side of history when history finally has its say, as if history’s harsh judgment is to be especially avoided.²⁰

This forward-looking way of deploying history as a guide to present action draws on the language of prospective condemnatory judgment, rather than policy preference or moral belief. It also speaks, as the theorist Joan Scott has emphasized,²¹ in the language of state

¹⁸ Chief Justice John Roberts, Remarks at University of Minnesota Law School, CSPAN (Oct. 18, 2018), https://archive.org/details/CSPAN2_20181018_115200_Chief_Justice_Roberts_Remarks_at_University_of_Minnesota_Law_School [<https://perma.cc/R3U8-APBE>].

¹⁹ See MICHAEL ROSEN, *THE SHADOW OF GOD* 230–60 (2022) (considering differing philosophical conceptions of history).

²⁰ See JOAN WALLACH SCOTT, *ON THE JUDGMENT OF HISTORY* xiii–xiv (2020).

²¹ See *id.* at 2.

authority and thus in a language that portrays the judge as deferring to the authority of a higher “court”—history’s future judgment—rather than imposing a judge’s own policy or moral view. It thus uses language that judges like.

Perhaps for this reason, judicial appeals to the court of history future are more common than you might think—though they do not all look like Chief Justice Roberts’s in relation to *Korematsu*. Consider the one that popped up in another Supreme Court case not long after *Trump v. Hawaii*.

The case concerned a religious freedom challenge to Nevada’s power to stop the spread of COVID-19 by limiting the size of religious gatherings.²² Nevada relied on an early twentieth-century Supreme Court precedent, *Jacobson v. Massachusetts*, that had rejected a constitutional challenge to a requirement to be vaccinated against smallpox.²³ Several Justices saw merit to the challenge to the COVID-19 regulation, and one of them, Justice Kavanaugh, wrote separately to explain why *Jacobson* was not controlling:

This Court’s history is littered with unfortunate examples of overly broad judicial deference to the government when the government has invoked emergency powers and asserted crisis circumstances The court of history has rejected those jurisprudential mistakes and cautions us against an unduly deferential judicial approach, especially when questions of racial discrimination, religious discrimination, or free speech are at stake.²⁴

Justice Kavanaugh did not argue that late-breaking work in the archives revealed that earlier judges flunked the originalist or textualist test in making those “jurisprudential mistakes.”²⁵ He did not appeal, in other words, to the court of history past. He invoked the court of history future and the harsh judgment that unfolding time had rendered. In fact, Justice Kavanaugh even warned that the court of history future would render that same judgment again unless the Supreme Court rejected emergency power to address the spread of a virus in the case at hand.

So unlike the Chief Justice, Justice Kavanaugh did not just rely on a judgment that the court of history future had already made. He invoked the prospect of a judgment that the court of history future would make to show that in choosing between competing interests, a

²² *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2604 (2020).

²³ 197 U.S. 11, 12–13, 38 (1905).

²⁴ *Calvary Chapel*, 140 S. Ct. at 2615 (Kavanaugh, J., dissenting from denial of application for injunctive relief).

²⁵ *Id.*

judge would prove more faithful to the law in time by making one kind of choice in the present rather than another.

Finally, consider an accusation that dissenting judges often make. The accusation is that, in time, history will treat the majority's ruling the way that it has treated the four precedents in what Professor Jamal Greene has called the constitutional anti-canon²⁶: *Korematsu*,²⁷ *Dred Scott*,²⁸ *Lochner*,²⁹ and *Plessy*,³⁰ the late nineteenth-century case that upheld Jim Crow and that was overruled in the wake of *Brown v. Board of Education*.³¹ Indeed, Justice Sotomayor made just this accusation by invoking *Korematsu* in *Trump v. Hawaii*.³²

This notorious quartet does not symbolize a court gone wrong, however, solely because those decisions badly described the past. There are, in fact, serious scholarly debates about whether all of them did get the past wrong.³³

For this reason, the accusation that a decision taken now will in time be viewed as the decisions in the quartet have come to be viewed packs its punch by highlighting the evident disdain that the court of history future has for those decisions and the way that our legal tradition has internalized that disdain. Accusations like this, then, anticipate history, just as Justice Kavanaugh's own appeal to the court of history future does. But, unlike Justice Kavanaugh's similarly anticipatory appeal to the court of history future, these accusations go one step further. They often seek to make way for the initial embrace of a new understanding of a legal principle that had long been defined in less inclusive terms.

Of course, the use of history's future verdict as a guide to action is not easily contained once loosed. If it can overrule *Korematsu*, then why not *Trump v. Hawaii*? At the same time, if it can overrule cases that defer to emergency power, then why not cases that decline to do so? Indeed, if it can judge harshly those rulings that failed to anticipate the court of history future, then why not those that anticipated

²⁶ See Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380 (2011) (listing cases universally condemned by the contemporary Court).

²⁷ 323 U.S. 214 (1944), *abrogated by* *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

²⁸ *Dred Scott v. Sandford*, 60 U.S. 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV (1868).

²⁹ *Lochner v. New York*, 198 U.S. 45 (1905), *abrogated by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

³⁰ *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by* *Gayle v. Browder*, 352 U.S. 903 (1956) (per curiam).

³¹ *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

³² *Trump v. Hawaii*, 138 S. Ct. 2392, 2447–48 (2018) (Sotomayor, J., dissenting).

³³ See Greene, *supra* note 26, at 405; see also Michael W. McConnell, *Reply: The Originalist Justification for Brown: A Reply to Professor Klarman*, 81 VA. L. REV. 1937, 1937 (1995) (responding to criticisms of the originalist case for *Brown*).

that court's future judgments with too little regard for the court of history past? As we will see, that was the charge leveled at the Warren Court in its waning days.³⁴

My point thus far, then, is not that history's future judgment runs in only one direction—or even that it is a reliable guide. There are serious questions about how a judge could ever know how that “court” will judge. For now, I just want to convince you that judges cannot help but be aware that they inevitably (if uneasily) sit between these two courts of history, the one that urges them to attend only to the record that history creates of the past and the other that cautions them to be wary of the judgment that history may render in the future. For, I will suggest, because judges do occupy that uneasy position, they must decide how they will manage the anxiety of influence that results.

II

THE DISTINCTIVENESS OF THE COURT OF HISTORY FUTURE

The forward-looking view of how courts relate to history that I have in mind might sound to you a lot like a defense of living constitutionalism or pragmatic consequentialism, which you might understandably associate with a focus on ensuring that legal interpretations keep up with the needs of the present moment or reflect policies that are net beneficial. This view thus may sound to you more like a view of how courts should relate to the present or to policy rather than a view of how they should relate to history. But the argument for judging with the court of history future in mind is, aspirationally, neither presentist nor policy-focused. So, before answering how courts should account for the court of history future, I want to explain how their doing so differs from their embracing either living constitutionalism or pragmatic consequentialism.

The modern argument for a living constitution was most pithily made by Franklin Roosevelt when he attacked the Supreme Court of his day for its “horse-and-buggy” conception of the Constitution.³⁵ He used that antique image to chide the Court for refusing to construe the Constitution to be fit for the times, given America's modern, urban, industrial economy. Echoing Chief Justice Marshall's early nineteenth-century admonition to construe the Constitution to be responsive to the various crises of human affairs that would befall the

³⁴ See *infra* pp. 112–13.

³⁵ LAURA KALMAN, *FDR'S GAMBIT: THE COURT PACKING FIGHT AND THE RISE OF LEGAL LIBERALISM* 35 (2022).

United States over time,³⁶ President Roosevelt sought to make room for present political innovation in the face of the current crisis that he faced—the Great Depression.³⁷ He wanted the courts of his time to get out of the way, do less, and defer to governmental power more, because he wanted them to permit law to be a workable instrument of government in the present.

The argument for making room for contemporary democratic politics based on present imperatives is straightforward enough. It asks the judge only to leave the assessment of what to do in the face of present needs to those best equipped to make such assessments—namely, elected politicians.

Such a presentist argument is not easily repurposed, however, as an argument for judges to constrain those very politics based on new understandings of constitutional limitations. If the constitutional constraint rests on accepting a new understanding of an old constitutional principle, then isn't the constraint just a product of its time? And, if so, why not let the politics of the time assess the need for it? Such questions led many enamored of Roosevelt's interpretive approach during the New Deal to have great trouble in the decades that followed with the Court's turn towards rights enforcement, and to *Brown* in particular,³⁸ especially when the novel right rested on a new understanding of social relations rather than just a change in technological or economic realities.

An appeal to the court of history future does not call to mind those same kinds of questions—and thus those same objections—about the legitimacy of enforcing rights based on new understandings of the social world. And that is because the temporal orientation of the appeal differs from the temporal orientation of the defense of a living constitution that President Roosevelt championed. Its time horizon is longer because its basic aim is different—to protect courts from the harsh decree of history that is to come, not to convince them to account for present imperatives.

To see the difference, I offer three examples, one from a majority opinion, one from a concurring opinion, and one from a trenchant commentary on the Warren Court.

The first example comes from the debate between the majority and the dissent in *Romer v. Evans*,³⁹ a case about the rights of gay and lesbian persons that the Supreme Court decided in 1996, and the majority opinion that resulted. The case concerned a challenge to a

³⁶ *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819).

³⁷ KALMAN, *supra* note 35, at 35.

³⁸ *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483 (1954).

³⁹ 517 U.S. 620 (1996).

state-wide referendum that prohibited gay and lesbian persons from securing the protection of state and local laws barring discrimination based on sexual orientation.⁴⁰

The Court as of that time had not yet recognized any constitutional bar to discrimination based on sexual orientation. In fact, a decade earlier, the Court in *Bowers v. Hardwick* had upheld a Georgia law that criminalized sodomy, making gay sex a crime, against a liberty-based constitutional challenge.⁴¹ The Court did so based on what it determined history had revealed about our country's past treatment of same-sex relations.⁴² The *Romer* Court nonetheless ruled that the Colorado referendum violated the Equal Protection Clause.⁴³ Justice Scalia ridiculed the decision in dissent. He highlighted late nineteenth-century Supreme Court decisions that permitted discrimination against polygamists.⁴⁴ He also pointed to the as-yet unoverruled *Bowers*.⁴⁵ He then taunted: What had changed besides a shift in present attitudes in some circles of society?⁴⁶

Justice Scalia's question assumed, however, that the majority in *Romer* was trying to be au courant, as if it had discerned a contemporary trend and wanted to be trendy. But what if instead the Court was anxious about history's future judgment? After all, Justice Kennedy's opinion in *Romer* began—most unusually for a majority opinion not purporting to overrule existing law—with a quotation from a dissenting opinion: Justice Harlan's in *Plessy v. Ferguson*, the case upholding Jim Crow. Justice Kennedy wrote:

One century ago the first Justice Harlan admonished this Court that the Constitution 'neither knows nor tolerates classes among citizens.' . . . Unheeded then, those words *now are understood* to state a commitment to the law's neutrality where the rights of persons are at stake. The Equal Protection Clause enforces this principle and today requires us to hold invalid a provision in Colorado's Constitution.⁴⁷

That opening suggests to me that the majority was worried that just as over the course of a century the court of history future had made *Plessy* a pariah, it might make *Bowers* one, too—only sooner.

⁴⁰ *Id.* at 623–24.

⁴¹ *Bowers v. Hardwick*, 478 U.S. 186, 192–94 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁴² *Id.*

⁴³ *Romer*, 517 U.S. at 635.

⁴⁴ *Id.* at 649 (Scalia, J., dissenting).

⁴⁵ *Id.* at 640–41.

⁴⁶ *See id.* at 652–53 (opining that the majority adopted the contemporary views of the “lawyer class” in overruling the Colorado referendum).

⁴⁷ *Id.* at 623 (majority opinion) (emphasis added).

So the Court in *Romer* had reason to be wary of deciding the case as if the Court were only a court of history past. That may be why, even though the *Romer* Court was not yet willing to overrule *Bowers*, it was not willing to associate itself with that earlier ruling either. Indeed, it may be why the *Romer* Court was intent on acknowledging up front—by invoking Justice Harlan’s *Plessy* dissent—that it was quite aware of the court of history future’s retrospective judgments. In other words, the *Romer* Court was announcing that it knew that history had taught that the Court had made a mistake in *Plessy* and that it would not make that same mistake again.

Eventually, through a series of cases over the next two decades, in which Justice Kennedy wrote each majority opinion—*Lawrence*,⁴⁸ *Windsor*,⁴⁹ and *Obergefell*⁵⁰—the Court rendered *Bowers* a *Plessy*-like artifact of the past, with the recognition of a constitutional right to same-sex marriage in *Obergefell* playing the role of *Brown* in the drama. Justice Kennedy brought that final act about in an opinion in the same-sex marriage case, moreover, that built on *Romer*’s opening words and relied on as forthright a defense as any there is of interpreting a legal command to state a general principle that could then acquire meaning through “new insight”⁵¹ gleaned from the experience of “future generations”⁵²—by, in other words, relying on history’s unfolding judgment. That Justice Kennedy kicked off this line of precedent in *Romer*’s first paragraph by creatively misreading Justice Harlan’s dissent in *Plessy* to state a principle of equality that, because uprooted from the context of Harlan’s own time, was more expansive than Harlan himself had reason in his day to intend would have no doubt earned a knowing nod from Harold Bloom.

If Justice Kennedy was anticipating history’s future judgment and not just reflecting its record of the past, his foresight so far has been true. When the Court overruled *Roe* and *Casey* last Term in *Dobbs*, on the ground that neither one of those precedents was itself deeply rooted in history, the majority denied the dissent’s charge that other

⁴⁸ *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding statutes criminalizing same-sex sexual conduct unconstitutional).

⁴⁹ *United States v. Windsor*, 570 U.S. 744 (2013) (finding Section 3 of the Defense of Marriage Act denying federal recognition of same-sex marriages unconstitutional). A companion version of *Windsor* was first decided by my own court, in an opinion by Judge Boudin and joined by Judge Lynch. See *Massachusetts v. U.S. Dep’t of Health & Hum. Servs.*, 682 F.3d 1 (1st Cir. 2012).

⁵⁰ *Obergefell v. Hodges*, 576 U.S. 644 (2015) (ruling that the Fourteenth Amendment requires all states to license and recognize same-sex marriage).

⁵¹ *Id.* at 660.

⁵² *Id.* at 664.

substantive due process precedents were at risk as well.⁵³ Here, too, the court of history future may be having its say. It is one thing to give effect to the past. It is another to be on the wrong side of history, as the mistake in *Plessy* had made all too clear.

The second example of how an appeal to the court of history future differs from the presentist orientation of President Roosevelt's defense of living constitutionalism comes from Justice Souter's concurring opinion in *Washington v. Glucksberg*,⁵⁴ which rejected a constitutional right to physician-assisted suicide. To my mind, that opinion continues to offer the most fully reasoned modern articulation of how a right to liberty not deeply rooted in our history might be recognized—but it is not presentist in orientation.

The majority's rationale in *Glucksberg* insisted that a court, to be a court, must be a court of history past. Justice Souter's own approach in his concurrence was more forward-looking. His concurrence repeatedly appealed to the judgment of the court of history future as if it were a sound interpretive guide. He first cited *Dred Scott* as a marker of how courts may go astray in recognizing constitutional limits on popular power, while noting that "[t]he ensuing judgment of history needs no recounting here."⁵⁵ And he cited *Lochner* for the same reason.⁵⁶ He then wound his way to an embrace of this passage from Justice John Harlan II to explain how a court could rule in favor of the recognition of a new right to liberty in a way that history would judge well: "The decision of an apparently novel claim . . . must take its place in relation to what went before and further [cut] a channel for what is to come."⁵⁷ The passage leaps from past to future without so much as mentioning the present.

My third and final example of the difference between the presentism underlying Roosevelt's living constitutionalism and judging with the court of history future in mind comes from the Holmes Lectures that Yale Law School professor Alex Bickel gave in 1969 about the Warren Court. The most penetrating critic of the Court most often accused of making up rights based on a presentist mindset, Bickel, who had clerked for Justice Frankfurter during *Brown*,⁵⁸

⁵³ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2277–78 (2022).

⁵⁴ *Washington v. Glucksberg*, 521 U.S. 702 (1997) (Souter, J., concurring in the judgment).

⁵⁵ *Id.* at 759.

⁵⁶ *See id.* at 760–61 (arguing that the *Lochner* line of cases "harbored the spirit of *Dred Scott* in their absolutist implementation of the standard they espoused").

⁵⁷ *Id.* at 770 (quoting *Poe v. Ullman*, 367 U.S. 497, 544 (1961) (Harlan, J., dissenting)) (alteration in original).

⁵⁸ Mark Tushnet & Katya Lezin, *What Really Happened in Brown v. Board of Education*, 91 COLUM. L. REV. 1867, 1873–74 (1991).

grasped (in a way that cruder critiques of the Warren Court miss) that the Justices were trying to get on the right side of history—not to ignore it. “[T]hey bet on the future,” he explained, “content to take their chances.”⁵⁹

So aware was Bickel that the real judge in the matter was the history to come that near the very start of one of his 1969 Oliver Wendell Holmes lectures, he conceded: “Historians a generation or two hence . . . may barely note, and care little about, method, logic, or intellectual coherence, and may assess results in hindsight—only results, and by their own future lights.”⁶⁰ He then added, in commiseration with another estimable critic of the Warren Court, Herbert Wechsler:

Mr. Wechsler has said[] [that *Brown*] has ‘the best chance of making an enduring contribution to the quality of our society of any [decision] that I know in recent years.’ Should that chance materialize, it isn’t going to matter that Mr. Wechsler thought that the decision rested on an inadequately neutral principle⁶¹

Not surprisingly, Bickel used his lectures to take on the Warren Court’s specific predictions about how history would unfold with respect to school integration, redistricting, and religious aid for schools, rather than to take on the Court’s authority to rely on forecasts about the future to interpret law in the present.⁶² Ultimately, though, he was concerned that the Warren Court’s confidence in its ability to wager well on what was to come had led it to stop attending to methods that make a court a court—reason, care, caution, consistency.⁶³ He expressed that concern most earnestly when he suggested that the Court might be losing the public confidence it would need to

⁵⁹ ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 12–13 (Harper & Row 1970).

⁶⁰ *Id.* at 11.

⁶¹ *Id.* at 99.

⁶² See, e.g., ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 26 (1975) (explaining that when the Court makes a decision, “it does so with an ear to the promptings of the past and an eye strained to a vision of the future”); see also Herbert P. Packer, *The Supreme Court and the Idea of Progress*, N.Y. TIMES, Mar. 1, 1970 (§ 7), at 3 (explaining Bickel’s view of how the Warren Court’s decisions will be received by future history); J. Skelly Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 796–97 (1971) (explaining Bickel’s view that the Warren Court attempted to “emulate the Marshall Court and earn its place in history for themselves” by adopting a results-oriented approach).

⁶³ See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 239 (Yale Univ. Press 2d ed. 1986) (1962) (“The Court is a leader of opinion, not a mere register of it, but it must lead opinion, not merely impose its own”); Anthony T. Kronman, *Alexander Bickel’s Philosophy of Prudence*, 94 YALE L.J. 1567, 1569 (1985) (“The most important element in Bickel’s political philosophy . . . is his belief in the value of prudence as a political and judicial virtue.”).

answer what he predicted would be history's ultimate call: "[I]s there not a chance that the judges might recall a riven society to its senses? If we should encounter, not malapportionment, not inequality and social injustice, but a coup, . . . a fundamental assault against broadly-responsive government, might not this unique American institution just save us?"⁶⁴

Just as I have suggested that the judicial invocation of the court of history future is not present-focused in the way that President Roosevelt's argument for a living constitution is, such judicial invocation also is not policy-oriented in the way that pragmatic consequentialism is. The claimed focus of a judge appealing to the court of history future is not on near-term consequences, in the fashion of a policy analyst calculating costs and benefits. It is on imagining a future society that will make judgments, identifying what they will be, and drawing on those divinations to come to a decision—not because it is of its time, but because it will stand the test of time.

Justice Harlan, dissenting in *Plessy*, plainly had his eyes on where history was headed in predicting that the majority ruling would be deemed "pernicious" in the way the majority's decision in *Dred Scott* had been deemed by history's retrospective assessment.⁶⁵ So, too, did the "unlikely heroes"⁶⁶ of the Fifth Circuit have their eyes on the future during the most challenging days of the Civil Rights Movement. It trivializes the efforts of those southern federal judges in dismantling a system of racial subjugation to suggest that they were acting out of a momentary pragmatic assessment. Indeed, Judge John Minor Wisdom, a member of that court, wrote toward the tail end of that period about why a desegregation decision that he was making and that was said to be lacking in strong precedential roots was warranted: "In 1966 this remedy is the relief commanded by *Brown*, the Constitution, the Past, the Present, and the wavy foreimage of the Future."⁶⁷

In the same vein, consider how much the prospect of future judgment—rather than pragmatic calculation—has influenced the kinds of decisions that judges of all stripes regularly invoke to explain why judicial review is worth preserving. Facing down the likes of *Dred Scott*, *Plessy*, *Lochner*, and *Korematsu*, the pantheon includes not

⁶⁴ BICKEL, *supra* note 59, at 178.

⁶⁵ *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), *overruled by* *Gayle v. Browder*, 352 U.S. 903 (1956) (per curiam).

⁶⁶ See generally JACK BASS, UNLIKELY HEROES (Univ. Ala. Press 1981) (describing the Fifth Circuit judges' resistance to the notion of "separate but equal" and their dedication to fulfilling the promise of *Brown*).

⁶⁷ *United States v. Jefferson Cnty. Bd. of Educ.*, 372 F.2d 836, 878 (5th Cir. 1966), *on reh'g*, 380 F.2d 385 (5th Cir. 1967).

only *Brown* but also the *Steel Seizure Case*,⁶⁸ neither of which simply reflects an original understanding. Indeed, Justice Robert Jackson, the author of the most admired of the many opinions in the latter case, decided during the Korean War, made no secret that the past offered little instruction about whether a President could seize an industry during a war to bring about labor peace in order to aid the military effort.⁶⁹

But in the face of a history of debates over war powers that Jackson described as no more intelligible to a judge than the dreams of the Pharaoh were to Joseph,⁷⁰ that Justice did not find refuge in a consequentialist calculation. His concern, as I read him, was that history would not look kindly on a Court that permitted executive absolutism to take hold under our constitutional system.⁷¹ And that was so even if a toting up of costs and benefits might support a bit of authoritarianism by Harry Truman, hardly a dictator in waiting. As Justice Jackson put it in contemplating history's future judgment, "No penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role."⁷²

Justice Jackson had good reason to approach his decision in that case that way. His eyes had been fixed on the judgment of history only years before, when he had served as the chief prosecutor at Nuremberg. He had opened that trial for the ages about the unspeakable danger of executive absolutism with this: "We must never forget that the record on which we judge these defendants is the record on which history will judge us tomorrow."⁷³

III

THE COURT OF HISTORY FUTURE AND THE "ANXIETY OF INFLUENCE"

How, then, should a court account for the judgment of the court of history future? I am sorry to have kept you in suspense this long in waiting for my answer. But, like all fundamental questions about the nature of identity, this one also occasions anxiety—albeit an anxiety

⁶⁸ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

⁶⁹ *See id.* at 634–35 (Jackson, J., concurring) (arguing that judicial precedent is often inconsistent and inconclusive).

⁷⁰ *Id.* at 634 ("Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh.").

⁷¹ *See id.* at 655 (warning against allowing the President to exercise powers that do not originate in law).

⁷² *Id.* at 646.

⁷³ TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* 168 (1992).

born of a judicial worry that the past may have too great a hold, even though it is surely supposed to have a strong one.

Predictably, judges often respond to this question indirectly by asking questions of their own: “Who Cares?” and “Who Knows?” Those two questions are both best understood as means of stress relief, but they are not the same question. The first asks, who cares how history will judge? The second asks, who knows how it will judge? By taking each question seriously, I hope to persuade you that while, in considering how to account for the court of history future, the “Who Knows?” question cannot be ignored, the “Who Cares?” question cannot justify refusing to account for the court of history future at all.

Justice Scalia nicely articulated the thinking that underlies the “Who Cares?” question in a case that concerned an equal protection challenge to the Virginia Military Institute’s exclusion of women from its student body. Justice Ginsburg closed her opinion for the Court striking down that policy by asserting that “[a] prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded.”⁷⁴ Justice Scalia replied as follows:

The virtue of a democratic system . . . is that it readily enables the people, over time, to be persuaded that what they took for granted is not so, and to change their laws accordingly. That system is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution.⁷⁵

In this passage, Justice Scalia does not deny that future generations will cast judgment on what judges do today. He contends only that it should be of no interest to judges that those generations will. There are in each age, he suggests, just the smug assurances of that age. So judges, as legal interpreters, must confine themselves to identifying only what was, not writing into the law either what has come to be or what will be.

This response depends on an implicit claim about the temporal fixedness of the equal protection command: that the content of the Equal Protection Clause was set by what was understood by the public at the time of the Clause’s ratification. But judgments of the court of history future—including not only those that it has already made, but also the prospect of those that it will make—themselves have shaped our equal protection law. The response thus ignores the harsh indictment that the court of history future has handed down on *Korematsu*

⁷⁴ United States v. Virginia, 518 U.S. 515, 557 (1996).

⁷⁵ *Id.* at 567 (Scalia, J., dissenting).

and *Plessy*, no matter how much each of those precedents might have been faithful to the court of history past. It ignores, too, the high esteem that time has bestowed on *Brown*, even though *Brown* was hardly beyond reproach in its day or a ruling clearly commanded solely by the court of history past.⁷⁶ It ignores even Justice McLean's dissenting appeal to the court of history future in *Dred Scott*, in which he explained that he would not opt for a discriminatory reading of the word "citizen" in the Constitution based on "so dark a ground" as the framers' toleration of slavery,⁷⁷ given that history had moved on since ratification by banning the trade in persons, and that even at the founding the "leading men, South as well as North" cherished the belief that slavery would eventually become "extinct."⁷⁸

One finds another instance of the "Who Cares?" question being invoked to justify ignoring the court of history future in a 2020 case from the Eleventh Circuit, upholding, against a federal constitutional challenge, a Florida law impeding felons from voting.⁷⁹ The dissent appealed to the Circuit's past, given that the Eleventh Circuit was carved out of the Fifth Circuit, to make a point about how poorly history would judge the decision to uphold the Florida law: "Our predecessor, the former Fifth Circuit, has been rightly praised for its landmark decisions on voting rights in the 1950s and 1960s. . . . I doubt that today's decision . . . will be viewed as kindly by history."⁸⁰

Two members of the majority responded this way: "Our duty is not to reach the outcomes we think will please whoever comes to sit on the court of human history."⁸¹ As a court with "limited jurisdiction," the court was obliged instead to "respect the political decisions made by the people of Florida and their officials within the bounds of our Supreme Law, regardless of whether [it] agree[d] with those decisions."⁸²

This response, by contrasting law with present-day judicial preference, does not directly address the dissent's prediction about the judgment that future generations would make. Nor does it deny that some

⁷⁶ See Jesse D.H. Snyder, *Stare Decisis is for Pirates*, 73 OKLA. L. REV. 245, 254 (2021) ("[T]he Court's analysis [in *Brown*] looked not within itself at past decisions, but rather to forward-leaning societal evidence"); Kevin H. Smith, *The Jurisprudential Impact of Brown v. Board of Education*, 81 N.D. L. REV. 115, 124, 128 (2005) (acknowledging that the Court in *Brown* did not address the doctrine of stare decisis or when a court may overrule a prior decision).

⁷⁷ *Dred Scott v. Sandford*, 60 U.S. 393, 537 (1857) (McLean, J., dissenting), *superseded by constitutional amendment*, U.S. CONST. amend. XIV (1868).

⁷⁸ *Id.* at 538.

⁷⁹ *Jones v. Governor of Fla.*, 975 F.3d 1016 (11th Cir. 2020) (en banc).

⁸⁰ *Id.* at 1107 (Jordan, J., dissenting).

⁸¹ *Id.* at 1050 (Pryor, C.J., concurring).

⁸² *Id.* (Pryor, C.J., concurring) (citation omitted).

judicial work is best evaluated only after the history to come has had its say. Indeed, the majority acknowledged the “heroic” quality of the predecessor judges of the Fifth Circuit without trying to show that their heroism owed only to their fidelity to the past.⁸³ Nor would such a showing have been easy to make, given that collection of judges’ forward-looking instincts, as the reference that I made earlier to Judge Wisdom’s appeal in taking aim at the system of Southern segregation to the “[f]uture’s” compulsory “foreimage” well shows.⁸⁴

The response by the majority in the Florida case, however, ultimately did hazard an explanation of why the judgment of “the court of human history” did not matter. It explained: “[I]n the end, as our judicial oath acknowledges, we will answer for our work to the Judge who sits outside of human history.”⁸⁵

This use of the “Who Cares?” question to respond to an appeal to the court of history future does not deny the anxiety of influence so much as this use of the question displaces that anxiety to a realm beyond “human history” and, by definition, beyond law. Yet if a judge answers to future judgment, why only to God’s and not posterity’s? The answer given by the majority in the Florida case offers little in the way of a response to *that* question. We have seen how our legal tradition internalizes the judgments of posterity. And, while Jefferson famously said that he trembled for his country when he reflected that God was just,⁸⁶ in good Enlightenment fashion he also was quite cognizant of what he called the “bar of posterity.”⁸⁷ Indeed, the Constitution announces at the outset that “We the People” established it “to . . . secure the Blessings of Liberty to ourselves and our Posterity.”⁸⁸

In other words, neither the claim that law is temporally fixed nor the invocation of an individual judge’s immortality satisfactorily faces up to the force of the appeal to the judgment that the court of history future may render. Each response just insists that our legal tradition is as resolutely backward-looking as the present-day judge making that response claims that tradition is.

There is, however, another type of question that is offered in response to the invocation of the court of history future: “Who

⁸³ *Id.*

⁸⁴ See *supra* text accompanying note 67.

⁸⁵ *Jones*, 975 F.3d at 1050.

⁸⁶ THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 250 (Robert Pierce Forbes ed., Yale Univ. Press 2022) (1785).

⁸⁷ Letter from Thomas Jefferson to Louis H. Girardin (Mar. 27, 1815), in 8 THE PAPERS OF THOMAS JEFFERSON: RETIREMENT SERIES 384 (J. Jefferson Looney et al. eds., 2011).

⁸⁸ U.S. CONST. pmbl.

Knows?” Here, again, Justice Scalia nicely articulates the thinking that underlies using this question to fend off the suggestion that the court of history future might be a guide to judicial judgment.

Dissenting in *Planned Parenthood v. Casey*, which had reaffirmed the right to abortion first recognized in *Roe*, Justice Scalia vividly called to mind the portrait of *Dred Scott*'s author, Chief Justice Roger Taney, hanging at Harvard Law School.⁸⁹ Justice Scalia did so to make a point about the difficulty of anticipating what the future holds:

There seems to be on his face, and in his deep-set eyes, an expression of profound sadness and disillusionment. Perhaps he always looked that way, even when dwelling upon the happiest of thoughts. But those of us who know how the lustre of his great Chief Justiceship came to be eclipsed by *Dred Scott* cannot help believing that he had that case . . . burning on his mind.⁹⁰

Justice Scalia does not deny in this passage that Taney cared about history's future judgment. Indeed, Justice Scalia imagines that Taney was—understandably—all but consumed by it. But Justice Scalia contends that just as Taney was wrong to think that he could anticipate what would follow in *Dred Scott*'s wake, so too was the *Casey* Court wrong to anticipate that its ruling could settle the abortion controversy: “It is no more realistic for us in this litigation, than it was for [Taney] in that, to think that an issue of the sort they both involved . . . can be ‘speedily and finally settled’ by the Supreme Court”⁹¹

The use of the “Who Knows?” question to respond to an appeal to the court of history future acknowledges the anxiety that the prospect of history's future judgment occasions in a way that the use of the “Who Cares?” question does not. It substitutes for a highly contestable claim about what law is—or about to whom a judge is answerable—an all but indisputable claim about the limits of human knowledge. Nor is the use of the “Who Knows?” question just a more polite way of asking, “Who Cares?” It is possible to be cautious about giving effect to what the court of history future might say in a particular case without being committed to ignoring what it has to say in all cases. Indeed, Justice Souter's concurrence in *Glucksberg* may be understood as an extended meditation on the difference between these two questions, in which he explains why, with respect to the claimed right to assisted suicide in that case, the “Who Knows?” ques-

⁸⁹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 1001–02 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

⁹⁰ *Id.*

⁹¹ *Id.* at 1002 (quoting INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES, S. DOC. NO. 101–10, at 126 (1989)).

tion must loom large, even though he cannot abide by the majority's seeming view in that case that the "Who Cares?" question is the only one worth asking.⁹²

The "Who Knows?" response thus usefully reminds a court too confident in its far-seeing ways that it may be finding in the future merely what it wishes for today. That was, in fact, Bickel's critique of the Warren Court, which he charged with building a heavenly city of its own imagining in the name of merely anticipating what it mistakenly thought was history's inevitable progress.⁹³

But the "Who Knows?" response, because it is prudential, is an equal-opportunity employer. It may be easily turned on a court too sure of its ability to divine the past and too sure that only the past need be divined. We may be tempted to think that the past is just there, waiting to be found, while history's future judgment is inherently beyond knowing. But that dichotomy is too sharp.

Chief Justice Roberts, in *Trump v. Hawaii*, and Justice Kavanaugh, in *Calvary Chapel*, each pointed to judgments that they thought the court of history future had already handed down. Judgments like that are no harder to find than is any artifact of public meaning, original or otherwise.

True, a judgment by the court of history future that has not yet been made is not knowable in the same way that a judgment by that court that already has been made is knowable. But predicting the future is sometimes easier than discerning the past. Justice Jackson certainly thought the past more inscrutable when it came to war powers than the future's judgment about where the balance in their exercise should lie.

It is worth remembering, too, that sophisticated defenders of originalism no longer assert that the method's virtue inheres in the easy-to-access answers that the method supplies.⁹⁴ That is partially because time travel in any direction is always somewhat fantastical. But it is also because controversial cases often turn on interpretive disputes about levels of generality and on disputes about what we are looking for in looking to the past—general principles or contempora-

⁹² See *Washington v. Glucksberg*, 521 U.S. 702, 764, 788–89 (1997) (Souter, J., concurring in the judgment) (explaining that substantive due process review requires weighing clashing principles "within the history of our values as a people," and noting that the Court should be reluctant to recognize unenumerated constitutional rights that may end up being short-lived).

⁹³ See BICKEL, *supra* note 59, at 14.

⁹⁴ See Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 781–86 (2022) (explaining the difficulties in discerning and applying history under originalism).

neous understandings of them, reflected in their contemporaneous application?

Thus, just as there is risk in judging based on forecasts of what is to come, there is risk in judging based on assessments of what has already been. Heavenly cities may be based on imagined pasts as easily as on imagined futures. If the forward-looking judge risks imagining a future in the judge's own pro-progress image, the backward-looking judge risks adhering to a narrow view of the past out of the judge's own commitment that change is best resisted.⁹⁵ Edmund Burke, it should be recalled, argued for looking to the past for guidance—rather than posterity's judgment—because he thought it best for the past to persist.⁹⁶

Admittedly, the counsel of prudence that the “Who Knows?” question offers to a court that sits—as I am suggesting all courts do—between the court of history past and the court of history future may seem like no counsel at all. Such counsel cautions against the too-ready recognition of what is new and the fetishization of what is old. Yet, what kind of caution is that? To live in time is to inhabit both the space of experience and the horizon of expectation,⁹⁷ and we know both that we have no reason to expect the future to bring more of the same and no ready means of anticipating what it will bring.

Nonetheless, the prudent counsel that the “Who Knows?” question impliedly offers at least appreciates the anxiety of influence that the court of history future occasions. It requires those partial to looking forward to face up to the perils of doing so. But it also reminds judges convinced of the need to look back not to mistake a legal tradition that has been informed by a concern about history's future judgment as if it were in fact a tradition that is untainted by any such concern. To make a mistake of that kind is to misread a tradition that has accommodated great change over time as if it were designed to permit no more such change to occur. It is thus to imagine, in the name of fidelity to history, that the end of history has arrived.

⁹⁵ See Anthony T. Kronman, *Precedent and Tradition*, 99 *YALE L.J.* 1029, 1047, 1067 (1990) (citing Edmund Burke as “the outstanding defender of tradition in the modern age,” looking to his writings “to understand the ancient but now largely discredited idea that the past has an authority of its own which . . . is inherent and direct,” and describing a sense of “mutual indebtedness” with one's predecessors and successors).

⁹⁶ MICHAEL ROSEN, *THE SHADOW OF GOD* 272 (2022) (arguing that the idea that “historically received customs and institutions have an intrinsic value that makes them worth defending” and that “tradition embodies a wisdom beyond the reach of justificatory reason” can be traced back to Burke).

⁹⁷ REINHART KOSELLECK, *FUTURES PAST: ON THE SEMANTICS OF HISTORICAL TIME* 259–63 (Keith Tribe trans., Colum. Univ. Press 2004) (1985).

For that reason, I am convinced that while it is fair to ask in response to an invocation of the court of history future, “Who Knows?,” it is a mistake to ask, “Who Cares?” Because courts long have cared—and still do—about the future and what it will have to say, that latter response risks encouraging defenders of the court of history past to try to have their cake and eat it, too. It invites them to confidently reject all calls for the need to look forward even as they claim to be casting no doubt on forward-looking rulings that the court of history future has already affirmed, *Brown* first among them.

With these reasons for keeping the “Who Knows?” question in mind and the “Who Cares?” question at bay, it is useful to recall—and here I am coming to the end—a question at the heart of *Dobbs*, which overruled *Casey* and *Roe* chiefly because each recognized a right without deep roots in the past. To explain why precedents so long in place did not warrant the respect that precedent usually does, the *Dobbs* Court highlighted a key question: Isn’t any decision as “egregiously wrong” as *Plessy* no more worthy of respect than *Plessy* itself?⁹⁸

If, in asking that question, a court is acknowledging all the history that followed *Plessy*—and thus all the history that proved the first Justice Harlan’s dissent right in predicting that “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”⁹⁹—then I think that a court is asking a question similar to the one that the Chief Justice asked of *Korematsu* and thus a fair one. For a court is then asking whether the history that followed (or will follow) the precedent at hand reveals that precedent to have been (or will reveal it to be) as unworthy of respect as the history that followed *Plessy* showed that ruling to have been when it was decided.

But if in asking that question, a court is asking only whether the precedent at hand recognized a right that is itself deeply rooted in the past, then such a court is not relating to history so much as creatively misreading it. For in asking only that question, such a court is forgetting that there are two senses of the court of history that influence what judges do—not only one—because such a court is then forgetting that it is history’s retrospective judgment that makes *Plessy* a present-day marker of a court gone wrong. Indeed, without the court of history future’s harsh judgment of *Plessy* lighting the way, what “opportunity” would there be to announce, without even the prospect

⁹⁸ See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2265 (2022) (suggesting that *Roe* should have long been overturned because it, like *Plessy*, was “deeply damaging”).

⁹⁹ *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

of present dispute, what the Court announced in *Dobbs* in echoing Harlan's dissent in *Plessy*: that, as the *Dobbs* Court put it, *Plessy* "betrayed our commitment to 'equality before the law'?"¹⁰⁰

That announcement draws its unchallenged acceptance in our day by leveraging the history that followed *Plessy*—a history that paved the way not only for *Brown* but also for *Brown*'s vindication in history's eyes. And that statement then further leverages that history by invoking "our commitment to the equality before the law" in terms that are open-ended enough and inclusive enough to permit new understandings of it. As a result, the confident invocation of that expansive principle hardly shows that a ruling must be wrong unless it draws only on the court of history past. Indeed, the very case that overruled *Plessy*—*Brown*—gave meaning to that principle by accounting for the court of history future, while decades later the first case in the *Romer* line of authority invoked *Plessy*'s dissent to make room for what the culminating case in that same line—*Obergefell*—called the "new insight"¹⁰¹ gained from "future generations"¹⁰² that not even *Brown*'s authors could foresee.

CONCLUSION

Courts that forget history rarely judge well—no matter how much they seek to adhere to it. So just as a court that cares nothing of the past cannot do its work well, neither can a court that proceeds as if history has stopped. "Judge not, that ye be not judged"¹⁰³ is no option for the judge charged with resolving a dispute. Thus, so long as courts retain the power to resolve whether novel rights may be recognized—or may be overruled after having been many decades in place—they must keep both the court of history past and the court of history future in mind. Otherwise, they will be ill-equipped to make the kind of prudential judgments about the relationship between past, present, and future that, in American law, have long-determined legal meaning.

Will history judge kindly a kind of judging that looks only in one direction and then only back? We cannot know the answer to that question for sure from where we sit. I hope I have convinced you, though, that—even from where we sit—we should care about the answer that the court of history future would give and do our best to account for that answer fairly in deciding how to judge today.

¹⁰⁰ *Dobbs*, 142 S. Ct. at 2265 (quoting *Plessy*, 163 U.S. at 562 (Harlan, J., dissenting)).

¹⁰¹ *Obergefell v. Hodges*, 576 U.S. 644, 664 (2015).

¹⁰² *Id.*

¹⁰³ *Matthew* 7:1 (King James).