

JUDICIAL MORAL PROPHECY

DANIEL B. RICE*

ABSTRACT

American judges decry past moral lapses as intolerable. They paint their predecessors' worst mistakes as tragedies that must never be allowed to happen again. When given the chance to avoid new injustices, however, judges increasingly flaunt their moral indifference. They insist that legal fidelity requires them to ignore whether their own rulings will be remembered as monstrous. But this cavalier outlook—for all its devotion to the past—is remarkably ahistorical. Feats of legal craft have never survived cultural repudiation. When precedents become morally shameful, the quality of their reasoning ceases to matter. The opinions' authors are remembered not for the technical virtues they displayed, but for the evils they enabled.

This Article explains why courts should contemplate—and heed—the moral judgments of coming generations. Doing so is not an arbitrary projection of personal fancy; it is a corollary of the shared practice of retrospective condemnation. Tenets of cultural morality often achieve judicial recognition, and those truisms inevitably shape how courts perceive their interpretive responsibilities. Methodologies that ignore the outlines of future regret thus threaten to saddle the legal system with precedents that time will construe as lawless.

Despite the formalizing pressures of modern legal discourse, a countertrend has begun to emerge: that of judicial moral prophecy. This growing practice should be viewed as an essential adjunct to the rule of law, rather than a sad diversion from it. Factors that will ultimately eclipse logical precision can and should inform conceptions of judicial duty in the present. And past patterns of failure offer insights for transcending current cultural assumptions. In the end, the legal system suffers when judges inflict tragic harms for the sake of analytical purity. We should stop pretending that legal fidelity blinds us to this recurring lesson.

* Assistant Professor, University of Arkansas School of Law. For helpful feedback and conversations, I thank Stuart Benjamin, Tommy Bennett, Dan Epps, Alden Fletcher, Alex Nunn, Chas Tyler, and Nina Varsava, as well as participants in the Twelfth Annual Junior Faculty Federal Courts Workshop and University of Arkansas Faculty Workshop.

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INTRODUCTION

The modern Supreme Court, it seems, cares little about how society will judge its work. Even in high-salience cases, the Justices increasingly describe their responsibilities as flowing solely from a static past. Culturally adaptive firearm regulations are received with scorn;¹ life-shaping liberty interests cannot survive their encounter with “history and tradition.”² Naturally, then, the Court has disclaimed any authority to anticipate the outrage of later audiences.³ This stance draws support from influential lower-court judges who have ridiculed the supposed relevance of future

1. See *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2128–30 (2022).

2. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2253 (2022).

3. See *id.* at 2279 (declaring that “we . . . have no authority” to anticipate how “society will respond to today’s decision”); *id.* at 2308 (Kavanaugh, J., concurring) (criticizing an earlier decision for engaging in “a predictive judgment about . . . the people’s views on the abortion issue”); see also Michael S. McGinniss, *A Tribute to Justice Antonin Scalia*, 92 N.D. L. REV. 1, 7 (2016) (stating that Justice Scalia disclaimed any “authority to . . . discern what ‘the right side of history’ is on a given question”).

morality.⁴ Amidst it all, academic originalists continue to portray judicial review as largely an exercise in historical fidelity.⁵ Institutional support for this past-centered paradigm has never been greater.

Far less clear is whether the landmark outcomes of a backward-facing jurisprudence will enjoy lasting acceptance. Time and again, earlier perceptions of legal legitimacy have been warped by the power of cultural memory. Years on, logic and technique tend to matter far less than whether a decision comports with dominant substantive values.⁶ American lawyers now celebrate weakly reasoned precedents that helped build a just society,⁷ and they lament examples of legal craft that our nation can no longer abide.⁸ The best-laid doctrines will be repudiated—and their authors vilified—if they prove to have spectacularly misjudged the future.

To date, formalist methodologies have failed to account for this recurring dynamic. But numerous scholars have ventured to predict the shape of societal regret. Professor Justin Driver, for example, has insisted that the use of corporal punishment in public schools will eventually be recalled with “shame and embarrassment.”⁹ Similar claims have been made about

4. See, e.g., *Jones v. Governor of Florida*, 975 F.3d 1016, 1050 (11th Cir. 2020) (en banc) (Pryor, C.J., concurring) (“Our duty is not to reach the outcomes we think will please whoever comes to sit on the court of human history.”); *In re State*, 489 S.W.3d 454, 456 (Tex. 2016) (Willett, J., concurring) (contending that “allegiance to the Rule of Law” requires judges to suppress their “desire to be fêted as on the ‘right side of history’”); J. Harvie Wilkinson III, *Subjective Art; Objective Law*, 85 NOTRE DAME L. REV. 1663, 1675–76 (2010) (claiming that concern for how “history will judge” one’s work “has no place in judging”).

5. See William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 L. & HIST. REV. 809, 812 (2019) (stating that American law “reflects the accumulation of past law,” including only those changes that “can be traced back to the law of the Founding”); Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 1 (2015) (“[T]he original meaning of the constitutional text should constrain constitutional practice.”).

6. See Jack M. Balkin, *Korematsu as the Tribute that Vice Pays to Virtue*, 74 ARK. L. REV. 255, 267 (2021) (“[W]hat we tend to remember years later about the work of courts . . . is whether, in the eyes of later generations, they did justice in their time.”); see also *infra* notes 22, 34.

7. See Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 CALIF. L. REV. 1721, 1722–23 (2001) (explaining that *Brown v. Board of Education* “became a cultural icon” even though its reasoning “was widely ridiculed at the time”); Or Bassok, *Legitimacy Without Legality* 44 (May 1, 2023) (unpublished manuscript), <https://ssrn.com/abstract=4217070> [<https://perma.cc/7P2X-LT59>] (“As years go by, fractures in legality can be healed by strong public support.”).

8. See MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 28 (2006) (“Taney’s constitutional claims in *Dred Scott* were well within the mainstream of antebellum constitutional thought.”); Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 415 (2011) (denying “that *Plessy* can fairly be called a model of bad legal reasoning”).

9. JUSTIN DRIVER, *THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND* 184 (2018).

practices as diverse as mass incarceration,¹⁰ the death penalty,¹¹ abortion,¹² and the institution of marriage.¹³ Time will vindicate only some of these varied predictions. Yet their underlying impulse seems incontrovertible. There is no reason to believe that today's generation, uniquely, will escape history's condemnation. At least some recent practices will almost certainly leave posterity aghast at our collective moral blindness.

American legal culture encourages just these sorts of retrospective judgments. It is common to speak of an "anticanon" of past decisions that stand for propositions our society has "collectively renounced."¹⁴ Judges of all ideological stripes frequently describe former practices as not just unlawful, but shameful and benighted.¹⁵ The prevalence of this distinction can serve a crucial educative function. The premise of maintaining an anticanon—and denouncing historical tragedies—is that today's actors should learn from these grave missteps. Pondering past patterns of failure can help public officials transcend their limited moral perspectives as they seek to avoid new injustices. Several scholars have urged just this, calling for greater awareness of how present-day practices will be viewed in the eyes of later generations.¹⁶

10. See Michelle Alexander, Opinion, *In Prison Reform, Money Trumps Civil Rights*, N.Y. TIMES (May 14, 2011), <https://www.nytimes.com/2011/05/15/opinion/15alexander.html> [<https://perma.cc/HV2V-4N5E>] (predicting that "future generations will judge us harshly" for enabling mass incarceration).

11. See Kevin M. Barry, *The Law of Abolition*, 107 J. CRIM. L. & CRIMINOLOGY 521, 558 (2017) ("[T]he death penalty will come to be seen as one of the worst indignities our Nation has ever known . . .").

12. See WILLIAM F. BUCKLEY, JR., A HYMNAL: THE CONTROVERSIAL ARTS 282 (1978) (suggesting that "one hundred years from now Americans will look back in horror at our abortion clinics," and comparing those facilities to antebellum slave markets).

13. See Dianne Post, *Why Marriage Should Be Abolished*, 18 WOMEN'S RTS. L. REP. 283, 302 (1997) ("Some day history will look back on the institution of marriage as we now look back on the institution of slavery.").

14. Greene, *supra* note 8, at 384.

15. For a detailed account of such assertions, see Daniel B. Rice, *Repugnant Precedents and the Court of History*, 121 MICH. L. REV. 577, 595–99 (2023).

16. See STEVEN W. BENDER, MEA CULPA: LESSONS ON LAW AND REGRET FROM U.S. HISTORY 16 (2015) ("I decided to examine historical instances of regret within the United States for common clues that should have been evident contemporaneously to policymakers and other participants."); Charles R. Calleros, *Advocacy for Marriage Equality: The Power of a Broad Historical Narrative During a Transitional Period in Civil Rights*, 2015 MICH. ST. L. REV. 1249, 1252–53 ("[A]s a society, we often could benefit from a reminder that . . . future generations . . . will judge us with benefit of hindsight and a broader perspective."); Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 TEX. L. REV. 1929, 1960 (1991) ("[T]here is nothing like the fear of tomorrow's judgment to instill a little needed reexamination into what we do for a living."); LINDA C. MCCLAIN, WHO'S THE BIGOT? LEARNING FROM CONFLICTS OVER MARRIAGE AND CIVIL RIGHTS LAW 9 (2020) ("This book uses the idea of generational moral progress to highlight that over time, people come to understand that practices once defended as natural, necessary, and just are unjust."); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1146 (1997) ("As we condemn the ways in which past

Yet advocates of this stance have found limited success in today's environment. Their warnings have been little match for the conventional view that judges have no business speculating about zeitgeists to come. Even scholars unallied with the conservative legal movement have discouraged judges from channeling future morality.¹⁷ Most notably, Professor Jack Balkin—who fully appreciates how normative shifts can engender perceived tragedies¹⁸—counsels judges to live primarily in the present. Rather than try to “curry favor” with an unknown future, Balkin advises, judges should simply operate “scrupulously and professionally.”¹⁹ It is not their job to consider whether posterity will rue their opinions, because “the future belongs to the future”—not to us.²⁰ What matters today are the technical virtues of “[c]raft and judiciousness.”²¹

Courts should not neglect basic rule-of-law values in deciding culturally salient cases, of course. But the formalizing pressures of modern legal discourse have reinforced an equally misguided tendency. Even as they denounce past rulings as wicked and heartless, many judges refuse to imagine how their strict devotion to craft could one day be viewed in the same light. They draw legal lessons from past moral lapses while shutting off conversations about their own normative legacies. In the end, though, courts are not graded on their analytical neutrality or their mastery of grammatical canons. What matters is whether they advanced—or impaired—substantive values deemed critical to a just society.²² Historical

generations of Americans interpreted the meaning of equal protection, we might also consider how future generations of Americans will judge our own.”). As this Article was being finalized for publication, Judge David Barron published a thoughtful meditation on courts' responsibility to account for the judgments of later generations. See generally David J. Barron, Madison Lecture, *The Court of History*, 98 N.Y.U. L. REV. 683 (2023). Although I cannot do more than acknowledge Judge Barron's contribution here, I strongly commend it to readers who seek further illumination on this topic.

17. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 69 (1980) (critiquing a conception of judicial review that would anticipate “the future development of popular opinion” or elevate the values of “tomorrow's observers”); Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 483 (2005) (“[C]ommentators have objected that . . . to defend such a soothsaying role for the Court is normatively problematic.”).

18. See Jack M. Balkin, *Arguing About the Constitution: The Topics in Constitutional Interpretation*, 33 CONST. COMMENT. 145, 168 (2018) (“It is very likely that later generations will consider some of what we do to be unjust, morally compromised, and even depraved.”).

19. Jack M. Balkin, *The Use that the Future Makes of the Past: John Marshall's Greatness and Its Lessons for Today's Supreme Court Justices*, 43 WM. & MARY L. REV. 1321, 1335 (2002).

20. *Id.*; see also JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* 28 (2011) (“[W]e live in the present and therefore have no choice but to see things from a present-day perspective.”).

21. Balkin, *supra* note 19, at 1335.

22. See Sanford Levinson, *Was the Emancipation Proclamation Constitutional? Do We/Should We Care What the Answer Is?*, 2001 U. ILL. L. REV. 1135, 1151 (“What [eventually] dictates popular acceptance (or rejection) of judicial decisions has almost nothing to do with their conformity to ostensible norms of legal reasoning.”); Greene, *supra* note 8, at 411 (“*Dred Scott* does not gnaw at us because it misused syllogism or invented constitutional rights; we hate it because it abided constitutional

formalism thus tends to exalt short-term legal legitimacy at the expense of long-term moral legitimacy.²³ If today's understandings of history must trump all else, judges lose their discretion to guard against moral disaster.

We are fortunate that some actors *have* taken the moral long view at key moments. Dissenting in *Plessy v. Ferguson*, Justice Harlan predicted that the majority's sanctioning of racial apartheid would, "in time, prove to be quite as pernicious as . . . the *Dred Scott* case."²⁴ Harlan deftly foresaw how a routine application of existing doctrine would come to be viewed as callous and indefensible.²⁵ His lonely effort helps assure us that judicial tragedies are not inevitable—that heeding intergenerational ethos can curb today's toleration of evil. Similar foresight played out in Congress following the Court's decision in *Brown v. Board of Education*.²⁶ Signatories of the so-called Southern Manifesto excoriated the Court's rather lax legal reasoning.²⁷ One senator cut through these points, decrying the Manifesto as "so shameful that it will forever be a dark page in American history."²⁸ The less lawyerly perspective triumphed in the end (as it often does).

This Article explains why judges should contemplate—and act upon—the moral revulsion of coming generations. I call this practice *judicial moral prophecy*. Far from a lawless projection of personal fancy, predictions like Harlan's are a corollary of the accepted practice of retrospective condemnation. It would be nonsensical for judges to label past phenomena "shameful,"²⁹ "ignominious,"³⁰ "grotesque,"³¹ "morally repugnant,"³² and

evil."); University of Pennsylvania, *Penn Presidential Inauguration Academic Symposium*, YOUTUBE, at 33:05 (Oct. 21, 2022), <https://www.youtube.com/watch?v=-BXAU9DS2iw> [<https://perma.cc/S9NN-84UX>] (statement of Justice Elena Kagan) ("[I]f you're going to be the greatest lawyer of the 20th century, maybe the real question is, . . . have you done the most justice?").

23. Professor Richard Fallon has usefully distinguished the concepts of legal, sociological, and moral legitimacy. See RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 22–24, 35–41 (2018).

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

25. See PETER J. CANELLOS, THE GREAT DISSENTER: THE STORY OF JOHN MARSHALL HARLAN, AMERICA'S JUDICIAL HERO 3 (2021) (lauding "Harlan's prescience—his ability to look over the horizon and envision . . . a hundred years in[to] the future"); *id.* at 487 (explaining that Harlan's *Plessy* dissent "rings down through the centuries not because it was legally sound but because it was morally right").

26. 347 U.S. 483 (1954).

27. See 102 CONG. REC. 4460 (1956).

28. *Id.* at 4687 (statement of Sen. McNamara).

29. *United States v. Vaello Madero*, 142 S. Ct. 1539, 1554 (2022) (Gorsuch, J., concurring) (*Insular Cases*); *Tex. Dep't of Hou. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 566 (2015) (Alito, J., dissenting) (de jure residential segregation); *United States v. Fordice*, 505 U.S. 717, 748 (1992) (Thomas, J., concurring) (de jure school segregation).

30. *Patel v. Tex. Dep't of Licensing & Regul.*, 469 S.W.3d 69, 94 (Tex. 2015) (Willett, J., concurring) (*Buck v. Bell*).

31. *Gamble v. United States*, 139 S. Ct. 1960, 2005–06 (2019) (Gorsuch, J., dissenting) (*Dred Scott v. Sandford*, *Plessy v. Ferguson*, and *Korematsu v. United States*).

32. *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (the internment of Japanese Americans upheld in *Korematsu v. United States*).

“a disgrace,”³³ yet scold colleagues who wish to avoid perpetrating further evils. Appealing to the future’s sense of shame can help judges escape doctrinal structures that would dishonor their institutions and inflict unjust suffering. Reasoning openly about future ethos also enables direct acknowledgement of a case’s moral stakes, rather than resting solely on mundane analysis that will soon be forgotten.³⁴ And normalizing this future-oriented practice could help advocates draw guidance from past achievements without being accused of animus or disrespect toward those holding traditional views.³⁵

Given the advantages of extending one’s moral gaze, it should not be surprising that many judges have followed in Justice Harlan’s footsteps. This Article is the first to document that growing practice. In a variety of circumstances—covering the areas of race, abortion, voting rights, climate change, LGBTQ+ rights, criminal procedure, and tribal sovereignty—judges have voiced their desire to avoid rulings that later generations would deplore.³⁶ Their opinions embody the paradoxical belief that intervening in an ongoing cultural conflict can enhance judicial legitimacy, at least in the long run. That is a lesson the Court well understood in *Brown*, “the greatest judicial prognostication of all time.”³⁷

Not all judicial prophecies will come true, of course. But it is wrong to characterize posterity’s moral verdicts as entirely unknowable. Throughout American history, practices that once seemed reasonable began instead to elicit collective horror. These patterns of moral development can yield insight into which of today’s arrangements will suffer societal contempt. Modern scholars have offered complementary theories for how to predict

33. *Confirmation Hearing on the Nomination of Hon. Brett M. Kavanaugh to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 222 (2018) (statement of Hon. Brett M. Kavanaugh) (*Buck v. Bell*).

34. See ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 11 (1970) (“Historians a generation or two hence . . . may barely note, and care little about, method, logic, or intellectual coherence . . .”); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1315–16 (1976) (arguing that “substantive results”—and not just “technical virtuosity”—are essential for long-term institutional legitimacy); SHERYLL CASHIN, *LOVING: INTERRACIAL INTIMACY IN AMERICA AND THE THREAT TO WHITE SUPREMACY* 4 (2017) (“In the long arc of history, the meaning of [a] case becomes clearer.”); Klarman, *supra* note 7, at 1721 (“[H]istory’s verdict on a Supreme Court ruling depends more on whether public opinion ultimately supports the outcome than on the quality of the legal reasoning or the craftsmanship of the Court’s opinion.”); J. Harvie Wilkinson III, *The Rehnquist Court and the Search for Equal Justice*, 34 TULSA L.J. 41, 41 (1998) (“Most of us today are not interested in the doctrinal progressions of *Dred Scott v. Sandford* or *Plessy v. Ferguson*. We only know . . . that the Supreme Court got those two cases terribly wrong and that *Brown v. Board of Education* was supremely right.”).

35. For one cautionary tale, see *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1729 (2018) (holding that a decision-making body had not given “neutral and respectful consideration” to a religious-exemption claimant because one of the body’s members noted that religion had been “used to justify all kinds of discrimination throughout history”).

36. See *infra* Part II.B.

37. Klarman, *supra* note 7, at 1756.

these future judgments.³⁸ Whatever the limitations of such models, it would defy human experience and instinct to write off our moral future as wholly inscrutable. Ignoring that future's potential contours is in no sense required by "the nature of the judicial role."³⁹ It is an abdication of responsibility—a self-indulgent refusal to protect the courts from succumbing to the worst pitfalls of legalism. Indeed, judges who preach institutional restraint *do* engage in moral prophecy when they sense that a calamity is unfolding in real time.⁴⁰ This behavior reveals much about whether contemplating tomorrow's anticanon can be squared with the rule of law.

The Article unfolds as follows. Part I explains why and how legal actors engage in moral prophecy. Because the salience of legal reasoning decreases sharply over time, factors that will eclipse logical precision should inform conceptions of judicial duty in the present. Without fail, decisive cultural shifts have revealed earlier perceptions of legal constraint to be far too rigid. Judges can learn from these mistakes by adopting an intergenerational understanding of legality. With this widened perspective, pursuing analytical purity at the expense of cultural durability comes to be seen as a parochial and self-defeating strategy.⁴¹ Judges thus rightly err on the side of avoiding results that they believe our nation will one day abhor.

Part II recounts moral prophecy's history in both the courts and Congress. Accounting for the moral verdicts of later generations is now a recurring judicial practice that should be carefully assessed rather than curtly dismissed. And taking stock of similar congressional behavior

38. See Kwame Anthony Appiah, *What Will Future Generations Condemn Us For?*, WASH. POST, Sept. 26, 2010, at B01 ("[A] look at the past suggests three signs that a particular practice is destined for future condemnation."); BENDER, *supra* note 16, at 25 (arguing that past examples of dehumanization enable us "to foresee the potential for societal regret and to thus alter the course of history during the current generation"); Calleros, *supra* note 16, at 1303 ("[I]t is revealing that our society seems to repeat the patterns of resistance that are ultimately rejected in each new step forward."); Mark Gibney & Erik Roxstrom, *The Status of State Apologies*, 23 HUM. RTS. Q. 911, 938 (2001) ("[I]t is not nearly as easy to recognize present wrongs as it is to recognize past wrongs Yet, we can be informed in this process by the apologies that already have been issued."); MCCLAIN, *supra* note 16, at 11 ("Past examples . . . provide reason to be skeptical or cautious about appeals to history, tradition, and conscience.").

39. *Jones v. Governor of Florida*, 975 F.3d 1016, 1049 (11th Cir. 2020) (en banc) (Pryor, C.J., concurring).

40. See *Stenberg v. Carhart*, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting) ("I am optimistic enough to believe that, one day, *Stenberg v. Carhart* will be assigned its rightful place in the history of this Court's jurisprudence beside *Korematsu* and *Dred Scott*. Th[is] method of killing a human child . . . is so horrible that even the most clinical description of it evokes a shudder of revulsion."); *Richmond Med. Ctr. for Women v. Herring*, 570 F.3d 165, 183 (4th Cir. 2009) (Wilkinson, J., concurring) (arguing that to constitutionalize a right to certain second-trimester abortions would be "to invite coming generations to judge harshly the coldness of our ways"); *id.* ("Surely centuries hence, people will look back on this gruesome practice . . . [a]nd they will shudder.").

41. See Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959, 967 (2008) ("[A] society cannot sustain the rule of law by pursuing rule-of-law values single-mindedly at the expense of all other ideals.").

usefully highlights both the promise and perils of visualizing a distant ethical consensus. Members of Congress rightly acknowledge that history will judge their actions—and that voting unjustly is a tragic outcome,⁴² rather than a sign of professional virtue.⁴³ But the very commonality of such rhetoric reveals that moral prophecy can easily become a partisan cudgel. Current political disagreements almost perfectly track incompatible claims about which causes history will favor. Practiced too loosely, moral prophecy could exacerbate ideological polarization in the judiciary (as well as expose the depth of existing rifts).

Part III identifies the key advantages of judicial moral prophecy—most notably, its capacity to avert institutional tragedies. Part IV addresses the strongest objections to this controversial technique. It explains why moral imagination is an essential adjunct to the rule of law, rather than a regrettable diversion from it. Judges' professional training renders them uniquely susceptible to condoning future evils under the rubric of obligation. Courts should strive to avoid that ugly fate—even if the future is uncertain, their democratic credentials wanting, and Justice Harlan's *Plessy* prediction a faint memory. Part V closes by offering practical guidance for engaging in moral prophecy. Such efforts must balance predictive clarity against the reality that law is a professionally grounded and culturally dependent practice. Courts cannot accomplish their long-term aims by issuing rulings that would strike most Americans as absurd. But neither do they act judiciously by simply taking for granted the contingent assumptions of their own time.

In the end, reaching enduring results matters more than giving airtight legal reasons. Courts succeed when their votes are vindicated by the broader culture; they fail disastrously when their decisions become morally untenable. We should stop pretending that legal fidelity blinds us to this recurring lesson.

I. TIME, REASONS, AND RESULTS

Courts have very little going for them apart from the quality of their reason-giving. Recognizing their inability to foster compliance by sheer ipse

42. See, e.g., 166 CONG. REC. S1053 (daily ed. Feb. 13, 2020) (statement of Sen. Thune) (“When people look back at us, we want to be remembered for standing up for what is right, not for going along with injustice.”); 163 CONG. REC. 1494 (2017) (statement of Rep. Quigley) (“We all bear a responsibility to learn from the evils of history so that we will never make the same mistakes again.”); 150 CONG. REC. 22940, 22979 (2004) (statement of Sen. DeWine) (“I often think, as a public official and as an American, we do not want to be on the wrong side of history.”); 97 CONG. REC. 5753 (1951) (statement of Rep. Hays) (“We do not want an adverse judgment of history to be imposed upon us.”).

43. See generally David Schraub, *Sadomasochistic Judging*, 35 CONST. COMMENT. 437 (2020) (book review) (criticizing a conception of judging that valorizes harsh results, given their inexplicability by anything other than strict fidelity to law).

dixit, the Justices have been known to trace their institution's legitimacy to its reputation for principle.⁴⁴ But logic and craft are imperfect guarantors of social acceptance. As recent empirical work has shown, the Supreme Court's public stature is largely a function of whether its rulings prove to be substantively popular or unpopular.⁴⁵ Most people, for example, care far more about whether firearm restrictions are legally permissible than whether the Court has accurately characterized centuries-old authorities on that subject.

This emphasis on outcomes only grows more pronounced with time. Even among lawyers, judicial decisions are later lionized for the good they brought about, not the logical prowess they displayed. Several well-known examples demonstrate this point. The Court was initially criticized for failing to ground its invalidation of the white primary in "neutral principles that satisfy the mind."⁴⁶ Its school-desegregation cases were viciously assailed for their many analytical shortcomings.⁴⁷ When the Justices extended *Brown*'s school-based holding to other public settings in a series of unreasoned per curiam orders, famed legal academics were "virtually apoplectic."⁴⁸ And a former U.S. Solicitor General claimed that *Harper v. Virginia Board of Elections*,⁴⁹ which held state poll taxes to be

44. See Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107, 1112 (1995) ("Majority opinions are increasingly calling attention to the importance of maintaining the public's faith in the Court as a principle-guided institution . . ."); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 865–66 (1992), *overruled by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (stating that "the Court's legitimacy depends on making legally principled decisions"—ones "grounded truly in principle"); *Smith v. Turner (Passenger Cases)*, 48 U.S. (7 How.) 283, 470 (1849) (Taney, C.J.) ("[A decision's] authority should hereafter depend altogether on the force of the reasoning by which it is supported.").

45. See Stephen D. Ansolabehere & Ariel White, *Policy, Politics, and Public Attitudes Toward the Supreme Court*, 48 AM. POL. RSCH. 365, 373 (2020) ("[W]hen individuals evaluate the Supreme Court, they appear to rely on their beliefs about whether the Court agrees with them on key recent cases and on their own partisanship."); Neil Malhotra & Stephen A. Jessee, *Ideological Proximity and Support for the Supreme Court*, 36 POL. BEHAV. 817, 819 (2014) (finding that individuals "who are ideologically closest to the Court's position tend to exhibit the highest levels of trust and approval"); LEONARD W. LEVY, *AGAINST THE LAW: THE NIXON COURT AND CRIMINAL JUSTICE* xiv (1974) ("The public cares about results and has little patience for reasons.").

46. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 29 (1959).

47. See LEARNED HAND, *THE BILL OF RIGHTS: THE OLIVER WENDELL HOLMES LECTURES*, 1958, at 55 (1977) (describing *Brown* as "a *coup de main*" issued by a Court that had "assume[d] the role of a third legislative chamber"); Michael J. Klarman, *Windsor and Brown: Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 142 (2013) ("*Brown* was widely vilified in the 1950s—not only by southern white supremacists, but also by scholars and judges.").

48. MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 321 (2004).

49. 383 U.S. 663 (1966).

unconstitutional, had “repudiate[d] every conventional guide to legal judgment.”⁵⁰

Of course, criticisms like these cut no ice today. Precedents widely celebrated for making our society more just face no serious threat from devotees of reasoned elaboration. Instead, those cases’ political untouchability has prompted originalist scholars to defend them with zeal.⁵¹ It is no surprise that our most treasured judicial precedents can be reconciled with later, culturally inflected conceptions of original meaning. The more pressing question is whether a given methodology—in *real time*—tends to deliver results that prove morally enduring. But as experience has shown, it is usually those who most valorize constraint and tradition whose judgment is most maligned in retrospect. These opinions are distinguished by their refusal to acknowledge any link between cultural change and interpretive discretion.⁵² Indeed, that claimed indifference to results is supposedly what makes backward-facing adjudication legally attractive. Yet a jurisprudence of historical obeisance has repeatedly yielded outcomes that would make most modern Americans shudder. It is curious that any methodology so

50. ARCHIBALD COX, *THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM* 125 (1968).

51. See generally Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995); Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1 (2011); Steven G. Calabresi & Andrea Matthews, *Originalism and Loving v. Virginia*, 2012 BYU L. REV. 1393; David R. Upham, *Interracial Marriage and the Original Understanding of the Privileges or Immunities Clause*, 42 HASTINGS CONST. L.Q. 213 (2015); M. Frances Rooney, *The Privileges or Immunities Clause of the Fourteenth Amendment and an Originalist Defense of Gender Nondiscrimination*, 15 GEO. J.L. & PUB. POL’Y 737 (2017). See also David J. Garrow, *Give Brown v. Board of Education Its Due*, HUM. RTS., Summer 2004, at 2, 3 (“Wanting to be on the ‘right side of history’ may help explain judicial conservatives’ change of tune on *Brown*.”).

52. See, e.g., *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 426 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV (denying that “any change in public opinion or feeling . . . should induce the [C]ourt to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted”); *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 142 (1873) (Bradley, J., concurring) (discounting “[t]he humane movements of modern society” in upholding states’ authority to exclude women from the legal profession); *Hennington v. Georgia*, 163 U.S. 299, 303, 305–06 (1896) (concluding that states may imprison anyone who labors on Sunday, given that, “[f]rom the earliest period,” such “was the policy of many of the original States”); *Mackenzie v. Hare*, 239 U.S. 299, 311 (1915) (upholding a law that expatriated women marrying non-citizens, given that “[t]he identity of husband and wife is an ancient principle of our jurisprudence”); *United States v. Dege*, 364 U.S. 51, 56 (1960) (Warren, C.J., dissenting) (focusing on “Congress’ intent as it was in 1867” in concluding that husbands and wives, as unitary legal persons, cannot conspire to commit federal crimes); *Harper*, 383 U.S. at 674–75, 677 (Black, J., dissenting) (relying on “the original meaning of the Constitution” in concluding that “history is on the side of ‘rationality’ of the State’s poll tax policy”); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 659 (1974) (Rehnquist, J., dissenting) (citing the “longstanding” allowance of irrebuttable statutory presumptions as proof that pregnant teachers may be required to take unpaid leave five months before childbirth); *Taylor v. Louisiana*, 419 U.S. 522, 542 (1975) (Rehnquist, J., dissenting) (belittling emerging “perception[s] of modern life” in voting to uphold a law that presumptively exempted women from jury service); Barry Cushman, *The Securities Laws and the Mechanics of Legal Change*, 95 VA. L. REV. 927, 930 (2009) (“[T]he voting behavior of the Four Horsemen did not reflect a preoccupation with getting on the right side of history.”).

grounded in the past could avoid having such grave historical blunders held against it.

Judicial moral prophecy, by contrast, is not neutral on whether courts should leave disgraceful legacies. Its proponents seek to decide more justly today by drawing lessons from past injustices. The technique assumes that institutional actors have a responsibility not just to avoid replicating specific outrages, but to understand why those mistakes occurred so that others can be avoided. Its central insight is that tomorrow's tragedies may not seem so unreasonable today.⁵³ After all, most constitutional precepts now viewed as morally necessary were once vigorously contested. Judicial moral prophecy thus entails forecasting the outcome of an ongoing social struggle. It invites participants to reflect on existing doctrines and methods from the vantage of a future consensus. Current perceptions of legal constraint can be deceptive, for such beliefs are pervasively shaped by shifting cultural imperatives.⁵⁴ Anticipating the moral condemnation of later generations can thus alter one's choices in the present—both in exercising legal discretion and in determining that discretion's true scope.⁵⁵

Those who believe it wrong for public officials to inflict needless pain and embarrassment should be attracted to this method. An illustrative episode occurred in 1865, when the Senate debated whether to fund a bust of Chief Justice Roger Taney. Supporters of the appropriation pointed out that Taney had a first-rate legal mind and was a lifelong public servant.⁵⁶ But opponents viewed these traits as tangential to whether he deserved to be honored in marble. On that score, what mattered was whether his use of power had made America more just. Senator Sumner predicted that Taney would be “hooted down the page of history” for having ruled “wickedly” in *Dred Scott*.⁵⁷ Senator Wilson—who wore his lack of legal training as a

53. See PAUL H. ROBINSON & SARAH M. ROBINSON, CRIMES THAT CHANGED OUR WORLD: TRAGEDY, OUTRAGE, AND REFORM xi (2018) (“Our successors will find appalling and intolerable things that we as a society are presently quite willing to tolerate.”); Susan Pace Hamill, *The Book That Could Change Alabama*, 56 ALA. L. REV. 219, 241 n.141 (2004) (book review) (calling for “honest study and moral evaluation of lawyers . . . who believed they were promoting justice when future hindsight proves they were not”).

54. See Neil S. Siegel, *Umpires at Bat: On Integration and Legitimation*, 24 CONST. COMMENT. 701, 724 (2007) (“[T]here is no view from nowhere in constitutional law, no place for a Justice to stand that is divorced from the culture and society in which the Court operates.”).

55. That said, I do not dispute the authority of existing legal texts or urge judges to ignore inescapably clear constraints. See *infra* Part V.,

56. See CONG. GLOBE, 38th Cong., 2d Sess. 1012 (1865) (statement of Sen. Trumbull); *id.* (statement of Sen. Johnson).

57. *Id.* (statement of Sen. Sumner); *id.* at 1013 (deeming Taney's work “thoroughly abominable,” and envisioning that “the judgment of history” would condemn his “unjust” use of power).

badge of honor⁵⁸—similarly warned that “the coming future” would denounce Taney as “recreant to liberty and humanity.”⁵⁹

This righteous stance was controversial at the time. Other senators viewed their colleagues’ predictions as personally insulting⁶⁰ and a shocking deviation from sober legal analysis.⁶¹ A century and a half later, it is *these* reactions that seem grossly out of touch. Yet it is difficult to shake the sense that we are not at liberty to emulate Sumner and Wilson in evaluating current practices. Can we really be sure that society will come to regard capital punishment with “disbelieving revulsion”?⁶² Or that factory farming will eventually be seen as “a defining moral failing of our age”?⁶³ Or that the deportation of immigrants will be repudiated as “inhumane” and “uncivilized”?⁶⁴

No, we cannot. But we can be confident that if and when societal judgments like these are reached, our descendants will wonder how we could have possibly believed otherwise. And they will have little sympathy for judges who reached now-unthinkable results out of a sense of legal duty.⁶⁵ On those issues, judicial reasoning—parsed endlessly in our own day—will be an afterthought. What will matter is whether a decision either advanced or betrayed commitments regarded as indispensable to American life.⁶⁶ This is not remotely how courts describe their work, and it rarely informs how law is taught and practiced. But it could have profound

58. *Id.* at 1015 (statement of Sen. Wilson) (proudly exercising “higher qualities than the capacity to dribble . . . legal crudities learned in judicial tribunals”).

59. *Id.* at 1014.

60. *See id.* at 1012 (statement of Sen. Johnson) (“[T]hose who knew . . . the Chief Justice as well as I did would blush to say that his name is to be execrated among men.”).

61. *See id.* at 1015 (“I wonder it did not occur to them . . . that such men as Taney, and Wayne, and Catron, and Grier might be right, and they might be wrong.”).

62. Robert A. Burt, *Wrong Tomorrow, Wrong Yesterday, but Not Today: On Sliding into Evil with Zeal but Without Understanding*, 5 ROGER WILLIAMS U. L. REV. 19, 22 (1999).

63. Ezra Klein, *We Will Look Back on This Age of Cruelty to Animals in Horror*, N.Y. TIMES (Dec. 16, 2021), <https://www.nytimes.com/2021/12/16/opinion/factory-farming-animals.html> [<https://perma.cc/WVM6-WTRU>].

64. BETH C. CALDWELL, DEPORTED AMERICANS: LIFE AFTER DEPORTATION TO MEXICO 191 (2019).

65. *See* Richard Delgado & Jean Stefancic, *Do Judges Cry? An Essay on Empathy and Fellow-Feeling*, 70 CASE W. RES. L. REV. 23, 37 (2019) (“[O]ur judicial system has yielded a number of decisions that . . . prompt us, years later, to ask: *What were they thinking?*”).

66. *See supra* note 34.

implications for how judges view their responsibilities in a limited class of cases.⁶⁷

* * *

Three qualifications help clarify my use of the term “judicial moral prophecy.” First, the technique does not require judges to engage in moral philosophy, offer a “moral reading” of the Constitution,⁶⁸ or otherwise identify enduring moral values. Its premise is far less lofty: that American judges should seek to avoid outcomes that American society will come to abhor. The prevalence of moral pluralism has not prevented certain uses of state power from being widely viewed as intolerable. When such a societal consensus arises,⁶⁹ the legal profession inevitably rethinks what the Constitution has to say about the offending practice. The law is brought into line with what judges and lawyers know to be true as citizens.⁷⁰ Despite my chosen label, then, moral prophecy can be justified entirely on rule-of-law grounds. I leave to other theorists what “true” morality entails—and what it might (or might not) require of judges.

Second, moral prophecy need not assume a particular theory of moral development. Just as history disproves pat narratives of inexorable progress,⁷¹ it would be naive to assume that cultural morality will consistently evolve in anyone’s favored direction. America has witnessed countless leftward and rightward shifts over the centuries.⁷² That said, this Article draws lessons not just from collective moral change, but from collective *moral condemnation*. That concept is defined by occasions on which moral views indeed grew drastically more enlightened (by modern standards). And it is hardly rare for courts to memorialize these specific

67. See Calleros, *supra* note 16, at 1290 (urging judges to decide civil-rights cases “in a way that later will withstand the judgment of history”); Justin Driver, *The Supreme Court as Bad Teacher*, 169 U. PA. L. REV. 1365, 1426 (2021) (encouraging the Justices to “contemplate whether subsequent generations will embrace their opinions or reject them”); FALLON, *supra* note 23, at 82 (arguing that judicial legitimacy will be imperiled unless the Court attends to “forward-looking considerations of substantive justice”); Toni M. Massaro, *The Lawfulness of the Same-Sex Marriage Decisions: Charles Black on Obergefell*, 25 WM. & MARY BILL RTS. J. 321, 325 (2016) (urging judges “to live . . . on the right side of history,” content “to be measured accordingly in time”); Siegel, *supra* note 16, at 1148 (“We need also to ask ourselves what opinions like [*Washington v. Davis*] and [*Personnel Administrator of Massachusetts v. Feeney*] will look like a century hence.”).

68. See RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 2 (1996) (urging that the Constitution’s “broad and abstract” language be understood as codifying “moral principles about political decency and justice”).

69. On the idea of a cultural “consensus” in our deeply polarized times, see Rice, *supra* note 15, at 602.

70. See Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1454 (2001) (“Social legitimacy is not separate from legal legitimacy, but can spill back upon it.”).

71. See Justin Driver, *Constitutional Outliers*, 81 U. CHI. L. REV. 929, 980 (2014) (explaining that many issues have “elicited undulating attitudes from American citizens, not unidirectional ascent toward enlightenment”).

72. See *infra* Part IV.B.

examples of national progress.⁷³ One need not adopt a teleological or “Whig” view of history, then, to believe that prior moral shifts can hold crucial lessons for today’s interpreters. It is those who refuse to imagine the legal implications of future morality who misapprehend how the past speaks to our own time.

Lastly, efforts at moral prophecy need not be backed by evidence of emerging trends. The Justices do often cite state-level developments in building out various pieces of constitutional doctrine.⁷⁴ This technique helps assure the Court that it is not misjudging the times and betting on losing causes.⁷⁵ But persons who do not speak for a Supreme Court majority need not worry whether their normative claims will be vindicated in the “rather immediate foreseeable future.”⁷⁶ *Plessy*’s descent into infamy took many decades; the same may well be true of modern practices whose fate can be only dimly anticipated. Indeed, one of moral prophecy’s virtues is to free actors from the grip of existing cultural assumptions. Attentive to more than just short-term backlash, judges can imagine how their work will be assessed many generations from now—when some of today’s arrangements will be branded as not just unlawful, but odious.⁷⁷

II. FUTURE ETHOS: A HISTORY

Predictions are a staple of judicial decision-making. Judges warn, for example, that certain doctrines will trigger harmful real-world effects⁷⁸ and eventually be abandoned by the legal profession.⁷⁹ These are not acts of

73. See Rice, *supra* note 15, at 595–99.

74. See Corinna Barrett Lain, *The Unexceptionalism of “Evolving Standards,”* 57 UCLA L. REV. 365, 370, 373 (2009) (cataloguing “the Supreme Court’s reliance on the majority position of the states,” as well as “state legislative trends,” to inform its constitutional rulings in a variety of contexts).

75. See David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859, 864 (2009) (arguing that courts try to discern “emerging trends and future developments” by “identify[ing] laws that are losing popular support”).

76. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 239 (2d ed. 1986).

77. For reflections on the tension between moral prophecy and the maintenance of courts’ sociological legitimacy, see *infra* Part V.

78. See *Carpenter v. United States*, 138 S. Ct. 2206, 2247 (2018) (Alito, J., dissenting) (“I fear that today’s decision will do far more harm than good.”); *Brown v. Plata*, 563 U.S. 493, 561 (2011) (Scalia, J., dissenting) (warning of “the inevitable murders, robberies, and rapes to be committed by the released inmates”); *Boumediene v. Bush*, 553 U.S. 723, 827–28 (2008) (Scalia, J., dissenting) (“[T]oday’s opinion . . . will almost certainly cause more Americans to be killed.”); *Blakely v. Washington*, 542 U.S. 296, 323 (2004) (O’Connor, J., dissenting) (“The consequences of today’s decision will be as far reaching as they are disturbing.”).

79. See *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 832 (2014) (Ginsburg, J., dissenting) (“Neither brand of immoderate, judicially confirmed immunity, I anticipate, will have staying power.”); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 580 (1985) (Rehnquist, J., dissenting) (predicting that the federalism principle rejected by the Court “will . . . in time again command the support of a majority of this Court”); *Indus. Union Dep’t, AFL-CIO v. Am. Petrol. Inst.*, 448 U.S. 607, 724 (1980) (Marshall, J., dissenting) (expressing “confiden[ce] that the approach taken by the plurality today . . . will eventually be abandoned”).

interpretation; they are prophecies of regret, meant to stir reflection over the long-term consequences of reaching certain outcomes.

It would be but a slight step beyond these accepted practices to forecast regret on a societal scale. One could be forgiven, though, for supposing that moral prophecy plays little role in contemporary legal practice. That assumption enables judges to assert as “truth” that “the nature of the judicial role” excludes any concern for the moral hereafter.⁸⁰ But the assumption is false. Emulating Justice Harlan, many judges have fortified their legal analyses with forceful predictions about the future state of society. The nature of this practice is crucial to assessing the benefits, drawbacks, and threshold lawfulness of anticipating cultural abhorrence.

Not all future-oriented judgments disclose that orientation explicitly, however. Many judicial opinions likely reflect an unstated desire to end up on the right side of history. Part I.A canvasses a series of credible scholarly claims to this effect. Part II.B then documents explicit predictions of future morality in both judicial decisions and congressional floor statements. Members of all branches of government have embraced their accountability to the eventual judgments of society. Just as moral neutrality toward the past is neither expected nor tolerable, these actors remain conscious of the scrutiny their own generation will endure. Their urgent calls offer useful insight into moral prophecy’s promise—as well as its potential pitfalls.

A. *Implicit Predictions*

Any discussion of the judicial tendency to anticipate societal judgments must begin with Professor Alexander Bickel’s 1970 monograph, *The Supreme Court and the Idea of Progress*. Bickel argued that the Warren Court was “seized of a great vision” for the future⁸¹—a more egalitarian culture that the Justices expected to emerge, and that their decisions would help precipitate. The Court knew that its predecessors had been condemned for exalting logical rigor above human flourishing.⁸² And so the Justices “placed [a] bet on the future,”⁸³ relying more “on events for vindication . . . than on the method of reason for contemporary validation.”⁸⁴ The Warren

80. *Jones v. Governor of Florida*, 975 F.3d 1016, 1049 (11th Cir. 2020) (en banc) (Pryor, C.J., concurring).

81. BICKEL, *supra* note 34, at 100.

82. *See id.* at 12 (describing the Court as “thoroughly conscious of the condemnation . . . visited” on prior Justices whose rulings preserved social stratification).

83. *Id.* at 99.

84. *Id.* at 12; *see also id.* at 14 (arguing that, for the Warren Court, correctly glimpsing future progress “over[ode] standards of analytical reason and scientific inquiry as warrantors of the validity of judgment”); Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1080 n.105 (1981) (“Bickel suggested that

Court did not expressly claim this sort of soothsaying role; to my knowledge, no Supreme Court majority ever has. But Bickel's broad description of the Warren Court's mission remains wholly plausible.

Bickel did not specify *how distant* a future he believed the Justices were imagining. His focus was on Supreme Court majority opinions, which face practical constraints that separate writings do not. The Court cannot bet on a future that America is nowhere near ready to accept, for in doing so it could gamble away the social support that sustains its authority. This is likely why later efforts to catalogue judicial predictions have depicted the Justices as accelerating perceived cultural trends. Scholars have offered this motive for numerous constitutional interventions—including in the areas of racial justice,⁸⁵ abortion,⁸⁶ capital punishment,⁸⁷ and gay rights⁸⁸—as well as for acts of statutory interpretation.⁸⁹ These explanations echo one federal judge's description of rights adjudication as a process of “sensing the future shape of value acceptance” without implementing it prematurely.⁹⁰

Clear societal trends—however partial—may also help judges anticipate which positions history will forsake. As support for same-sex marriage increased dramatically, one commentator mused that the Court would soon have to decide whether to “write the next *Plessy v. Ferguson*, or . . . the next *Brown v. Board of Education*.”⁹¹ Fear of an adverse cultural consensus may well have influenced Justice Kennedy's stance on this issue.⁹² Another observer has argued that Kennedy voted against the juvenile death penalty

the Warren Court had tried . . . to decide cases according to values it believed would be accepted in the future.”).

85. See Klarman, *supra* note 7, at 1756 (“The Justices [in *Brown*] rightly understood that a fundamental shift in race relations was in the offing.”).

86. See JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 352 (1994) (describing *Roe v. Wade*, 410 U.S. 113 (1973), as a misguided effort “to anticipate popular sentiment” and to achieve “the solution toward which the country as a whole was clearly aimed”).

87. See *id.* at 413 (noting that the Justices in *Furman v. Georgia*, 408 U.S. 238 (1972), viewed capital punishment as “on the wane,” needing only a “nudge” from the Court to achieve extinction).

88. See Richard Fallon, Akhil Reed Amar, Robert Nagel & Mark Tushnet, *Will the Brennan Legacy Endure?*, 43 N.Y. L. SCH. L. REV. 177, 187 (1999) (remarks of Professor Mark Tushnet) (arguing that in *Romer v. Evans*, 517 U.S. 620 (1996), the Court “predicted the future by making a guess about where social change was likely to go and by getting ahead of the tide”).

89. See WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 261 (1994) (claiming that the Warren and Burger Courts adopted certain “pragmatic mechanisms” to “facilitate[] the smooth evolution of the nation's public culture”).

90. William C. Kelly, Jr., *In His Own Words: Judge Coffin and Workability*, 63 ME. L. REV. 453, 463 (2011); see also *id.* (describing the Court as “a prophet of opinion” that must be “sensitive to the pace and direction of societal [evolution]”).

91. Erwin Chemerinsky, *Law Review Symposium 2014 — Keynote by Erwin Chemerinsky*, 48 U.C. DAVIS L. REV. 447, 455–56 (2014).

92. See *id.* at 456 (“There's no doubt where history is going on this issue.”); Klarman, *supra* note 47, at 155 (“The future with regard to marriage equality seems . . . easy to predict.”); Vikram David Amar, *Reflections on the Doctrinal and Big-Picture Issues Raised by the Constitutional Challenges to the Patient Protection and Affordable Care Act (Obamacare)*, 6 FIU L. REV. 9, 27 (2010) (“Justice Kennedy has a knack for being on the right side of history.”).

to distance himself from a practice that history would judge as barbaric.⁹³ The same may also have been true of Justice Curtis's dissent in *Dred Scott*,⁹⁴ as well as Justice Douglas's vote to stay the executions of Julius and Ethel Rosenberg.⁹⁵

Theories like these—though difficult to falsify—make a great deal of sense. Judges are active participants in a legal culture that views certain features of the American past as reprehensible. And it is not difficult to identify which types of issues more readily give rise to society-wide judgments. Over two centuries of experience offer powerful clues in this respect.⁹⁶ That is not to say that such a consensus will ever arise, or that its direction can be predicted with certainty. But judges are savvy enough to know which of their rulings might eventually suffer moral praise or moral rebuke.

It is also fair to presume that many judges would prefer to avoid authoring the next *Dred Scott*, *Plessy*, or *Korematsu*.⁹⁷ Such failures can seriously mar one's judicial legacy, overshadowing other doctrinal contributions.⁹⁸ Admittedly, not all who aim to avoid this fate will be so fortunate. Few cultural judgments can be perfectly foreseen, and much judicial disagreement likely stems from conflicting beliefs about which outcomes history will favor. Yet it is hardly a stretch to posit that many judges care whether their work will come to be viewed as monstrous. Thankfully, we need not resort to ascribing hidden motives—we can examine judges' own writings on this score.

93. See Edward Lazarus, *Roper v. Simmons: Insights from the Perspective of Justice Blackmun's Former Law Clerk*, 82 DENV. U. L. REV. 723, 737 (2005) (“[W]hat’s really going on in *Roper v. Simmons* is that Justice Kennedy . . . doesn’t want to be on the wrong side of history.”).

94. See Gerald Leonard, *Law and Politics Reconsidered: A New Constitutional History of Dred Scott*, 34 L. & SOC. INQUIRY 747, 781 (2009) (book review) (arguing that Curtis “cho[se] to be on the right side of history rather than adhere to a construction of the law that was true to the available materials”).

95. See Charles A. Reich, *Keeping Up: Walking with Justice Douglas*, 36 TOURO L. REV. 721, 740 (2020) (“I could see how much Douglas cared about the verdict of history, and how outraged he could be at his colleagues and their indifference.”).

96. See Rice, *supra* note 15, at 595–99 (identifying past arrangements that judges have deemed anathema to modern American values); Wilkinson, *supra* note 34, at 41 (“[T]he Justices themselves must be acutely aware . . . that the efforts of each generation of jurists to deal with [racial issues] will in the end warrant the broadest and most sober measure of historical judgment.”); *In re Freddie L.*, 465 N.Y.S.2d 460, 463 (N.Y. Fam. Ct. 1983) (explaining that the Supreme Court “justifiably views its ultimate stance on [the death penalty] as one of those barometers by which future generations will judge our society”).

97. See Chemerinsky, *supra* note 91, at 456 (“[The] Justices want to be on the right side of history.”); Delgado & Stefancic, *supra* note 16, at 1958 (“[J]udges are interested in . . . avoidance of history’s condemnation.”); Thomas G. Donnelly, *Supreme Court Legitimacy: A Turn to Constitutional Practice*, 47 BYU L. REV. 1487, 1503 (2022) (“Many Justices want to be remembered by later generations—and for the right reasons.”).

98. See CONG. GLOBE, 38th Cong., 2d Sess. 1013 (1865) (statement of Sen. Hale) (“[Chief Justice Taney] will be known to posterity . . . by the *Dred Scott* decision. That will associate itself with his memory, and his memory will associate itself with that.”).

B. Explicit Predictions

1. Courts

At least four Supreme Court opinions (all of them dissents) have engaged in moral prophecy. Most famously, Justice Harlan’s *Plessy* dissent predicted that the Court’s ruling would, “in time, prove to be quite as pernicious as . . . the *Dred Scott* case.”⁹⁹ Justice Scalia offered an equally vehement warning one century later. Describing one method of abortion as “brutal” and “horrible,” he insisted that his colleagues’ decision to find the practice constitutionally protected would “be assigned its rightful place in the history of this Court’s jurisprudence beside *Korematsu* and *Dred Scott*.”¹⁰⁰ Justices Breyer and Sotomayor have likewise warned that certain decisions would suffer not just legal reversal, but broad cultural repudiation.¹⁰¹ And other Justices have used extrajudicial writings to anticipate harsh societal judgments.¹⁰²

Future morality has been invoked far more frequently in lower courts—and most extensively in the context of LGBTQ+ rights. Judge Stephen Reinhardt began this tradition by disparaging the Supreme Court’s decision in *Bowers v. Hardwick*¹⁰³ shortly after it was issued. In allowing states to criminalize same-sex intimacy, Reinhardt believed, *Bowers* had wrongly subjected sexual minorities to “unfair and irrational” prejudice.¹⁰⁴ He proclaimed that “history will view [*Bowers*] much as it views *Plessy v. Ferguson*,” eventually resulting in the case’s overruling by “a wiser and more enlightened Court.”¹⁰⁵

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

100. *Stenberg v. Carhart*, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting).

101. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 868 (2007) (Breyer, J., dissenting) (of a decision invalidating two school districts’ voluntary integration plans: “This is a decision that the Court and the Nation will come to regret.”); *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 551 (2021) (Sotomayor, J., concurring in the judgment in part and dissenting in part) (of a decision that seemingly enabled states to shield their constitutional violations from judicial review: “I fear the Court, and the country, will come to regret that choice.”).

102. See David G. Farrelly, *Justice Harlan’s Dissent in the Pollock Case*, 24 S. CAL. L. REV. 175, 180 (1951) (quoting an 1895 letter from Justice Harlan to his sons: “Just as certain as anything can be this recent decision will become as hateful with the American people as the *Dred Scott* case . . .” (italics added)); BENJAMIN N. CARDOZO, WHAT MEDICINE CAN DO FOR LAW 21 (1930) (cautioning, soon before his elevation to the Court, that “a century or less from now, our descendants will look back upon the penal system of today with . . . surprise and horror”); William J. Brennan, Jr., *A Tribute to Justice Harry A. Blackmun*, 108 HARV. L. REV. 1, 2 (1994) (predicting that “Justice Blackmun’s dissenting opinion in *Bowers v. Hardwick* . . . ultimately will prevail in the judgment of history”).

103. 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

104. *Watkins v. U.S. Army*, 847 F.2d 1329, 1358 (9th Cir. 1988) (Reinhardt, J., dissenting), *withdrawn on reh’g* by 875 F.2d 699 (9th Cir. 1989).

105. *Id.*

A series of lower-court dissents echoed this theme in the ensuing years. Breaking with the D.C. Circuit's decision to uphold a prohibition on homosexual students attending the Naval Academy, Judge Patricia Wald condemned the regulation as an "injustice" that struck at the "soul of [the] nation."¹⁰⁶ "In years to come," she warned, "we will look back with dismay at these unconstitutional attempts to enforce silence" on non-heterosexuals.¹⁰⁷ A Connecticut Supreme Court justice reacted similarly to her colleagues' interpretation of state adoption law to exclude same-sex couples. She asserted that "[f]uture generations will look back upon the majority's decision today with the same opprobrium with which we regard the draconian absurdities of the early English common law."¹⁰⁸ And a First Circuit judge lamented a panel majority's "prejudice" in upholding a prison's refusal to provide sex-reassignment surgery.¹⁰⁹ She predicted that the ruling "will not stand the test of time, ultimately being shelved with the likes of *Plessy v. Ferguson* . . . and *Korematsu v. United States*."¹¹⁰

These concerns reached their apex in the context of same-sex marriage. In opinions ranging from 2003 to 2014, at least eight separate judges cautioned that future generations would recall same-sex-marriage bans with shame and disbelief.¹¹¹ Their opinions noted structural similarities between the claimed justifications for those bans and traditionalist arguments once offered against laws mandating racial equality.¹¹² In predicting an equally tragic legacy for same-sex-marriage bans, these judges maintained that past

106. *Steffan v. Perry*, 41 F.3d 677, 721 (D.C. Cir. 1994) (en banc) (Wald, J., dissenting).

107. *Id.*

108. *In re Adoption of Baby Z.*, 724 A.2d 1035, 1065 (Conn. 1999) (Berdon, J., dissenting).

109. *Kosilek v. Spencer*, 774 F.3d 63, 113 (1st Cir. 2014) (Thompson, J., dissenting).

110. *Id.*

111. *See In re Marriage License for Nash*, Nos. 2002-T-0149, 2002-T-0179, 2003 WL 23097095, at *12 (Ohio Ct. App. Dec. 31, 2003) (predicting that future generations would "wonder '[w]hat were they thinking?'); *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 764 (Cal. Ct. App. 2006) (Kline, J., concurring in part and dissenting in part) (insisting that judicial opinions upholding same-sex-marriage bans "will not stand the test of time" due to their "inhuman[ity]"), *rev'd in part*, 183 P.3d 384 (Cal. 2008); *Hernandez v. Robles*, 855 N.E.2d 1, 34 (N.Y. 2006) (Kaye, C.J., dissenting) ("I am confident that future generations will look back on today's decision as an unfortunate misstep."); *Andersen v. King County*, 138 P.3d 963, 1040 (Wash. 2006) (en banc) (Bridge, J., dissenting) ("Future generations . . . will undoubtedly look back on our holding today with regret and even shame . . ."); *Donaldson v. State*, 292 P.3d 364, 422 (Mont. 2012) (Nelson, J., dissenting) ("[A] not-too-distant generation of Montanans will consign today's decision . . . to the dustbin of history and to the status of a meaningless, shameful artifact."); *Whitewood v. Wolf*, 992 F. Supp. 2d 410, 431 (M.D. Pa. 2014) (claiming that "future generations" would view same-sex-marriage bans as a form of separate-but-equal); *Brenner v. Scott*, 999 F. Supp. 2d 1278, 1281 (N.D. Fla. 2014) ("When observers look back 50 years from now, . . . [they] will wonder just how those views could have been held."); *Pareto v. Ruvin*, 21 Fla. L. Weekly Supp. 899, 907 (Fla. Cir. Ct. 2014) ("The Court . . . foresees a day when the term 'same-sex marriage' is viewed in the same absurd vein as 'separate but equal' . . .").

112. *See, e.g., Brenner*, 999 F. Supp. 2d at 1281 ("Now, nearly 50 years later, the arguments supporting the ban on interracial marriage seem an obvious pretext for racism . . . [T]he arguments supporting Florida's ban on same-sex marriage, though just as sincerely held, will again seem an obvious pretext for discrimination.").

cycles of regret offer crucial insights for modern interpreters. And they did so despite knowing that their votes would—for now—be characterized as choosing sides in an ongoing cultural struggle. One Fourth Circuit judge later applied this prophetic sensibility to the issue of bathroom access for transgender students.¹¹³

The question of abortion, too, has shifted judges' gaze toward the future. Reviewing one method of performing second-trimester abortions, Judge J. Harvie Wilkinson III devoted an entire section of his opinion to the "[f]uture."¹¹⁴ He issued this dire warning: "Surely centuries hence, people will look back on this gruesome practice . . . [a]nd they will shudder."¹¹⁵ To accord the technique constitutional protection, he believed, would "invite coming generations to judge harshly the coldness of our ways."¹¹⁶ A state judge went even further, viewing *all* abortions as a source of future shame: "[E]ventually the majority opinion of *Roe* will be buried as an atrocity and rightfully recognized as one of the most immoral laws of humankind, comparable to the holding in *Dred Scott* . . . and the 1935 Nuremberg Laws of the German Third Reich."¹¹⁷

Other judges have predicted dishonorable legacies for impediments to majoritarian democracy. A state supreme-court justice chided her colleagues for issuing a "tragic decision" upholding a voter-ID law, predicting that "history will judge us harshly."¹¹⁸ A second justice foresaw that her colleagues' refusal to entertain partisan-gerrymandering claims would be "permanently relegate[d] . . . to the annals of this Court's darkest moments."¹¹⁹ And a dissenting Eleventh Circuit judge accused his co-panelists of historical myopia for upholding Florida's requirement that ex-felons pay off outstanding legal debts before regaining the right to vote. Unlike southern judges remembered fondly for protecting voting rights, he warned, the majority's ruling would not "be viewed . . . kindly by history."¹²⁰ Individual judges have made similar prophecies in the contexts

113. See *G.G. v. Gloucester Cnty. Sch. Bd.*, 853 F.3d 729, 730–31 (4th Cir. 2017) (mem.) (Davis, J., concurring) (claiming that, "one day, equality will prevail," and that the plaintiff "will be famous" for helping to "redefin[e] and broaden[] the scope of civil and human rights").

114. *Richmond Med. Ctr. for Women v. Herring*, 570 F.3d 165, 182 (4th Cir. 2009) (Wilkinson, J., concurring).

115. *Id.* at 183.

116. *Id.*; see also *id.* ("Such treatment of the truly helpless will not stand the test of time."); *id.* ("[F]uture generations . . . will ask: 'What on earth were they thinking?'").

117. *Cabinet for Hum. Res. v. Women's Health Servs., Inc.*, 878 S.W.2d 806, 809 (Ky. Ct. App. 1994) (McDonald, J., concurring).

118. *In re Request for Advisory Op. Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d 444, 503 (Mich. 2007) (Kelly, J., dissenting). The law required voters to present a photo ID or sign an affidavit averring that they lacked one. *Id.* at 447.

119. *Harper v. Hall*, 886 S.E.2d 393, 478 (N.C. 2023) (Earls, J., dissenting).

120. *Jones v. Governor of Florida*, 975 F.3d 1016, 1107 (11th Cir. 2020) (en banc) (Jordan, J., dissenting).

of climate change,¹²¹ investigative searches,¹²² tribal sovereignty,¹²³ territorial governance,¹²⁴ and the dwindling of jury trials.¹²⁵

Judges of all ideological backgrounds thus believe it wrong to resist the pull of future morality. Interestingly, none of them has provided a reasoned justification for channeling later norms—as if the conscious avoidance of tragedy needed no explanation. But judicial anticipation of future shame does not occur in a legal vacuum. It serves as a supplement to—not a substitute for—traditional legal analysis. The technique of moral prophecy suggests a specific orientation toward applicable legal authorities, rather than erasing their relevance. Judges need not abandon their professional training when they map tomorrow’s infamy onto the present. Instead, that training helps contextualize the crucial link between moral and legal repudiation.

Yet moral prophecy does entail an exercise of cultural foresight—a skill often deemed foreign to the judicial role.¹²⁶ The technique is much less frowned upon in the halls of Congress, where members usually enjoy the discretion to vote their consciences at pivotal moments.

2. Congress

Although Presidents and their subordinates do employ moral prophecy,¹²⁷ congressional examples are especially illuminating. The

121. See *Juliana v. United States*, 947 F.3d 1159, 1191 (9th Cir. 2020) (Staton, D.J., dissenting) (insisting that “history will not judge us kindly” for refusing to entertain a claim that would require the government to draw down its use of fossil fuels).

122. See *United States v. Zapata-Ibarra*, 223 F.3d 281, 282 (5th Cir. 2000) (mem.) (Wiener, C.J., dissenting) (“I sense that history is likely to judge the judiciary’s evisceration of the Fourth Amendment in the vicinity of the Mexican border as . . . joining *Korematsu*, *Dred Scott*, and even *Plessy*[] on the list of our most shameful failures”); *State v. Stevens*, 734 N.W.2d 344, 352 (S.D. 2007) (Sabers, J., dissenting) (arguing that, in light of changed expectations of privacy, the court was “placing itself in a position similar to . . . *Dred Scott* and *Plessy*” by relying on a Supreme Court decision allowing warrantless searches of garbage).

123. See *Cohen v. Little Six, Inc.*, 543 N.W.2d 376, 391 (Minn. Ct. App. 1996) (Randall, J., dissenting) (noting that Justice Harlan’s *Plessy* prophecy—which invoked *Dred Scott*—“made the same observation that I make today watching the court’s solemn discussion about Indian sovereignty”).

124. See *Igartúa v. United States*, 654 F.3d 99, 111 (1st Cir. 2011) (Torruella, J., concerning the denial of en banc consideration) (describing Puerto Rico’s colonial status as “intolerable” and an “anachronism[]” that “[h]istory will not judge . . . kindly”).

125. See *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 93 (D. Mass. 2005) (“History will not look kindly on that generation of jurists who acquiesced in the eclipse of our greatest bulwark of personal liberty—the American jury.”).

126. See *supra* notes 3–4 and accompanying text.

127. See Jeh Charles Johnson, *National Security Law, Lawyers, and Lawyering in the Obama Administration*, 31 YALE L. & POL’Y REV. 141, 148 (2012) (“[T]hose who govern today must ask ourselves how we will be judged ten, twenty, or fifty years from now. . . . [W]hat we find tolerable today may be condemned in the permanent pages of history tomorrow.”); Lyndon B. Johnson, *Special Message to Congress: The American Promise* (Mar. 15, 1965), in 1 PUBLIC PAPERS OF THE PRESIDENTS OF THE

predictions quoted below presuppose that *all* governmental officials and institutions have a stake in avoiding historical denunciation. And legislators, of course, inhabit the same political culture as today's judges. Courts thus have much to learn from officials who believe it is their job not to misjudge the future state of society. Their powerful warnings underscore the transcendent importance of reaching results that posterity will not abhor.

For better or worse, members' appeals to future values tend to recapitulate present-day ideological conflict. This occurs in two broad patterns. First, congressional Democrats and Republicans often clash expressly over what history's verdicts will be. When this happens, one cannot easily assess the competing claims without reference to one's political commitments. Second, at other times, only one party will draw upon the expected beliefs of future generations. The other party's lack of direct engagement could reflect a strategic choice to prioritize other, better arguments. Or it could betray a belief that no serious response exists—that the direction of future events has become increasingly obvious. In the latter scenario, being on the right side of history takes a back seat to partisan conformity or fidelity to one's present moral convictions.

Sharply conflicting visions of the future emerged during the impeachments of President Trump. Those who voted to impeach and convict routinely cited the expected judgments of history. These actors (mostly Democrats) depicted Trump's legacy as so rotten that the mere act of contemplating it dictated a clear choice.¹²⁸ Yet the President's supporters resisted this grim prognosis. In their eyes, the impeachment efforts would go down as a shameful ploy to subvert the results of a valid election.¹²⁹

These are far from the only dueling predictions of national ethos to have emerged from Congress. In remarking on President Trump's proposed

UNITED STATES: LYNDON B. JOHNSON 284 (1966) (“[O]utside this chamber is the outraged conscience of a nation . . . and the harsh judgment of history on our acts.”); Abraham Lincoln, *Second Annual Message to Congress* (Dec. 1, 1862), in 5 THE COLLECTED WORKS OF ABRAHAM LINCOLN 1861–1862, at 537 (Roy P. Basler ed., 1953) (“[W]e cannot escape history. . . . The fiery trial through which we pass, will light us down, in honor or dishonor, to the latest generation.”).

128. See, e.g., 165 CONG. REC. H12183 (daily ed. Dec. 18, 2019) (statement of Rep. Beatty) (expressing “full confidence that future generations will judge us on the right side of history”); 166 CONG. REC. S789 (daily ed. Feb. 3, 2020) (statement of Rep. Schiff) (“History will not be kind to Donald Trump—I think we all know that . . .”); 166 CONG. REC. S897 (daily ed. Feb. 5, 2020) (statement of Sen. Romney) (claiming that to vote to acquit would “expose my character to history’s rebuke”); 167 CONG. REC. S734 (daily ed. Feb. 13, 2021) (statement of Sen. Schumer) (“[President Trump] has been discredited . . . in the judgment of history.”).

129. See 165 CONG. REC. H12170 (daily ed. Dec. 18, 2019) (statement of Rep. Walberg) (“History will not be kind to the vote today.”); 166 CONG. REC. H6 (daily ed. Jan. 7, 2020) (statement of Rep. Rodney Davis) (“History will not judge this process and this impeachment favorably.”).

border wall,¹³⁰ the Trump tax cuts,¹³¹ the FCC's net-neutrality policy,¹³² and the Iraq War,¹³³ lawmakers have confidently inscribed incompatible futures into the *Congressional Record*. Naturally, the same basic forces that shape people's beliefs about right and wrong, justice and injustice, also tend to instill optimism that goodness will win out in the end. So the fact that Democrats and Republicans envision contradictory national destinies may reveal nothing more than that they are Democrats and Republicans. But the stakes of predicting correctly are truly massive: namely, whether one will be remembered for having fostered cruelty and oppression. Perhaps that is why members of Congress so often characterize history's judgments as paramount.¹³⁴

Congressional Republicans have readily anticipated future cultural stances toward abortion, the public fisc, and foreign policy. In countless floor statements, Republican members have characterized abortion as a grave human-rights violation that will one day be a source of national sorrow.¹³⁵ Abortion's future legacy is no incidental matter for these actors; it is central to their explanation of why the practice should not be tolerated today. Many Republicans have also cited the unforgiving judgments of posterity as a reason to curtail spending and reduce America's debts to other

130. Compare 163 CONG. REC. H6478 (daily ed. July 27, 2017) (statement of Rep. Gonzalez) ("Building a wall along our Southern border will put us on the wrong side of history."), with 167 CONG. REC. H6182 (daily ed. Nov. 4, 2021) (statement of Rep. McClintock) ("For God's sake, secure our border . . . Or else, be prepared to bear the full condemnation of history . . .").

131. Compare 163 CONG. REC. H9404 (daily ed. Nov. 16, 2017) (statement of Rep. Rodgers) ("I urge all of my colleagues to join me on the right side of history by voting in favor of the Tax Cuts and Jobs Act."), with 163 CONG. REC. H10203 (daily ed. Dec. 19, 2017) (statement of Rep. John Lewis) ("I urge all of my colleagues to be on the right side of history and to vote against this bill.")

132. Compare 165 CONG. REC. S6918 (daily ed. Dec. 10, 2019) (statement of Sen. Markey) ("We are on the right side of history on this issue."), with *id.* (statement of Sen. Wicker) ("[L]et me disagree fundamentally with my friends on the other side of the aisle about who is on the right side of history.")

133. Compare 149 CONG. REC. 24029 (2003) (statement of Sen. Bunning) ("[W]e must remember that our cause is just and that we are on the right side of history."), with 151 CONG. REC. 24186 (2005) (statement of Sen. Kerry) ("History will judge the invasion of Iraq one of the greatest foreign policy misadventures of all time.")

134. See *supra* note 42 and accompanying text.

135. See, e.g., 167 CONG. REC. S8818 (daily ed. Nov. 30, 2021) (statement of Sen. Wicker) ("[W]e have every reason to believe that we are on the right side of history."); 161 CONG. REC. 860 (2015) (statement of Rep. Yoho) (predicting that "[f]uture generations will look back and judge us . . . for allowing infanticide"); 146 CONG. REC. H1785 (2000) (statement of Rep. Chris Smith) (claiming that "future generations of Americans will look back with horror, incredulity, and astonishment" at "the slaughter of over 40 million babies").

nations.¹³⁶ And they have urged listeners to consider how particular diplomatic and military choices will be viewed in centuries to come.¹³⁷

Congressional Democrats have employed “right side of history” arguments with even greater regularity. Central to the Democrats’ case for addressing climate change is that a refusal to reverse course would earn the opprobrium of later generations.¹³⁸ Democrats have also cited future morality in expressing support for LGBTQ+ rights in a variety of contexts. Whether in opposing the Defense of Marriage Act,¹³⁹ resisting a federal marriage amendment,¹⁴⁰ urging the repeal of Don’t Ask, Don’t Tell,¹⁴¹ or supporting an expansion of federal nondiscrimination law,¹⁴² their remarks depict LGBTQ+ inclusion as a struggle whose moral rightness will one day seem obvious. And congressional Democrats have channeled future societal values in endorsing gun regulations,¹⁴³ condemning President Trump’s family-separation policy,¹⁴⁴ and supporting universal health coverage,¹⁴⁵ among other examples.

136. See 157 CONG. REC. 11373 (2011) (statement of Rep. Herger) (“[W]e will be judged harshly, and rightfully so, by future generations if we fail to act.”); 139 CONG. REC. 31917 (1993) (statement of Rep. Orton) (“[F]uture generations of Americans will suffer and curse our names as they try to pay for our mistaken fiscal policies.”).

137. See 162 CONG. REC. 7962 (2016) (statement of Sen. McCain) (“History will judge [the Obama administration’s Syria policy] not only with anger but with embarrassment. This is a shameful chapter in American history.”); 161 CONG. REC. 14061 (2015) (statement of Sen. Rubio) (asserting that “history will condemn” those who failed to oppose the Obama administration’s Iran deal).

138. See 162 CONG. REC. 8682 (2016) (statement of Sen. Whitehouse) (“The GOP-Citizens United-fossil fuel industry nexus will earn history’s condemnation.”); 160 CONG. REC. 3786 (2014) (statement of Rep. Schakowsky) (“History will not be kind to the climate change deniers.”).

139. See 142 CONG. REC. 22461 (1996) (statement of Sen. Robb) (predicting that supporters of the Defense of Marriage Act “will stand on the wrong side of history, not unlike the majority of the Supreme Court . . . in *Plessy versus Ferguson*”).

140. See 150 CONG. REC. 20067 (2004) (statement of Rep. McGovern) (“[T]o those of my colleagues who support this amendment today, let me state clearly that you are on the wrong side of history.”).

141. See 156 CONG. REC. 19429 (2010) (statement of Sen. Reid) (“When it comes to equality in the military, we know which side is the right side of history.”).

142. See 165 CONG. REC. S3335 (daily ed. June 12, 2019) (statement of Sen. Jones) (“This is a matter of civil rights . . . and this is a matter of being on the right side of history.”).

143. See 164 CONG. REC. S1698 (daily ed. Mar. 14, 2018) (statement of Sen. Blumenthal) (“[T]he right side of history is in favor of preventing gun violence.”); 158 CONG. REC. 12292 (2012) (statement of Rep. Holt) (“[F]uture generations will condemn us if [our] sole response to [the Aurora, Colorado] massacre is the passage of this resolution.”).

144. See 164 CONG. REC. S4027 (daily ed. June 19, 2018) (statement of Sen. Booker) (“[F]uture generations will look back at this crossroads of conscience in the same way we look back at some of the most shameful chapters, shameful moments in our history.”); 164 CONG. REC. H5763 (daily ed. June 27, 2018) (statement of Rep. Bass) (“How long before we consider how history will remember this moment and judge us?”).

145. See 155 CONG. REC. 33122 (2009) (statement of Sen. Harkin) (“My friends on the Republican side will be on the wrong side of history, the wrong side of reform, and the wrong side of progress.”); 155 CONG. REC. 29034 (2009) (statement of Rep. Tim Ryan) (“[Republicans are] going to be on the wrong side of history, like they were for Social Security and Medicare and civil rights . . .”).

The many differences between Congress and the courts should not be minimized. But when the two institutions engage in moral prophecy, their roles are indistinguishable. They are peering into an uncertain future to warn their contemporaries against actions that might one day be decried as reprehensible. Because judges cannot wall themselves off from dominant cultural values,¹⁴⁶ America's moral future will have profound implications for how legal doctrines are assessed in years to come. This Subsection has shown that paying heed to future norms may entail writing opinions that accord with the aims of specific political movements. This is inescapable, since tomorrow's tragedies virtually always generate political conflict while they are being perpetrated. It would be a mistake for judges to swear off moral foresight whenever society is deeply divided. For it is in such moments that judicial prescience may be most desperately needed.

III. BENEFITS

When judicial decisions lose their cultural respectability, little else about them matters. The standard criteria of sound doctrine collapse under the weight of moral disrepute. Awareness of this dynamic can awaken judges to the possibility that they, too, are capable of inflicting tragic suffering. This frame also encourages judges to reshape legal dialogue by defending their votes as faithful not just to past authorities, but to the demands of future morality. And a broader view of regret can help advocates explain why their cultural predictions should not be dismissed as hurtful accusations of bigotry. This Part explores these key advantages in turn.

A. *Averting Tragedies*

The primary case for judicial moral prophecy is simple: to prevent immense harm to the people over whom they exercise power, judges should strive to avoid results that will come to be seen as intolerable. That this position could be controversial is remarkable. Over the centuries, the Court has ratified numerous policies that would be unthinkable in contemporary society.¹⁴⁷ Today's judges freely denounce these decisions as not just

146. See Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003) (“[C]ulture is inevitably (and properly) incorporated into the warp and woof of constitutional law.”).

147. See *supra* note 65; see also H. JEFFERSON POWELL, *THE PRACTICE OF AMERICAN CONSTITUTIONAL LAW* 204 (2022) (“The practice of constitutional law has sometimes led in the past to monstrous decisions, and . . . failed to rectify obvious injustices.”); *Donaldson v. State*, 292 P.3d 364, 375 (Mont. 2012) (Nelson, J., dissenting) (“There are some cases where we look back and can see that the [C]ourt was clearly on the wrong side of history.”).

erroneous, but atrocious—the types of mistakes that an enlightened nation must never repeat.¹⁴⁸

Indeed, our legal system has developed techniques for implementing these cautionary tales. As described by Professor Jamal Greene, a set of decisions known as the “anticanon” are famous for embodying values that our polity has repudiated.¹⁴⁹ Liberals and conservatives tend to disagree about which analytical errors can be blamed for these dreadful outcomes.¹⁵⁰ But all operate on the shared premise that those legal flaws—however conceived—should be studiously avoided in the future.¹⁵¹ In this way, the avoidance of discredited techniques becomes a proxy for preventing ethical disasters.

It would make little sense to decry past outrages—and shun the legal principles thought responsible for them—yet forbid judges from directly asking whether their decisions will be remembered as moral failures. To do so would be to impose rigid legal constraints on an inquiry that is fundamentally non-legal in nature. Today’s judges curse Jim Crow segregation and involuntary sterilization not because those practices are unlawful, but because they are appalling. Likewise, it would be naïve to think that legal norms alone can protect any doctrine from cultural condemnation. The existing anticanon is not the sum total of all future injustice.¹⁵² And every infamous precedent has been supported by reasoning that sophisticated lawyers once viewed as defensible.¹⁵³ In cases capable of touching a cultural nerve, judges will be more likely to avoid future tragedies if they regard form and technique not as ends in themselves, but as incidental to the ultimate goal of avoiding future tragedies.

Although other examples could be offered, two doctrines in particular are especially likely to outrage later generations. The first is qualified immunity. Under this judge-made rule, violations of federal statutory and constitutional rights are not compensable unless a prior precedent made unmistakably clear that the offending act was unlawful.¹⁵⁴ Though rooted in

148. See *supra* notes 29–33 and accompanying text.

149. See Greene, *supra* note 8, at 384.

150. See *id.* at 435–60.

151. *Id.* at 460–61.

152. See Justin Collings, *After Law’s Infamy: Judicial Self-Legitimation in the Aftermath of Judicial Evil*, in *LAW’S INFAMY: UNDERSTANDING THE CANON OF BAD LAW* 13, 41 (Austin Sarat, Lawrence Douglas & Martha Merrill Umphrey eds., 2021) (urging that the anticanon not be used as a “containment” device, allowing the Court to assure us that it has “learned its lessons, repudiated past sins, and gloriously set things right”).

153. See Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 *YALE L.J.* 1407, 1450 (2001) (explaining that “well-trained lawyers acting in good faith” once “rationalized [past evils] according to well accepted modes of legal argument”).

154. See *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (stating that the question must have been placed “beyond debate” by existing precedent); *Taylor v. Riojas*, 141 S. Ct. 52, 54 (2020) (reiterating

fairness concerns, the doctrine has lost any sense of proportion. The analysis it prescribes—one of strict factual notice—has allowed truly heinous acts to go unremedied.¹⁵⁵ That is because the doctrine is formally insensitive to the outrage of present and future audiences. It requires no great skill to predict that posterity will be ashamed of qualified immunity’s many indignities. And when that happens, the judges who performed them will not be excused merely because they were applying established principles in workmanlike fashion. They will be excoriated for having abetted injustice. Moral prophecy can help defang legal doctrines that find themselves producing such astonishing results.

The Court’s test for identifying unenumerated constitutional rights is also apt to produce results that future audiences will deplore. Under that methodology, unwritten protections cannot be recognized unless they are “deeply rooted in this Nation’s history and tradition.”¹⁵⁶ To be sure, the phrase “*this Nation*” could be fairly read to negate the force of past traditions now viewed as grossly immoral.¹⁵⁷ But the Justices have taken the opposite tack. Their monumental decision in *Dobbs v. Jackson Women’s Health Organization* treated as dispositive—on a question of women’s rights—the traditions of a society in which women were politically powerless and economically subservient.¹⁵⁸ *Dobbs* also ignored the fact that 19th-century campaigns against abortion were spearheaded by men who sought to “enforce wives’ marital and maternal obligations.”¹⁵⁹ No matter that the Court has elsewhere repudiated this archaic ethos;¹⁶⁰ benighted traditions

that qualified immunity applies absent a prior decision that speaks “with obvious clarity to the specific conduct in question” (quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997))).

155. See, e.g., *Corbett v. Vickers*, 929 F.3d 1304, 1318–19 (11th Cir. 2019) (holding that qualified immunity shielded an officer who shot a young child—one of six in the vicinity—while attempting to shoot a family dog that posed no threat); *Jessop v. City of Fresno*, 936 F.3d 937, 942–43 (9th Cir. 2019) (holding that qualified immunity shielded the “deeply disturbing” and “morally reprehensible” act of stealing property covered by a search warrant); *Ramirez v. Guadarrama*, 3 F.4th 129, 135–36 (5th Cir. 2021) (holding that qualified immunity precluded recovery for the fiery death of an unarmed man who was tased by police officers after they witnessed him douse himself with gasoline); *Cope v. Cogdill*, 3 F.4th 198, 211–12 (5th Cir. 2021) (holding that qualified immunity shielded a jailer who stood by, failing even to call emergency services, as he watched an inmate known to be suicidal strangle himself to death).

156. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

157. See Daniel B. Rice, *The Riddle of Ruth Bryan Owen*, 29 *YALE J.L. & HUMAN.* 1, 68 (2017) (“Practices that have been extirpated from our constitutional tradition ought not weigh against a finding that others have firmly taken root there.”).

158. See Reva B. Siegel, *Memory Games: Dobbs’s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 *TEX. L. REV.* 1127, 1136, 1188 (2023).

159. *Id.* at 1188.

160. See *Stanton v. Stanton*, 421 U.S. 7, 14 (1975) (asserting that women are “[n]o longer . . . destined solely for the home and the rearing of the family”); *Kerry v. Din*, 576 U.S. 86, 96 (2015) (plurality opinion) (“[M]odern moral judgment rejects the premises of such a legal order.”).

are still our traditions. They are equally relevant—or even most relevant—in identifying which rights Americans enjoy today.¹⁶¹

This vision has ushered in a world in which young girls can be forced to deliver their fathers' children after being sexually victimized. Under *Dobbs*, too, American women can be coerced into giving birth to skull-less infants,¹⁶² or to babies who will die soon after being born.¹⁶³ And expectant mothers can evidently be denied access to chemotherapy until their cancers are deemed sufficiently life-threatening.¹⁶⁴ Contemplating horrors like these, some observers consigned *Dobbs* to future infamy within hours of its being issued.¹⁶⁵ For its part, the Court claimed neither to know nor care how the public would react to its decision.¹⁶⁶ That blasé attitude—a denial of ultimate moral accountability—materially increases the risk that the Justices will sin against later societal values. The same is true of the Court's use of primitive traditions to trump existing liberties.

The prospect of future disgrace can also help halt the expansion of doctrines that are sensible at their core, but susceptible to retail abuse. The political-question doctrine is one such example. Created to keep the courts

161. For other failures to distinguish between acceptable and intolerable traditions, see *Din*, 576 U.S. at 96 (concluding that American women have no liberty interest in the disposition of their foreign husbands' visa applications because, for a period of time beginning in 1907, Congress involuntarily expatriated American women who married non-citizens); *United States v. Perez-Gallan*, PE:22-CR-00427-DC, 2022 WL 16858516, at *9 (W.D. Tex. Nov. 10, 2022) (crediting William Blackstone's view that spousal disputes "lay outside the law's legitimate domain" in invalidating a restriction on firearm ownership by persons subject to domestic-violence restraining orders).

162. See Minyvonne Burke, *Woman Carrying Fetus Without a Skull to Seek Abortion in Another State Following Louisiana Ban*, NBC NEWS (Aug. 26, 2022, 12:22 PM), <https://www.nbcnews.com/news/us-news/louisiana-woman-carrying-fetus-skull-seek-abortion-another-state-rcna45005> [<https://perma.cc/LLV9-BZGN>] ("[D]octors said they would not be able to perform the procedure because of the state's ban on abortions.").

163. Selena Simmons-Duffin, *A Good Friday Funeral in Texas. Baby Halo's Parents Had Few Choices in Post-Roe Texas*, NPR (Apr. 6, 2023, 2:07 PM), <https://www.npr.org/sections/health-shots/2023/04/06/1168399423/a-good-friday-funeral-in-texas-baby-halos-parents-had-few-choices-in-post-roe-te> [<https://perma.cc/6ZCJ-87VR>] ("[Samantha] Casiano knew that Texas banned abortions, but she didn't think those laws would apply in a situation where the fetus was certain to die.").

164. See Heather Grey, *How Strict Abortion Laws Are Delaying Cancer Treatment*, HEALTHLINE (Oct. 27, 2022), <https://www.healthline.com/health-news/how-strict-abortion-laws-are-delaying-cancer-treatment> [<https://perma.cc/5WZF-RM2P>] ("Recent court filings in Ohio show that concerns over disruptions in cancer care are not just hypothetical.").

165. See, e.g., Ilhan Omar (@IlhanMN), TWITTER (June 24, 2022, 11:21 AM), <https://twitter.com/IlhanMN/status/1540354350819999744> [<https://perma.cc/394W-A2YU>] ("The reversal of *Roe* will be recorded in the history books in the same nauseous tones as decisions like *Dred Scott*, *Korematsu*, *Plessy*, and *Buck*"); Michelle Goodwin, Opinion, *No, Justice Alito, Reproductive Justice Is in the Constitution*, N.Y. TIMES (June 26, 2022), <https://www.nytimes.com/2022/06/26/opinion/justice-alito-reproductive-justice-constitution-abortion.html> [<https://perma.cc/3WMB-FD85>] (claiming that "the harms that predictably will result from [*Dobbs*]" render it "in league with some of the [Court's] darkest rulings"—namely, *Plessy v. Ferguson* and *Buck v. Bell*).

166. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2279 (2022) ("We do not pretend to know how our . . . society will respond to today's decision overruling *Roe* and *Casey*. And even if we could foresee what will happen, we would have no authority to let that knowledge influence our decision.").

from treading into nonlegal territory, the doctrine has been used to thwart accountability for grave evils. The D.C. Circuit, for example, has invoked it to rebuff allegations that the U.S. government subjected native Pacific Islanders to starvation, torture, and genocide while forcibly removing them to make way for a naval base.¹⁶⁷ Regardless of any applicable legal prohibitions, the court refused to scrutinize “[t]he specific tactical measures” taken to carry out U.S. foreign policy.¹⁶⁸ Decisions that license such cartoonish depravity never age well. In time, their analytical underpinnings are eclipsed by the moral horror they condoned.

Judicial moral prophecy is a corrective to interpretive theories that valorize constraint above all else. It teaches that many judicial rulings are not intrinsically right or wrong; they are remitted to the “cultural marketplace, where the country as a whole renders its historical judgment.”¹⁶⁹ People who care little about the future may find that the future cares little for them. Later generations will not be kind to judges whose efforts to remain “scrupulously neutral”¹⁷⁰ beget grave moral wrongs. Crucially, though, the stakes here are not just whether individual jurists will be “fêted” in future times.¹⁷¹ It is whether their fealty to craft will deeply damage both society and the legal system in the long run. Refusing to reason prospectively about cultural morality is not a mark of good judging; it is a decision to prioritize analytical gratification over the human values law is meant to serve. Courts should not wait for immense suffering to occur before speaking directly about moral failure.¹⁷²

B. Reshaping Legal Dialogue

Lower-court judges *do* often talk openly about future ethos.¹⁷³ These opinions do not simply take stock of the past; they are meant to help the legal system legitimate itself over the long run. Under this view, outcomes that will rankle deeply in generations to come are—for that reason—deeply wrong today. To leave that rationale unspoken would be to strip such opinions of perhaps their most vital quality.

167. *Bancoult v. McNamara*, 445 F.3d 427, 431, 438 (D.C. Cir. 2006).

168. *Id.* at 436.

169. Robert L. Tsai, *How Activists Resisted—and Ultimately Overturned—an Unjust Supreme Court Decision*, WASH. POST (Jan. 30, 2019), <https://www.washingtonpost.com/outlook/2019/01/30/how-activists-resisted-ultimately-overturned-an-unjust-supreme-court-decision/> [<https://perma.cc/3BYZ-YVHY>]; see also *Baptiste v. Kennealy*, 490 F. Supp. 3d 353, 374 (D. Mass. 2020) (“The decisions of elected officials, and those of the courts, will also eventually be judged by history.”).

170. *Dobbs*, 142 S. Ct. at 2305 (Kavanaugh, J., concurring).

171. *In re State*, 489 S.W.3d 454, 456 (Tex. 2016) (Willett, J., concurring).

172. See Ronald J. Bacigal, *Putting the People Back into the Fourth Amendment*, 62 GEO. WASH. L. REV. 359, 417 (1994) (“Because I live in the short run, I draw little solace from the hope that any present deprivations of my liberties ultimately will be rejected by future generations.”).

173. See *supra* Part II.B.1.

Supreme Court Justices, by contrast, tend not to invoke future values expressly. But those values clearly weigh heavily on some Justices. Normalizing judicial moral prophecy would foreground a crucial element of sound decision-making, revealing an array of issues on which even elite lawyers sense that law will matter little in the end. Judges who neglect this tool do not just overlook a powerful argumentative resource. They risk being remembered for having reduced profound questions of justice to matters fit for technical resolution. And they miss an opportunity to signal the abiding importance of cultural memory in the construction of legal correctness.

Take *West Virginia v. EPA*,¹⁷⁴ in which the Court severely limited the EPA's ability to phase out the use of carbon-emitting power plants under the Clean Air Act. After a lengthy point-by-point response, Justice Kagan's dissent struck an elegiac tone. "I cannot think of many things more frightening," she wrote, than a Court primed to serve as "decision-maker on climate policy."¹⁷⁵ She warned that "[t]he stakes here are high"¹⁷⁶—foreseeably "catastrophic" harms poised to befall the natural world.¹⁷⁷ This was an important step toward imagining how posterity would evaluate such a deregulatory blow. Yet even Kagan stopped short of adopting the perspective of later Americans whose lives hung in the balance. If ever there were an appropriate time to preview the unforgiving judgments of history, it was here.

Or take *Dunn v. Ray*,¹⁷⁸ a case in which the Court allowed a non-Christian inmate to be treated worse than similarly situated Christians. An Alabama prison system refused to let unauthorized spiritual advisers enter its execution chamber, reserving that privilege for its official Christian chaplains. A Muslim prisoner sentenced to die requested that an imam be present for his final moments. The Justices upheld the prison's denial of this request.¹⁷⁹ In dissent, Justice Kagan (joined by three colleagues) assailed the Court's order as "profoundly wrong."¹⁸⁰ She surely believed—as others have claimed¹⁸¹—that history would frown upon the decision. Yet her

174. 142 S. Ct. 2587 (2022).

175. *Id.* at 2644 (Kagan, J., dissenting).

176. *Id.*

177. *Id.* at 2627.

178. 139 S. Ct. 661 (2019).

179. In one sentence of analysis, the Court—exercising its equitable discretion—noted that the prisoner had not challenged his imam's exclusion until ten days before his scheduled execution. *Id.* at 661. But the prisoner brought suit only five days after his request was denied. *Id.* at 662 (Kagan, J., dissenting).

180. *Id.* at 661 (Kagan, J., dissenting).

181. See Neal Katyal (@neal_katyal), TWITTER (Feb. 7, 2019, 10:58 PM), https://twitter.com/neal_katyal/status/1093720802971844608 [<https://perma.cc/4UJR-VLTQ>] ("100 years from now, law students will read about this decision. It may be read alongside *Dred Scott*, *Plessy v. Ferguson*, *Korematsu*, and the Chinese Exclusion Act cases.").

dissent went no further than applying the relevant legal principles to the case's facts.¹⁸² Appealing to future notions of justice would have underscored why the majority's error warranted not only sharp disagreement, but moral censure.

A third example comes from Justice Harlan himself. When the Court held in 1895 that Congress was powerless to tax various forms of wealth, Harlan issued a scathing dissent. He warned that the Court had stripped the federal government of a power that might become "vital to the very existence and preservation of the Union."¹⁸³ But he saved his strongest fire for a private letter sent to his two sons. In it, Harlan predicted that the Court's ruling would eventually "become as hateful with the American people as the *Dred Scott* case."¹⁸⁴ The nation did indeed pass a constitutional amendment vindicating Harlan's vision.¹⁸⁵ But because his prophecy did not appear in the *U.S. Reports*, it has not served as a beacon for later judges inclined to warn against unfolding tragedies. In that respect, his *Plessy* dissent has stood largely alone.

It will not be every day that a litigant's position seems destined to suffer societal condemnation. On those occasions, however, we would be better off if judges disclosed their expectations in writing. Convictions about future morality tend to be totalizing. They plainly affect how private citizens assess judicial rulings,¹⁸⁶ and it would be farcical to suggest that judges are indifferent to whether they leave legacies of shame. Courts should be praised—not lambasted—for seeking to guard against moral revulsion. But it is not enough for scholars to celebrate decisions that are consistent with that end. If judges believe they are helping to spare the nation from tragic harms, they should defend their votes on that basis. Such acts of candor could bring much-needed change to a professional culture that looks askance at reasoning about "our Posterity."¹⁸⁷

182. See *Ray*, 139 S. Ct. at 661–62 (Kagan, J., dissenting).

183. *Pollock v. Farmers' Loan & Tr. Co.*, 158 U.S. 601, 671 (1895) (Harlan, J., dissenting); see also *id.* at 684 (deeming the Court's decision "a disaster to the country").

184. Farrelly, *supra* note 102, at 180; *id.* (foreseeing that *Pollock* would "make the freemen of America the slaves of accumulated wealth").

185. See U.S. CONST. amend. XVI.

186. See Hugo Adam Bedau, *Someday McCleskey Will Be Death Penalty's Dred Scott*, L.A. TIMES, May 1, 1987 ("[I]n the future, historians will look back on *McCleskey* and judge it to be yet another of the [C]ourt's great failures—along with *Dred Scott*, *Plessy*, *Korematsu*, and *Hirab[ayashi]*"); Kenneth B. Clark, *Racial Justice in Education: Continuing Struggle in a New Era*, 23 HOW. L.J. 93, 93 (1980) ("[F]uture historians will rank *Brown* with such documents as the Magna Carta, the Declaration of Independence and the Emancipation Proclamation."); Delgado & Stefancic, *supra* note 16, at 1951 ("*Bowers* . . . seems destined to join its predecessors, *Plessy*, *Dred Scott*, and *Bradwell*, as flagrantly and wantonly wrong in the public's imagination.>").

187. U.S. CONST. pmb1.

C. Avoiding the Bigotry Trap

Anticipating societal horror is a vital responsibility—rather than a parlor game—because earlier generations have given us reason to be vigilant. Their moral stumbles were driven by beliefs that once commanded wide respect. Given this record, it is notable that similar rationales have been advanced to resist social change in recent years. Yet the Court has been skeptical of efforts to draw such parallels, coding them as ugly charges of bigotry. A commitment to avoiding future tragedies calls this approach into question. Insights from past mistakes should not be broadly written off as degrading civic discourse; they should be welcomed as a step toward avoiding future shame. Advocates would do well to employ this alternative framing when engaging with judges inclined to police official rhetoric toward traditional values.

This dynamic has played out most dramatically in the clash between LGBTQ+ rights and free-exercise values. Those disposed toward moral prophecy have plenty of history to draw upon as they study such conflicts. As Professor Linda McClain has shown, resistance to racial integration in both public and private settings was powerfully influenced by claims of religious conscience. Defenders of the status quo appealed to scripture, to the understandings of their faith communities, and to the societal customs those beliefs had engendered.¹⁸⁸ Few at the time doubted the sincerity of these conservative views. Today, however, opposition to “race mixing” is a shameful stance thought to have no valid foundation in sacred texts. Those who hold such views are bigots, and it is perfectly acceptable to condemn their intolerance.

Modern advocates of LGBTQ+ rights warn that this history is repeating itself.¹⁸⁹ As with earlier resistance to interracial intimacy, opponents of same-sex marriage offer scriptural defenses of traditional marriage.¹⁹⁰ There can be no question that these views are genuinely held—indeed, that they supply a foundational premise for a leading worldview. Such beliefs have also inspired refusals to comply with generally applicable

188. See MCCLAIN, *supra* note 16, at 76–86, 97–99.

189. See Greg Johnson, *We’ve Heard This Before: The Legacy of Interracial Marriage Bans and the Implications for Today’s Marriage Equality Debates*, 34 VT. L. REV. 277, 279 (2009) (observing that the legal arguments used to support bans on interracial marriage were “strikingly similar to arguments made today against same-sex marriage”); Kyle C. Velte, *Recovering the Race Analogy in LGBTQ Religious Exemption Cases*, 42 CARDOZO L. REV. 67, 77 (2020) (“[T]he LGBT-rights movement ha[s] deployed the race analogy when seeking formal equality.”).

190. See, e.g., *Biblical Perspective on Homosexuality and Same-Sex Marriage*, FOCUS ON THE FAMILY, <https://www.focusonthefamily.com/family-qa/biblical-perspective-on-homosexuality-and-same-sex-marriage/> [<https://perma.cc/6W6W-862Y>] (“[S]ex is given by God as an expression of love to be shared and enjoyed exclusively between a husband and wife.”).

nondiscrimination laws.¹⁹¹ But the use of traditionalist arguments to arrest an emerging form of equality raises dark parallels that cannot be safely ignored. With continued attitudinal change, opponents of LGBTQ+ rights may be remembered alongside those who fought against interracial marriage and integrated lunch counters.¹⁹² Basic humility would seem to counsel that officials at least ponder this uncomfortable possibility.

To date, however, judicial conservatives have not only resisted this forward-looking frame. They have taken umbrage at the idea that modern traditionalists could be reenacting past forms of oppression. Multiple Justices, for example, have deemed it outrageous to compare opponents of same-sex marriage to persons who once championed racial separation.¹⁹³ And in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,¹⁹⁴ the Court ruled that the mere act of drawing such historical parallels may itself be a form of unconstitutional discrimination. *Masterpiece Cakeshop* involved a baker who cited his Christian beliefs in refusing to create a cake for a same-sex wedding.¹⁹⁵ When his case was brought before the Colorado Civil Rights Commission, one member noted that religion had “been used to justify all kinds of discrimination throughout history,” including slavery and the Holocaust.¹⁹⁶ The Court held that this remark evinced a “clear and impermissible hostility toward the sincere religious beliefs” underlying the baker’s objection.¹⁹⁷ For that reason, the Commission was held to have violated the Free Exercise Clause.¹⁹⁸

Masterpiece Cakeshop threatens to disable officials from reasoning openly about the causes of past abuses—and thus to prevent future injustices. The Court’s opinion teaches that it is wrong to invoke the concept of bigotry in the midst of ongoing conflict. By definition, ideas that still

191. See McCLAIN, *supra* note 16, at 186–88, 194.

192. See Anthony E. Varona, *Taking Initiatives: Reconciling Race, Religion, Media and Democracy in the Quest for Marriage Equality*, 19 COLUM. J. GENDER & L. 805, 847 (2010) (“Rabbi David Saperstein . . . posits that ‘[f]ifty years from now, most religious communities will look back with astonishment on the controversy over same sex relations the way we do today on yesterday’s bans on miscegenation.’”) (alteration in original); CASHIN, *supra* note 34, at 132 (“Those who resist are forced to adapt or accept being on the wrong side of history.”).

193. See, e.g., *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1925 (2021) (Alito, J., concurring in the judgment) (“[L]umping those who hold traditional beliefs about marriage together with racial bigots is insulting to those who retain such beliefs.”); *Davis v. Ermold*, 141 S. Ct. 3, 4 (2020) (Thomas, J., respecting the denial of certiorari) (“Since *Obergefell*, parties have continually attempted to label people of good will as bigots merely for refusing to alter their religious beliefs in the wake of prevailing orthodoxy.”); *Obergefell v. Hodges*, 576 U.S. 644, 712 (2015) (Roberts, C.J., dissenting) (charging that the majority had wrongly branded those who do not support same-sex marriage as “bigot[s]”).

194. 138 S. Ct. 1719 (2018).

195. *Id.* at 1724.

196. *Id.* at 1729.

197. *Id.*

198. *Id.* at 1731–32. Only weeks later, the Court would insist—almost indignantly—that its decision upholding President Trump’s travel ban was not a continuation of *Korematsu*’s “morally repugnant” legacy. *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

command significant support must be regarded as reasonable (rather than revolting).¹⁹⁹ To suggest otherwise is to treat decent, thoughtful citizens with disrespect—an intolerable stance in a pluralistic society. Invocations of slavery and race discrimination must thus be cheap political attacks, not good-faith reflections on political morality.

It is a telling indictment of *Masterpiece Cakeshop* that it discourages officials from anticipating future shame. Justice Harlan, for one, was supremely disrespectful toward the views of segregationists. Against *Plessy*'s insistence that Louisiana's separate-car law was "reasonable,"²⁰⁰ Harlan warned that this mindset would come to seem preposterous.²⁰¹ Chief Justice Taney's allies were likewise displeased that Republicans had reacted to *Dred Scott* with fierce rancor.²⁰² Nor would foes of interracial marriage have welcomed expressions of disdain toward their genuine religious convictions. Yet each of these positions is now seen as wildly, unfathomably wrong.

The central lesson of this experience is that beliefs about reasonableness are rarely fixed. They can and do change with the arrival of new insights.²⁰³ But this process will be distorted if the Court regards efforts to recast conventional assumptions as imputations of bigotry.²⁰⁴ Decisions like *Masterpiece Cakeshop* are made possible because legal elites have little experience reasoning directly about future tragedies. The growing practice of moral prophecy provides that missing framework. It teaches that backward-looking ethical condemnation is not simply descriptive, but instructive. We must ask why past moral failures occurred so that new ones can be guarded against. This broader perspective can help advocates deflect the potent rhetoric of bigotry—and thus enable honest conversations about moral tolerability across time.

199. See Douglas NeJaime, *Bigotry in Time: Race, Sexual Orientation, and Gender*, 99 B.U. L. REV. 2651, 2655 (2019) ("If only one side held views plausibly deemed reasonable, there would likely not be a society-wide debate.").

200. *Plessy v. Ferguson*, 163 U.S. 537, 550 (1896).

201. *Id.* at 559 (Harlan, J., dissenting).

202. See *supra* notes 60–61.

203. See NeJaime, *supra* note 199, at 2654 ("[B]eliefs once seen as unremarkable and reasonable come to be seen as harmful and unacceptable—as bigoted."); Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739, 760 (2002) ("What today appear[s] to be self-evidently correct . . . may strike later generations as absurd or even offensive."); W. Bradley Wendel, *Teaching Ethics in an Atmosphere of Skepticism and Relativism*, 36 U.S.F. L. REV. 711, 753 (2002) ("[T]here is at least a widespread consensus on the falsity of numerous ethical positions that were once commonly held."); Henry Louis Gates, Jr., *Men Behaving Badly*, NEW YORKER, Aug. 18, 1997, at 4 ("History is, in no small part, a chronicle of formerly acceptable outrages.").

204. See Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 142 (2018) ("It cannot be constitutionally prohibited animus for public officials to observe that religious believers have made discriminatory claims in the past and that contemporary justifications for violating civil rights might take similar form . . .").

IV. OBJECTIONS

Despite these significant benefits, numerous doubts persist. Institutional moral prophecy will feel entirely foreign to many practicing lawyers. Judges and attorneys are trained to analyze legal arguments, not to divine the ethical codes of their descendants. This Part explains why moral prophecy is not only consistent with the rule of law, but crucial to its healthy functioning. I then address a key conceptual critique—that the idea of “future generations” is too imprecise to be actionable. And this Part closes by answering several arguments for why moral prophecy might be normatively undesirable. These include the difficulty of predicting future morality, the problem of institutional competence, the likelihood of liberal bias, the alleged emptiness of cultural morality, and the tool’s susceptibility to opportunistic use.

A. *Rule of Law*

One might object, first of all, that judges have no authority to engage in moral prognostication. All they may do is say what the law is.²⁰⁵ Judges may enforce only those values encoded in legal texts—not a set of free-floating norms, and certainly not the wishes and aversions of nonexistent persons. To channel future values would not just be undemocratic,²⁰⁶ it would make a mockery of the very idea of constraint. For these critics, judges abandon any pretense of legal analysis when they practice moral prophecy. They simply assert raw power, reconfiguring the present to make it resemble their ideal world. However personally satisfying this exercise might be, it is a perversion of the judicial role and an assault on the rule of law.²⁰⁷

This critique consists of two related components: judges may not give effect to ambient cultural values, and they lack authority to predict how those values will change over time. Neither point is convincing.

First, as I have previously shown, judges purport to describe prevailing societal values with remarkable frequency. These assertions identify

205. See *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2504 (2022) (“[T]his Court’s proper role under Article III . . . is to declare what the law is, not what we think the law should be.”).

206. See ELY, *supra* note 17, at 70 (“Controlling today’s generation by the values of its grandchildren is no more acceptable than controlling it by the values of its grandparents . . .”).

207. For judicial assertions to this effect, see *supra* notes 3–4; see also BICKEL, *supra* note 34, at 173–74 (calling for “adherence to the method of analytical reason,” rather than “reliance on the intuitive judicial capacity to identify the course of progress”); Benjamin C. Block, *Bradley, Breyer, Bush and Beyond: The Legal Realism of Legal History*, 15 U. FLA. J.L. & PUB. POL’Y 57, 83–84 (2003) (claiming that concern for having one’s historical reputation “tarnish[ed]” is not a “principled legal reason” for voting in a particular manner); *Hernandez v. Robles*, 855 N.E.2d 1, 12 (N.Y. 2006) (refusing to “predict what people will think generations from now” on the issue of same-sex marriage), *abrogated by Obergefell v. Hodges*, 576 U.S. 644 (2015).

specific arrangements as either culturally indispensable or culturally intolerable.²⁰⁸ It is not law that causes judges to speak of death-by-guillotine as “inconsistent with our national ethos,”²⁰⁹ the starvation of deadlocked juries as “barbarous,”²¹⁰ or race-based internment as “morally repugnant.”²¹¹ It is their perception of an adverse cultural consensus on those issues. And judges do not separate these notions of intolerability from their use of judicial power. They regularly act as if such background conditions *should* inform the development of legal doctrine.²¹²

I am unaware of a single commentator who categorically rejects this approach. It would cheapen our proudest achievements for judges to characterize barbaric practices as merely a violation of the positive law.²¹³ Nor do the virtues of constraint and predictability counsel against naming the intolerable. Judges achieve remarkable cross-ideological convergence in discerning cultural repugnance.²¹⁴ For instance, they all agree that eugenic sterilization is abhorrent, even if they would surely disagree about how to write an opinion overruling *Buck v. Bell*.²¹⁵ So moral prophecy cannot be objectionable simply because its outputs are not derived from written texts.

The question then becomes whether judges should be forbidden from *anticipating* cultural condemnation as they decide cases in the present. Here, too, the objection has little force. Judges routinely act as if their rulings should account for the future state of society. They insist that their colleagues’ opinions will have regrettable real-world consequences—and should be rejected for that reason.²¹⁶ Justice Harlan, for example, warned that *Plessy* would “arouse race hate” and “stimulate aggressions . . . upon the admitted right of colored citizens.”²¹⁷ It was entirely logical for his

208. I refer to these as “affirmative” and “aversive” ethical claims. See Rice, *supra* note 15, at 591–99.

209. Wood v. Ryan, 759 F.3d 1076, 1103 (9th Cir. 2014) (Kozinski, J., dissenting from denial of rehearing en banc).

210. Buck v. Chesapeake Ins., 4 F. Cas. 545, 545 (C.C.D. Md. 1829).

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

212. See, e.g., *id.* (announcing that *Korematsu* had lost any precedential value); Gamble v. United States, 139 S. Ct. 1960, 2005–06 (2019) (Gorsuch, J., dissenting) (praising the overruling of three “grotesque” decisions); Bob Jones Univ. v. United States, 461 U.S. 574, 592 (1983) (citing “deeply and widely accepted views of elementary justice” in holding that an organization was not tax-exempt under federal law); Greene, *supra* note 8, at 436 (“[R]ecognition of a case as anticanonical is not internal to legal reasoning.”).

213. See Rice, *supra* note 15, at 604 (“[T]he law will lose something vital if it becomes unable to distinguish between the presently unlawful and the deeply unjust or archaic.”).

214. See *id.* at 601 (“In practice, the justices appear to be far more constrained in pronouncing certain policies beyond the pale than in reasoning from the multifarious resources of text, purpose, precedent, and history.”).

215. 274 U.S. 200 (1927).

216. See *supra* note 78 and accompanying text.

217. Plessy v. Ferguson, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting).

dissent to proceed one step further and preview *Plessy*'s overarching historical legacy. To reject only the latter type of prediction would be to maintain a senseless distinction. It would mean that dire consequences may be foreseen and accounted for—but only if they are not so awful as to trigger national shame.

Indeed, anticipating cultural regret can *advance* the rule of law. If a strict devotion to craft ultimately leads judges astray, the legal system will not be better off for their efforts. It will be saddled with precedents that time has badly discredited. The necessity of overruling those decisions will damage courts' reputation as a reliable caretaker of legal principle.²¹⁸ And in the interim, countless people will have been treated unjustly. The rule of law cannot thrive if courts lose public respect by failing to meet even minimal expectations of decency. Prospectively accounting for these effects is not a corruption of the "judicial role"²¹⁹—it is a clear-eyed appraisal of what enables courts to continue functioning as courts.²²⁰

It is also worth stressing that, to date, examples of judicial moral prophecy have been brimming with legal reasoning.²²¹ Fear of history's condemnation is never the only stated basis for reaching a particular result. It functions as an add-on justification—the sort of rationale that rounds out conventional analysis by escaping its ritualistic confines. It is entirely fair to question whether the societal judgments foretold in these opinions will actually occur. But it is wrong to suggest that the opinions' authors have taken leave of their legal learning.²²² Imagining America's moral future no more threatens the rule of law than does pervasive disagreement over how to interpret textual authorities. Moral prophecy harnesses the clear link between interpretation and revulsion, aiming to spare society from legalism's worst excesses.

218. Professor Nina Varsava has also argued that judges should strive to issue rulings that later generations will be less likely to repudiate. See Nina Varsava, *The Gravitational Force of Future Decisions*, in *PHILOSOPHICAL FOUNDATIONS OF PRECEDENT* (forthcoming 2023) (manuscript at 14), <https://ssrn.com/abstract=3956848> [<https://perma.cc/ZT9F-Y9WA>] ("If [a court] foresees that future courts will depart from past cases, then it ought to decide the present case with that in mind; this would require considering what kind of decision today would make future decisions seem less capricious and more coherent when those decisions come to pass.").

219. *Jones v. Governor of Florida*, 975 F.3d 1016, 1049 (11th Cir. 2020) (en banc) (Pryor, C.J., concurring).

220. Professor Gillian Metzger has likewise argued that the Court's sociological legitimacy is "a functional prerequisite for principled legal decision making." Gillian E. Metzger, *Considering Legitimacy*, 18 *GEO. J.L. & PUB. POL'Y* 353, 377 (2020) (book review).

221. For a survey of these decisions, see *supra* Part II.B.1.

222. See Schraub, *supra* note 43, at 467 (observing that an opinion that had been criticized for anticipating the verdict of history was "perfectly legalistic in character" and otherwise "distinguished by its markedly textual orientation").

B. Temporal Indeterminacy

A second objection to judicial moral prophecy centers on the murkiness of “future generations” as a legal concept. The future is theoretically limitless. Which generation’s views are most relevant—our children’s? Their children’s? Those of Americans who may live five centuries hence?²²³ To say that history will condemn a certain policy is to say very little, because society will hold many disparate views during its continued existence.²²⁴ Every fulfilled prediction is but one turn of the wheel. Without some basis for privileging one generation’s beliefs above all others, the use of moral prophecy would elevate trivially accurate forecasts into quasi-sacred prescriptions for living out America’s true destiny.

This criticism vastly underestimates the stability of cultural views of moral repugnance. To be sure, public opinion and public policy have fluctuated in countless respects since the Founding. Chief Justice Marshall experienced this firsthand when the Jacksonian movement repudiated his nationalist vision.²²⁵ Nativists’ grip on immigration policy has tightened and loosened recurrently over the centuries.²²⁶ America has played host to both the Second Great Awakening and the sexual revolution of the 1960s.²²⁷ And leading commentators have identified no fewer than seven distinct eras of federal Indian policy.²²⁸ Clearly, every generation governs itself—and remembers the past—in its own way. The level of societal enthusiasm for any given practice will naturally depend on one’s temporal perspective.²²⁹

But societal *condemnation* has proved to be far less fleeting. In the United States, policies regarded as morally beyond the pale do not typically come roaring back to life. The level of consensus necessary for judges to

223. See Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449 (1985) (“At any moment there exists a short-run future, a long-run future, and a future in between.”); *Recent Cases: Cruel and Unusual Punishment*, 22 BUFF. L. REV. 351, 353 (1972) (“[T]here is no way to determine . . . how far in the future to look before stopping to choose a standard.”).

224. See Blasi, *supra* note 223, at 449 (“The future is virtually certain to contain some progress, some regression, some stability, some volatility.”); Charles L. Black, Jr., *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3, 13 (1970) (“[S]uch things never finally come out.”); D.P.B., *Mencken and Holmes*, 2 CONST. COMMENT. 277, 285 (1985) (“History’s verdict is . . . never final.”).

225. See Black, *supra* note 224, at 6 (“[I]n 1861, it was plain that John Marshall had misread the national character.”).

226. See JARED A. GOLDSTEIN, *REAL AMERICANS: NATIONAL IDENTITY, VIOLENCE, AND THE CONSTITUTION* 107–40 (2022).

227. STEPHEN GARTON, *HISTORIES OF SEXUALITY: ANTIQUITY TO SEXUAL REVOLUTION* 103 (2004).

228. See ANGELIQUE WAMBDI EAGLEWOMAN & STACY L. LEEDS, *MASTERING AMERICAN INDIAN LAW* 10–22 (2d ed. 2019).

229. See Jon Grinspan & Peter Manseau, *It’s 2086. This Is What American History Could Look Like*, N.Y. TIMES (Jan. 6, 2022), <https://www.nytimes.com/2022/01/06/opinion/jan-6-shaman-past-future.html> [<https://perma.cc/4M2X-438P>] (“At different moments since [1859], [John Brown’s] pikes have symbolized a demented terrorist’s scheme for mass murder, a religious fanatic’s fiery crusade and a hero’s lonely struggle for justice.”).

describe practices as odious normally prevents them from gaining (or regaining) political traction.²³⁰ Married women may still own property of their own;²³¹ torts occurring on Sunday are still compensable;²³² primogeniture still enjoys no serious support;²³³ and burning at the stake is still viewed as grossly inhumane.²³⁴

That is not to say that exceptions to this pattern could never occur. It is theoretically possible that a revanchist movement more powerful than any in American history could reinstitute segregation, exclude women from political office, and execute political dissidents. Again, however, societal condemnation tends to persist once achieved. Social movements rarely mobilize to revive practices almost universally viewed as barbaric. For this reason, periodic policy shifts usually do not mark the undoing of a preexisting consensus; they signify the natural churn of political and moral conflict. To anticipate societal regret is thus not to speak incoherently or incompletely. It is to foresee one respect in which cultural morality will coalesce—and endure—along familiar lines.

C. Pragmatic Objections

1. Predictive Challenges

One of the strongest critiques of judicial moral prophecy is that our moral blind spots can be hard to detect. As the Supreme Court famously observed, “[t]he nature of injustice is that we may not always see it in our own times.”²³⁵ We do not have the luxury of knowing history’s moral verdicts in advance.²³⁶ The social dynamics that produce future regret have never

230. See Rice, *supra* note 15, at 595 (explaining that such assertions of intolerability are universal in character, “presum[ing] the impossibility of good-faith disagreement on each issue”).

231. See Follansbee v. Benzenberg, 265 P.2d 183, 189 (Cal. Dist. Ct. App. 1954) (“This hollow, debasing, and degrading philosophy . . . has spent its course.”).

232. See Gross v. Miller, 61 N.W. 385, 386 (Iowa 1894) (scorning the opposite doctrine as “abhorrent to our enlightened civilization”).

233. See Warner v. Brinton, 29 F. Cas. 234, 235 (C.C.E.D. Pa. 1835) (characterizing a right of exclusive inheritance in firstborns as “odious”).

234. See Furman v. Georgia, 408 U.S. 238, 385 (1972) (Burger, C.J., dissenting) (describing this punishment as one “that everyone would ineffably find to be repugnant to all civilized standards”).

235. Obergefell v. Hodges, 576 U.S. 644, 664 (2015); see also Lawrence v. Texas, 539 U.S. 558, 579 (2003) (“[T]imes can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.”); United States v. Virginia, 518 U.S. 515, 566–67 (1996) (Scalia, J., dissenting) (stating that “every age” is morally vulnerable on “matters it cannot guess, because it simply does not consider them debatable”).

236. See Lucian Hölscher, *Future Thinking: A Historical Perspective*, in THE PSYCHOLOGY OF THINKING ABOUT THE FUTURE 15, 27 (Gabriele Oettingen, A. Timur Sevincer & Peter M. Gollwitzer eds., 2018) (“Nobody knows how future generations will judge our time”); John Inazu, *Law, Religion, and the Purpose of the University*, 94 WASH. U. L. REV. 1493, 1495 (2017) (“[W]e cannot know how future generations will judge our justice claims.”); Mahoney, *supra* note 203, at 762 (“How

operated according to fixed formulas. They are shaped by myriad external forces—including grassroots mobilization—that are difficult to understand and even harder to control.²³⁷ It is thus no accident that most judgments of legal infamy are made long after the relevant injustices have occurred. And it will rarely be obvious whether an ongoing cultural struggle will actually draw to a close, to say nothing of which side will prevail. Perhaps this fraught undertaking should be avoided altogether. History will judge us when it is good and ready.

In answering this challenge, it is essential not to minimize it. Most people naturally conclude that the beliefs they have spent their entire lives developing are on the right side of history.²³⁸ So it should not be surprising that political elites have espoused clashing visions of posterity's judgments.²³⁹ And many of their predictions about future ethos have proved spectacularly wrong.²⁴⁰ The Justices, too, have turned out to be “horrendous prognosticators” on more than a few occasions.²⁴¹ These details should humble anyone who hopes that moral prophecy is the solution to our legal system's deepest flaws. Even scholars sympathetic to taking the long view concede that anticipating societal outrage can be immensely tricky.²⁴² Doing

cultural attitudes will shift over the next few decades is, of course, a matter of conjecture.”); Wechsler, *supra* note 46, at 11 (insisting that posterity can “never [be] a contemporary critic” because its moral judgments are “inscrutable”).

237. See Robert L. Tsai, *Supreme Court Precedent and the Politics of Repudiation*, in *LAW'S INFAMY: UNDERSTANDING THE CANON OF BAD LAW* 96, 100 (Austin Sarat, Lawrence Douglas & Martha Merrill Umphrey eds., 2021) (explaining that the durability of judicial decisions depends on “unruly institutional and social dynamics”).

238. See Brian Richardson, *The Imperial Treaty Power*, 168 U. PA. L. REV. 931, 1012 (2020) (“[N]early every one of the losing partisans described in this Article . . . expected their adversaries to become infamous in the eyes of future generations who soberly reflected on the past.”).

239. See *supra* notes 128–33 and accompanying text.

240. See, e.g., CONG. GLOBE, 41st Cong., 2d Sess. 1513–14 (1870) (statement of Sen. Nye (“[N]ever while I live shall there come any party into power that dare attempt to root out these measures of progress, mercy, and reform that the Republican party have established. . . . These revolutions never go backward.”)); 31 CONG. REC. 6526 (1898) (statement of Sen. Bate (“Can any Senator see even in the far-distant future the probability or possibility of a [Hawaiian] Territory or State?”)); CHARLES MERZ, *THE DRY DECADE* 297 (1931) (quoting one senator's prediction that “[t]here is as much chance of repealing the Eighteenth Amendment . . . as there is for a humming-bird to fly to the planet Mars with the Washington Monument tied to its tail”); 102 CONG. REC. 12232 (1956) (statement of Rep. E. L. Forrester) (praising the Southern Manifesto as “an immortal document, and as sure as the sun shines it will take its place as one of the greatest classics”).

241. Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 818 (1991).

242. See Delgado & Stefancic, *supra* note 16, at 1930 (“Only hindsight, benefited by increased empathy and understanding, exposes an opinion as . . . a moral abomination.”); Siegel, *supra* note 16, at 1112 (“When I asked the class whether there were any social practices currently sanctioned by the Constitution that our descendants might judge evil . . . the class could not agree upon one.”); David H. Getches, *The Legacy of the Bush II Administration in Natural Resources: A Work in Progress*, 32 *ECOLOGY L.Q.* 235, 235 (2005) (“Attempts to view current events as history will judge them as imperiled by an inevitable lack of perspective and detachment.”).

so, after all, requires preemptively demonizing one's contemporaries—persons who regard their beliefs as not just reasonable, but correct.

One response to this critique is that perfect accuracy cannot be the relevant metric. Just as judges reach competing (and often erroneous) conclusions in other settings, moral prophecy should not be rejected simply because its users sometimes misfire.²⁴³ The same is true of judicial predictions generally. Dissenting Justices are not shamed for warning that certain precedents will “produce massive inequities”²⁴⁴ or leave “bitter and lasting wounds,”²⁴⁵ even though solid proof would be impossible. They are given significant leeway to make these assertions on the basis of their instincts and experience. Although curious scholars may wonder how past predictions have fared, judicial legitimacy is not seriously threatened when judges prove to have exaggerated the harms they foresaw.

It also seems likely that commentators have overstated the difficulty of predicting societal regret. Justice Harlan managed to do so, as have many others who took seriously the task of pursuing justice in the present.²⁴⁶ And the canvas of regret is not remotely blank. We, today, have the benefit of examining over two centuries of American moral failure. We know the language today's lawyers use to signify moral disidentification, we know which past practices have suffered this fate, and we know how competent lawyers once rationalized those practices under prevailing norms. If questions of life and death can be left to “analogical” analysis of the past,²⁴⁷ then surely analogical reasoning is also competent to draw lessons from an ever-growing list of past mistakes. Scholars have offered powerful reason for optimism on this front.²⁴⁸ With these hard-earned tools in hand, refusing to contemplate America's moral future is not an admirable display of humility. It is an abdication of responsibility.

243. See Mary L. Dudziak, *The Future as a Concept in National Security Law*, 42 PEPP. L. REV. 591, 606 (2015) (“Understanding that there are limits to our ability to grasp the future should not undermine the effort to craft forward-looking law . . .”).

244. *Concepcion v. United States*, 142 S. Ct. 2389, 2407 (2022) (Kavanaugh, J., dissenting).

245. *Obergefell v. Hodges*, 576 U.S. 644, 742 (2015) (Alito, J., dissenting).

246. See, e.g., *The National Convention*, WOMAN'S J., May 13, 1899, at 146 (“The day will come when people will look back with shame on the time when the best brains and virtue were shut out from the ballot-box, if they belonged to a woman.”); Malcolm K. White, *The War Powers of the President*, 1943 WIS. L. REV. 205, 227 (predicting that history would be “ashamed of our excesses” in evacuating and internment Japanese Americans living on the West Coast); DAVID M. KENNEDY, *FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929–1945*, at 755–56 (1999) (“Secretary of the Interior Harold Ickes advised the president in June 1944 that ‘the continued retention of these innocent [Japanese Americans] in the relocation centers would be a blot upon the history of this country.’”); 95 CONG. REC. 2134 (1949) (statement of Sen. Pepper) (“I say to my fellow southerners, history will condemn you if you stand persistently as the uncompromising champions of those who would perpetrate wrong . . . behind the false façade of States’ rights.”).

247. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2132–33 (2022).

248. See *supra* note 38.

Finally, complete confidence should not be a prerequisite for practicing moral prophecy. The relevant stakes may be so high that even minimal risks would be unacceptable. To take one example, a judge reviewing a state ban on medical treatments for gender dysphoria may be fairly (but not entirely) confident that the practice will eventually be viewed as cruel and bigoted. That perception should be central to the judge's assessment of which outcome would be legally correct today. Again, this precautionary mindset closely resembles methods of risk aversion that judges already employ when engaged in legal interpretation.²⁴⁹ That protective instinct should not shut off when it is used to shield courts from moral disaster.

2. Institutional Competence

Even granting that future morality should matter to the living, perhaps judges are ill suited to play prognosticator. Justice Frankfurter has voiced this skepticism most elegantly. “To pierce the curtain of the future, to give shape and visage to mysteries still in the womb of time,” he wrote, “requires poetic sensibilities with which judges are rarely endowed and which their education does not normally develop.”²⁵⁰ Numerous scholars have likewise questioned the Justices' aptitude for moral prophecy.²⁵¹ The political branches, by contrast, are well versed in the ways of public opinion. It is their job to understand how complex social trends may affect their ability to govern (and continue winning elections). When judges cite future ethos to annul the work of legislatures, then, they wrongly uplift their own prophetic abilities over those of the people's representatives. If future values are

249. See, e.g., *Bostock v. Clayton County*, 140 S. Ct. 1731, 1783 (2020) (Alito, J., dissenting) (“[T]oday’s decision may have [adverse] effects that extend well beyond the domain of federal antidiscrimination statutes.”); *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 786 (2002) (Breyer, J., dissenting) (“The Court’s decision may undermine enforcement against state employers of many laws designed to protect worker health and safety.”); *Basic Inc. v. Levinson*, 485 U.S. 224, 251 (1988) (White, J., concurring in part and dissenting in part) (expressing “fear that the Court’s decision may have many adverse, unintended effects”).

250. Felix Frankfurter, *The Judicial Process and the Supreme Court*, 98 AM. PHIL. SOC’Y PROC. 233 (1954), reprinted in *OF LAW AND MEN: PAPERS AND ADDRESSES OF FELIX FRANKFURTER, 1939–1956*, at 31, 35 (Philip Elman ed., 1956). But see DAVID S. SCHWARTZ, *THE SPIRIT OF THE CONSTITUTION: JOHN MARSHALL AND THE 200-YEAR ODYSSEY OF MCCULLOCH V. MARYLAND* 202 (2019) (quoting a 1936 cable from then-Professor Felix Frankfurter to Justice Stone: “Despite all, history remains the ultimate tribunal. . . . [A]nd so your dissent will take its place with the great moral pronouncements of your court.”).

251. See ELY, *supra* note 17, at 69 (“[T]here is no reason to suppose that judges are well qualified to foresee the future development of popular opinion.”); John C. Jeffries, Jr. & Daryl J. Levinson, *The Non-Retrogression Principle in Constitutional Law*, 86 CALIF. L. REV. 1211, 1246 (1998) (“[W]e see little reason to believe that the Justices are gifted prophets.”); R. Shep Melnick, *Statutory Reconstruction: The Politics of Eskridge’s Interpretation*, 84 GEO. L.J. 91, 99 (1995) (book review) (denying “that judges are particularly good at divining the direction of progress”).

relevant at all, they should be implemented by the officials best situated to see them clearly.²⁵²

This objection warrants three responses. First, it is essential that courts retain their ability to forestall moral calamity. No institution can responsibly outsource the determination of whether to inflict grave harm. Courts cannot stop legislatures from sullyng their own legacies, but misbegotten laws should not have the automatic effect of producing judicial tragedies. Experience has refuted the idea that legislatures are uniquely skilled at anticipating future outrage.²⁵³ The argument from institutional competence would prevent courts from upsetting any law that plausibly reflected a vision of the nation's future. This scheme would be indistinguishable from one in which judges did not care how their decisions came to be viewed. That is hardly a recipe for minimizing future regret.

Second, judges may actually be best positioned to channel future values in the cases that come before them. To put it mildly, many politicians care far more about amassing power than about currying favor with persons they can never know. Norms of partisan conformity also discourage serious efforts at moral contemplation. And many challenged laws will not have benefited from recent efforts to engage with future ethos. Those laws may themselves be generations old, serving as examples of predictions gone awry.²⁵⁴ In these situations, today's judges will be far better equipped than the enacting legislature to forecast societal outrage.

Finally, consideration of future values need not pit the branches against one another. The process can operate equally well when judges merely interpret a legislature's handiwork. Consider again *West Virginia v. EPA*, in which the Court—interpreting Section 111 of the Clean Air Act—risked the well-being of future generations in order to reify the so-called “major

252. See ELY, *supra* note 17, at 70 (“[T]here is no warrant for an appointed judge’s supposing he is so much better at [predicting progress] than the legislature that he is going to declare their efforts unconstitutional on the basis of his predictions.”); Will Marks, *Whose Majority Is It Anyway? Elite Signaling and Future Public Preferences*, 4 J.L. (1 NEW VOICES) 13, 29 (2014) (“Having the Justices decide what the people want before the people actually reach their own conclusions will strike many as both paternalistic and deterministic.”); *Hernandez v. Robles*, 855 N.E.2d 1, 12 (N.Y. 2006) (“We do not predict what people will think generations from now, but we believe the present generation should have a chance to decide the issue through its elected representatives.”), *abrogated by Obergefell v. Hodges*, 576 U.S. 644 (2015).

253. For four now-startling examples of judicial deference to federal or state laws, see *Hennington v. Georgia*, 163 U.S. 299, 303 (1896) (concluding that states may imprison any of their residents who choose to labor on Sunday); *L’Hote v. New Orleans*, 177 U.S. 587, 595, 597 (1900) (holding that women “of lewd character” may be confined to residential ghettos); *Terrace v. Thompson*, 263 U.S. 197, 220 (1923) (holding that Congress may enact racially discriminatory naturalization laws); and *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45, 51 (1959) (upholding the use of literacy tests as a precondition to voting).

254. See Corinna Barrett Lain, *Upside-Down Judicial Review*, 101 GEO. L.J. 113, 117 (2012) (“When widespread attitudes change but the law does not . . . [s]ometimes the Supreme Court is the most conducive outlet through which [normative] change can occur.”).

questions doctrine.”²⁵⁵ Or take *Bostock v. Clayton County*, which held that Title VII of the Civil Rights Act of 1964 protects gay and transgender persons from employment discrimination.²⁵⁶ It is hard to imagine a statutory-interpretation ruling more destined to be judged on its result than on its reasoning. As the majority must have sensed, a contrary ruling would likely have exposed the Justices to future obloquy. Whatever the Court’s protestations to the contrary,²⁵⁷ *Bostock* was an ideal occasion to dwell on the institution’s responsibility to later generations.

3. *Liberal Bias*

Another objection to judicial moral prophecy is that its use would systematically disadvantage conservatives. Liberal-leaning judges, after all, have employed the tool far more than their conservative counterparts.²⁵⁸ This pattern is also evident in the political realm. President Obama often claimed that his policies were on the right side of history—and that his supporters were bending the arc of history toward justice.²⁵⁹ It makes sense that progressives would look to the future when championing policies that have never commanded majority support. Conservatives, on the other hand, are wired to stand athwart history yelling, “Stop!”²⁶⁰ As one critical commentator sees it, references to the right side of history simply reveal that “a liberal is trying to shame a conservative into reaching a liberal result.”²⁶¹

This objection is flawed—or at least incomplete—in both theory and practice. Insofar as conservatism represents an aversion to drastic change, predicting societal regret can be a powerful way of advocating for conservatism. For it is not hard to imagine how the nation could be harmed by extreme social, ethical, or technological shifts. And insofar as conservatism signals a preference for Republican policies, it is untrue that moral prophecy reliably favors Democrats. Numerous conservative

255. 142 S. Ct. 2587, 2609–10 (2022).

256. 140 S. Ct. 1731, 1754 (2020).

257. *Id.* at 1737 (purporting to consider only “the law’s demands” and “the written word”). *But see id.* at 1783 (Alito, J., dissenting) (“The updating desire to which the Court succumbs no doubt arises from humane and generous impulses.”).

258. *See supra* Part II.B.1.

259. *See* David A. Graham, *The Wrong Side of ‘the Right Side of History,’* ATLANTIC (Dec. 21, 2015), <https://www.theatlantic.com/politics/archive/2015/12/obama-right-side-of-history/420462/> [<https://perma.cc/4NM6-4ZKF>].

260. *See* William F. Buckley Jr., *Our Mission Statement*, NAT’L REV. (Nov. 19, 1955), <https://www.nationalreview.com/1955/11/our-mission-statement-william-f-buckley-jr/> [<https://perma.cc/T885-PMHU>] (announcing that the *National Review* would “stand[] athwart history, yelling Stop, at a time when no one is inclined to do so”).

261. Josh Blackman, *There Is No Court of History*, VOLOKH CONSPIRACY (Sept. 12, 2020, 12:13 AM), <https://reason.com/volokh/2020/09/12/there-is-no-court-of-history/> [<https://perma.cc/D6LJ-6XNW>].

judges,²⁶² politicians,²⁶³ and scholars²⁶⁴ have demonstrated just the opposite. As with any methodology, moral prophecy's valence will depend on the circumstances of its use.

But the objection contains more than a grain of truth. On balance, judicial moral prophecy likely *would* redound to conservatives' detriment. That is not because American morality is destined to drift ever leftward. It is because American conservatism has compiled such a dreary record on matters now viewed as beyond moral dispute. For example, it was earlier conservatives who fought to preserve—rather than jettison—such features as blasphemy laws, public executions, property requirements for voting, debtors' prisons, chattel slavery, white rule after the Civil War, convict leasing, coverture, marital chastisement, male-only voting, child labor, an unregulated food industry, segregated schooling, anti-miscegenation laws, poll taxes, and a male-only military. This sort of resistance has been a hallmark of traditionalist politics throughout American history.²⁶⁵ It would be surprising if efforts to avoid societal condemnation did *not* disfavor a worldview that has so often defended now-reviled values, precisely because its adherents are predisposed to contest major shifts in social morality.²⁶⁶

262. See *supra* notes 100, 114–17 and accompanying text.

263. See *supra* notes 129–33, 135–37; 163 CONG. REC. 5678 (2017) (statement of Sen. Wicker (“[H]istory will judge [Neil Gorsuch] to be an outstanding Associate Justice of the Supreme Court.”)); 162 CONG. REC. 2924 (2016) (statement of Sen. Inhofe (“[H]istory will remember [Justice] Scalia as a stalwart defender of the Constitution”)).

264. See Michael S. Greve, *Fallacies of Fallacies*, 94 B.U. L. REV. 1359, 1381 (2014) (book review) (predicting that “posterity will not be pleased to be saddled with unpayable debts”); Bradley P. Jacob, *Back to Basics: Constitutional Meaning and “Tradition,”* 39 TEX. TECH L. REV. 261, 284 (2007) (arguing that *Lawrence v. Texas*, 539 U.S. 558 (2003), which struck down a state’s sodomy ban, would “surely stand in history with such notoriously manipulative decisions as *Dred Scott*”); Lino A. Graglia, *Fraud by the Supreme Court: Racial Discrimination by a State Institution of Higher Education Upheld on “Diversity” Grounds*, 36 LOY. U. CHI. L.J. 57, 82 (2004) (“It is unlikely that history will look kindly on Justices Powell and O’Connor for . . . upholding [affirmative action.]”); Mark Trapp, *Created Equal: How the Declaration of Independence Recognizes and Guarantees the Right to Life for the Unborn*, 28 PEPP. L. REV. 819, 846 (2001) (“One day *Roe* will be overturned and regarded with the same abhorrence as the *Dred Scott* case.”); Craig Anthony (Tony) Arnold, *Religious Freedom as a Civil Rights Struggle*, 2 NEXUS 149, 162 (1997) (“Ultimately, [*Employment Division v. Smith*] will come to be viewed as the *Plessy* of the 20th century.”).

265. See PEGGY PASCOE, *WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA* 292 (2009) (“[P]olitical conservatives . . . had long been the backbone of resistance to civil rights legislation of all kinds.”); Neil S. Siegel, *Why the Nineteenth Amendment Matters Today: A Guide for the Centennial*, 27 DUKE J. GENDER L. & POL’Y 235, 243 (2020) (“[I]t was conservative, traditionalist men in particular who most strongly opposed the Nineteenth Amendment”); DAVID R. DOW, *AMERICA’S PROPHETS: HOW JUDICIAL ACTIVISM MAKES AMERICA GREAT* 133 (2009) (“[A]t each moment in American history, when the concepts of equality and liberty . . . have expanded noticeably, people who opposed the expansion have dug in their heels. . . .”).

266. It is, of course, possible to identify counterexamples. See VICTORIA F. NOURSE, IN RECKLESS HANDS: *SKINNER V. OKLAHOMA* AND THE NEAR TRIUMPH OF AMERICAN EUGENICS 21 (2008) (noting that prominent progressives once supported eugenic sterilization, whereas the Catholic Church vigorously opposed it). I do not claim that conservatives consistently end up on the wrong side of history or that they never take stances that prove morally righteous.

Because of earlier advances now taken for granted, it is easy to overlook how arguments to preserve traditional mores would have applied in former times. But that history only underscores the need for ongoing moral reflection. We must always ask whether positions held today in good faith could become a source of enduring shame. It should matter to courts whether certain patterns of thought have, far more often than others, rationalized policies now viewed as morally disastrous. If conservatism underperforms on that metric, so much the worse for conservatism.

4. *Moral Emptiness*

But what if the culture is led astray? When society is veering in troubling directions, perhaps it is a virtue to push back. This argument holds that it is more important to do right than to be agreed with.²⁶⁷ At least before *Obergefell v. Hodges*,²⁶⁸ many opponents of same-sex marriage stuck to their guns even when the practice's future acceptance became increasingly obvious.²⁶⁹ And it is not conservatives alone who believe that actual morality matters more than cultural morality. The famed liberal judge J. Skelly Wright offered a trenchant critique of anticipating the verdicts of history. "The ultimate test of the Justices' work," he wrote, "must be goodness, not a cynically defined success."²⁷⁰ Wright refused to allow justice and injustice to be measured by "passing societal value choices of no inherent and true meaning."²⁷¹

This point is well taken with respect to cultural habits or trends, broadly conceived. But the objection underestimates the reshaping power of cultural *condemnation*.²⁷² When a normative struggle is decisively resolved, "goodness" and "success" come to be viewed interchangeably. Other perspectives—even ones that stemmed from sincere moral convictions—become inconceivably wrong. In the 1960s, for example, opponents of

267. Professor Philip Kurland, for one, lamented that "[h]istory . . . has a nasty way of measuring greatness in terms of success rather than goodness." Philip B. Kurland, *Earl Warren, the "Warren Court," and the Warren Myths*, 67 MICH. L. REV. 353, 357 (1968).

268. 576 U.S. 644 (2015).

269. See Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman*, 2 U. ST. THOMAS L.J. 33, 68 (2004) ("[M]aybe, just maybe, the young are inexperienced and even occasionally ignorant. Maybe they've been relentlessly propagandized by only one side of the gay marriage debate for years."); Jay Nordlinger, *'The Right Side of History'*, NAT'L REV. (Mar. 31, 2011, 4:00 AM), <https://www.nationalreview.com/magazine/2011/04/18/right-side-history-2/> [perma.cc/A4E6-NZC4] ("The victorious side is not always the right one, is it?").

270. J. Skelly Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 797 (1971).

271. *Id.*

272. See KWAME ANTHONY APPIAH, *THE HONOR CODE: HOW MORAL REVOLUTIONS HAPPEN* xvii (2010) ("One day, people will find themselves thinking not just that an old practice was wrong and a new one right but that there was something shameful in the old ways.").

interracial marriage may have regarded *Loving v. Virginia*²⁷³ as the crest of a “passing societal value choice[.]”²⁷⁴ The same could be said of those who initially resisted Black civil rights,²⁷⁵ school desegregation,²⁷⁶ and women’s military service.²⁷⁷ But we have lost any collective capacity to treat those beliefs charitably. There is nothing “good” or “true” in them—only the seeds of extreme retrogression.

The objection thus proves far too much. All who once pushed back against the pillars of today’s moral order thought they were acting virtuously. Inevitably, however, societal repudiation conditions our beliefs about justice and morality. Contrary traditions are rejected, sacred verses are reinterpreted,²⁷⁸ and bitter-enders lose their status as nodes of elite influence. Any distinction between goodness and success cannot be maintained after a genuine cultural consensus arises. When it does, we cease to admire those who fought for values now viewed as depraved or benighted. And it is unclear what credible moral theory could justify adopting *any* of the numerous practices that American political culture now recognizes as odious. Moral prophecy thus sacrifices little by relying on an especially compelling subset of cultural morality.

The Court’s conservatives are well aware of this dynamic. They surely know that if *Obergefell* becomes the next *Loving*, they will leave legacies of intolerance. It is thus no accident that these Justices have jointly portrayed opposition to LGBTQ+ rights as a respectable belief held by millions of decent Americans.²⁷⁹ As recently as December 2022, Justice Alito pointedly reiterated “what Justice Kennedy wrote in *Obergefell* about honorable people who object to same-sex marriage.”²⁸⁰ Having lost

273. 388 U.S. 1 (1967).

274. Wright, *supra* note 270, at 797; see PASCOE, *supra* note 265, at 289 (“[E]ven after . . . *Loving*, Florida continued to refuse marriage licenses to interracial couples.”).

275. See SELMA WKLY. MESSENGER, Dec. 15, 1866, at 2 (“[P]osterity will condemn the measures and policy of the [Republican] party . . . as unwise, cruel, vindictive, unstatesmanlike, and ruinous.”).

276. See Samuel L. Brown, Letter to the Editor, *Voice of the People: Takes Issue with Valentine Concerning Segregation*, RICH. TIMES-DISPATCH, Dec. 14, 1953, at 18 (stating that “[f]uture generations will condemn us” for failing to consider the effects of integration on white children).

277. See Adam G. Mersereau, *Women in Combat: The Deadly Inefficiency of Current Law and Policy*, 3 HOLY CROSS J.L. & PUB. POL’Y 39, 73 (1998) (“History will condemn the flag officers and policy-makers who carelessly send America’s women into battle with men.”).

278. See Michael Kent Curtis, *A Unique Religious Exemption from Antidiscrimination Laws in the Case of Gays? Putting the Call for Exemptions for Those Who Discriminate Against Married or Marrying Gays in Context*, 47 WAKE FOREST L. REV. 173, 187 (2012) (“Slavery, racial discrimination and segregation, and opposition to women’s rights were all supported by strong religious arguments bolstered by citations to the Bible.”) (footnotes omitted); DAVID FROST, BILLY GRAHAM: CANDID CONVERSATIONS WITH A PUBLIC MAN 81 (2014) (“I think that we have misinterpreted the Scriptures many times and we’ve tried to make the Scriptures say things that they weren’t meant to say . . .”).

279. See *supra* notes 193–97 and accompanying text.

280. Transcript of Oral Argument at 80–81, 303 *Creative LLC v. Elenis*, No. 21-476 (U.S. argued Dec. 5, 2022) (question of Alito, J.); see also Transcript of Oral Argument at 75, *Masterpiece Cakeshop*,

Obergefell, and possibly wary of reversing it, the conservative legal movement is actively using its power to forestall an adverse societal judgment. That is not because social conservatives reject the idea of cultural regret; it is because they understand the grave threat it could pose to their historical reputations.

5. *Opportunism*

Finally, one might worry that moral prophecy would be used opportunistically, with an eye more toward the present than the future. Labeling a decision the next *Plessy* or *Dred Scott* is a uniquely strident way of voicing one's disapproval. As our country grows further and further apart, these extreme reactions could become normalized. Predictions of anticanonicity would be a cheap—and expected—way to signal a tribal affiliation. All good decisions will be on the right side of history, and all suboptimal ones will make our grandchildren shudder. Moral prophecy thus risks devolving into an engine of partisan warfare.

Professor Paul Horwitz has stated this concern most powerfully. In today's polarized climate, he writes, appeals to posterity usually indicate political maneuvering in the present. Commentators are prone to describe each new disfavored decision as “anticanonically wicked and deserving of infamy.”²⁸¹ Horwitz sees such reactions as calculated performances designed to fundraise, earn clicks, and bludgeon one's political opponents.²⁸² He warns of “strategic effort[s] to pre-form a ‘judgment of history,’”²⁸³ as if these far-off assessments should not (or cannot) be influenced by today's advocacy.²⁸⁴ Such predictions are far more likely to “substitute for . . . reasoned argument”²⁸⁵ than to grapple with a case's actual role in constitutional time.

Professor Horwitz's concern is worth heeding—at least as far as it goes. He is surely correct that many actors have an incentive to exaggerate the harms of disfavored precedents. When partisans churn out hot takes that

Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018) (question of Roberts, C.J.) (“[W]hen the Court upheld same-sex marriage in *Obergefell*, it went out of its way to talk about the decent and honorable people who may have opposing views.”).

281. Paul Horwitz, *Fame, Infamy, and Canonicity in American Constitutional Law*, in *LAW'S INFAMY: UNDERSTANDING THE CANON OF BAD LAW* 213, 244 (Austin Sarat, Lawrence Douglas & Martha Merrill Umphrey eds., 2021).

282. See *id.* at 237–38.

283. *Id.* at 244.

284. See *id.* at 238 (“A consensus that some action merits the label of ‘fame’ or ‘infamy’ emerges only with time. It requires patience and perspective.”); *id.* at 239 (“[T]he conclusion that a case is truly canonical or anticanonical requires an expanded time horizon.”).

285. *Id.* at 245; see also Allen Mendenhall, *Children Once, Not Forever: Harper Lee's Go Set a Watchman and Growing Up*, 91 IND. L.J. SUPP. 6, 10 (2015) (“This business about being on the right or wrong side of history is anti-intellectual . . .”).

trade on *Dred Scott*, we should presume that those messages are intended to shape a political narrative. That is especially true if their predictions are wholly conclusory, failing to specify how the stated relationships might materialize. Horwitz is right that these bare assertions will have “little power to persuade the other side.”²⁸⁶

But the objection is not fatal to judicial moral prophecy. That some actors will cry wolf does not eliminate the dire threat that actual wolves pose. We should not drop our best protection against moral tragedy just because the tool can be exploited for political gain. Some warnings will be right—and their premises laid out with devastating clarity. In addition, Horwitz’s essay addresses the practice of anticanonization in civil society, not the judiciary. There is far less risk that judges will lodge overwrought accusations in order to steer the political conversation. To date, these interventions have been fairly selective,²⁸⁷ suggesting that jurists have often held their fire in marginal situations.

Lastly, it would trivialize moral prophecy to describe it as an effort to “pre-form a ‘judgment of history.’”²⁸⁸ Horwitz suggests that actors who channel future ethos are wrongly curtailing the time horizon necessary for genuine understandings of honor and infamy to emerge.²⁸⁹ They are prematurely intervening in history, rather than “patien[tly]” awaiting its verdicts.²⁹⁰ Horwitz is plainly correct that predictions of moral condemnation usually double as attempts to win support for those visions. Justice Harlan was not agnostic as to whether his *Plessy* prophecy should be fulfilled. He despised Jim Crow laws and appealed unapologetically to the better angels of later eras. We should not be troubled by this commingling of the predictive and the prescriptive. Public servants who foresee societal regret *should* strive to halt its advance. If forward-looking claims can aid in this process, that is hardly a reason to renounce them.

286. Horwitz, *supra* note 281, at 258 n.223.

287. *See supra* Part II.B.1.

288. Horwitz, *supra* note 281, at 244.

289. *See supra* note 284.

290. Horwitz, *supra* note 281, at 238. Scholars have relatedly argued that Supreme Court majorities inevitably shape American culture as they endeavor to predict it. *See* Driver, *supra* note 71, at 980 (“Portraying the justices as mere forecasters . . . conceals their ability to influence the nation’s constitutional climate.”); ELY, *supra* note 17, at 70 (“[T]he fact that things turned out as the Supreme Court predicted may prove only that the Supreme Court is the Supreme Court.”); Sherally Munshi, “*The Courts of the Conqueror*”: Colonialism, the Constitution, and the Time of Redemption, in *LAW’S INFAMY: UNDERSTANDING THE CANON OF BAD LAW* 50, 65 (Austin Sarat, Lawrence Douglas & Martha Merrill Umphrey eds., 2021) (claiming that Professor Balkin “ascribes to [Chief Justice] Marshall an extraordinary, superhuman capacity to see into the future while obscuring his very human hand in creating that future”); Siegel, *supra* note 41, at 973 (arguing that the *Brown* Court “succeed[ed] in shaping constitutional values as it expressed them”).

V. PRACTICING MORAL PROPHECY

The avoidance of future tragedies may well be a worthy aspiration. But how would this lofty ideal be implemented in the real world? This Part offers a set of guidelines for operationalizing judicial moral prophecy—ones that are sensitive not just to the pull of future morality, but also to the legal and cultural demands of the present.

For starters, relatively few cases will be worthy candidates for moral prophecy. The technique should not be used in settings that appear incapable of giving rise to a society-wide moral judgment. This general category cannot be rigidly defined, of course. But in cases of doubt, judges can learn from courts' extensive experience with pinpointing past moral failure.²⁹¹ Nor should moral prophecy be employed without a basis for believing that an ongoing normative conflict will be resolved—and in the way a judge predicts. Admittedly, this second condition cannot reliably constrain; most of us want to envision a future in which our deepest values will flourish. But epistemic humility may do significant work here, given moral prophecy's inevitable lack of textual mooring. And precisely because of that well-founded anxiety, courts would be well advised to preserve moral prophecy's legal character by analogizing to past transformations as part of their reasoning.²⁹² Real patterns of interpretive change are harder to dismiss than unsupported visions of coming cultural epiphanies.

Importantly, I do not counsel judges to reject the authority of existing legal texts. Moral prophecy is ultimately a theory of how cultural shifts can alter perceptions of interpretive discretion. If textual constraints are unalterably clear—as with the constitutional requirement of two senators per state²⁹³—then judges cannot flout their commands. Such situations call for anguished concurrences, not lawlessness. Nor can judges simply assume away the existence of unfavorable provisions. Adjudication would lose its legal legitimacy if judges declined to apply governing texts based on a prediction that they might eventually be amended or repealed.²⁹⁴ Moral prophecy, then, assumes an established textual baseline. But it recognizes that looming moral closure can affect how those texts might fairly be interpreted.

291. See *supra* note 96 and accompanying text.

292. For an example, see *Brenner v. Scott*, 999 F. Supp. 2d 1278, 1281 (N.D. Fla. 2014) (“Now, nearly 50 years later, the arguments supporting the ban on interracial marriage seem an obvious pretext for racism . . . [T]he arguments supporting Florida’s ban on same-sex marriage, though just as sincerely held, will again seem an obvious pretext for discrimination.”).

293. See U.S. CONST. art. I, § 3, cl. 1.

294. See G. Alexander Nunn, *The Living Rules of Evidence*, 170 U. PA. L. REV. 937, 964 (2022) (“An unmitigated judicial rejection of the Rules would constitute an anarchical rejection of the very notion of positivism.”).

Moral prophecy can—and often should—prove decisive when existing doctrine readily allows for the avoidance of future regret. In its weakest form, moral prophecy could simply serve as a tiebreaker when conventional arguments leave a judge genuinely unsure how to rule. But averting institutional tragedy should be a significantly higher priority. When we contemplate the history of court-inflicted moral disaster,²⁹⁵ apathy toward one’s own normative legacy becomes almost inexcusable. Preventing mass injustice should thus weigh heavily in a judge’s decisional calculus. When current doctrine could easily accommodate this goal, it should be pursued in earnest. And judges should explain their decisions for what they are: efforts to stave off grievous moral failure.

Moral prophecy can have its greatest bite when received doctrinal frameworks are seen as an obstacle to long-term justice. Through the force of repetition, individual doctrines can take on an air of inevitability. It can become difficult to imagine alternative legal tests—or to continue insisting on a relationship between analytical method and human flourishing. Moral prophecy functions to disturb the “normative power of the actual.”²⁹⁶ It does so by exposing the most familiar interpretive devices as potential accessories to moral horror. Moral prophecy thus operates as a permission to rethink established principles whose very regularity conceals their dark potential.²⁹⁷ The prospect of future regret can spur judges either to reassess the contours of existing frameworks or to scrap them altogether.

Consider *Juliana v. United States*,²⁹⁸ a cutting-edge suit brought to lessen the ravages of climate change. The plaintiffs in *Juliana* claimed a constitutional entitlement to “a climate system capable of sustaining human life.”²⁹⁹ The evidentiary record they marshaled left little doubt that the continuation of existing policies would “hasten an environmental apocalypse.”³⁰⁰ In particular, an ever-warming planet would “bury cities, spawn life-threatening natural disasters, and jeopardize critical food and water supplies.”³⁰¹ The plaintiffs accordingly sought an injunction requiring the federal government to develop a plan to phase out the domestic use of fossil fuels.³⁰²

295. See sources cited *supra* note 147.

296. Charles L. Black, Jr., *The Death Penalty Now*, 51 TUL. L. REV. 429, 434 (1977) (attributing the phrase to Georg Jellinek).

297. See Nikolas Bowie & Norah Rast, *The Imaginary Immigration Clause*, 120 MICH. L. REV. 1419, 1429 (2022) (“[B]ecause its relationship to other legal and moral norms is contingent, the present generation has an obligation to imagine alternatives.”).

298. 947 F.3d 1159 (9th Cir. 2020).

299. *Id.* at 1169. The court assumed the substantive validity of this theory for purposes of its decision. *Id.* at 1169–70.

300. *Id.* at 1164.

301. *Id.* at 1166.

302. *Id.* at 1164–65, 1172.

A panel of the U.S. Court of Appeals for the Ninth Circuit well understood the stakes. It accepted that climate change was an “existential”³⁰³ threat that posed a “clear and present danger[] to the American Experiment.”³⁰⁴ Yet perhaps because of the case’s public importance, the court made a virtue of clinging tightly to Article III justiciability requirements. The *Juliana* majority deemed the plaintiffs’ suit nonredressable, disclaiming any authority to issue the requested relief. The panel fretted that assessing the government’s compliance with any remedial decree would necessarily involve “a broad range of policymaking.”³⁰⁵ And it worried that supervising the government’s performance would be a decades-long endeavor.³⁰⁶ The court refused to compromise ordinary craft values—being “informed by tradition, methodized by analogy, [and] disciplined by system”³⁰⁷—under even the direst of circumstances. Only by respecting “the defining characteristics of Article III judges,”³⁰⁸ *Juliana* insisted, can courts truly protect human liberty.

This ode to interbranch symmetry will almost certainly make our descendants shudder. It is the height of obtuseness to utter theoretical platitudes about liberty on an issue that threatens to upend liberty as we know it. When the expected devastation materializes, *Juliana*’s insistence on a cabined judicial role will seem inconceivably petty. It will be difficult to reconstruct the mindset that condoned mass suffering for the sake of an abstract structural equilibrium. *Juliana* is the sort of case that calls for exploring any available doctrinal pathway to stave off (or mitigate) future tragedy.

The dissent understood this well, warning that “history will not judge us kindly” for hastening civilizational turmoil.³⁰⁹ Nor, as the dissent pointed out, would *Juliana* have been the first example of a court mandating “widespread, programmatic changes in government functions.”³¹⁰ The *Juliana* court’s failure illustrates a key lesson of moral prophecy: judges do not deserve moral absolution any time their decisions represent the fairest, cleanest applications of existing doctrine. It is entirely proper to condemn them for burdening posterity with injustices that lawyerly creativity could have avoided. We should expect our courts to anticipate how today’s

303. *Id.* at 1173.

304. *Id.* at 1174.

305. *Id.* at 1172 (“These decisions range, for example, from determining how much to invest in public transit to how quickly to transition to renewable energy . . .”).

306. *Id.*

307. *Id.* at 1174 (quoting BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 141 (1921)).

308. *Id.* (quoting *Stern v. Marshall*, 564 U.S. 462, 483 (2011)).

309. *Id.* at 1191 (Staton, D.J., dissenting).

310. *Id.* at 1188 (citing other structural injunctions in the contexts of school desegregation and intolerable prison conditions).

analytical patterns will be rethought if they yield horrifying outcomes. In time, it is *Juliana*'s showy inaction that will come to seem legally untenable.

A second example well illustrates how long-range moral intuitions can clash with current doctrinal standards. In the 2010 case of *United States v. Stevens*, the Supreme Court held that the First Amendment presumptively shields depictions of animal cruelty from governmental regulation.³¹¹ Under *Stevens*, profiting from the brutal torture of sentient creatures is an interest of constitutional magnitude. It makes no difference that such gratuitous torment lacks any social value, or that the government has an overwhelming interest in halting this form of savagery. All that matters for First Amendment coverage is the absence of a "long-settled tradition" of regulating depictions of animal cruelty.³¹² The First Amendment necessarily encompasses any form of expression that was not singled out for restriction ages ago. And—crucially—regulations of protected speech will usually fail the demanding test of strict scrutiny, as in *Stevens* itself.³¹³

One can easily envision a day when *Stevens* is remembered as a "stench in the nostrils,"³¹⁴ an icon of the Court's elevation of form over basic decency. This thought is unlikely to occur to anyone who—like most lawyers—approaches doctrine as something to be internalized and operated within. But doctrines come and go as the world changes around them.³¹⁵ It is always perilous to consider only the past in issuing rulings that could become culturally salient. If *Stevens* is remembered as a moral travesty, it is *today*'s history-focused approach that will seem "startling and dangerous."³¹⁶ *Stevens*'s analytical legitimacy will collapse as society awakens to the sheer depravity it licensed. Far from being an easy case, *Stevens* was a missed opportunity to consider whether a doctrine capable of dictating such haunting results is worth adhering to.

This is not to say that the Justices should always follow moral prophecy wherever it leads. Some results would be so outlandish under current norms that to reach them could seriously threaten the Court's sociological standing. Imagine, for example, an argument that animals—as legal "persons"—enjoy a substantive-due-process right not to be slaughtered for human consumption. This position might conceivably gain traction if moral

311. 559 U.S. 460, 472 (2010).

312. *Id.* at 469–72; *see also id.* at 472 (reiterating that only "historically unprotected" categories of speech fall outside the First Amendment's ambit).

313. *See id.* at 482.

314. CONG. GLOBE, 41st Cong., 2d Sess. 1566 (1870) (statement of Sen. Sumner) (maligning the *Dred Scott* decision).

315. *See* BALKIN, *supra* note 20, at 13 ("[Doctrinal] categories are not permanent; they have been different before and they will be different again.").

316. *Stevens*, 559 U.S. at 470 (criticizing the government's proposed test for First Amendment coverage, one that would entail "a categorical balancing of the value of the speech against its societal costs").

sentiments shift decisively.³¹⁷ It is also possible to imagine a future in which mandatory jury service is viewed as a form of “involuntary servitude.”³¹⁸ Today, however, these conclusions would be greeted with shock and ridicule.³¹⁹ The Court would be foolish to provoke economic, culinary, or institutional chaos for the sake of remaining on history’s good side.³²⁰ The necessity of maintaining a sufficient level of social acceptance surely limits the Court’s full-throated pursuit of moral prescience.

But even when drastic, immediate change would be unfathomable, individual judges have other options when contemplating future revulsion. Most importantly, they can lay down moral markers by writing separate opinions that do not have immediate legal effect. These signposts, in turn, can create the conditions for quicker acceptance of moral norms destined to reshape established doctrine. The proper distribution of majority, concurring, and dissenting moral prophecy is not a question that law alone can answer. It requires an irreducible element of pragmatic judgment. The appropriate method of intervention will depend on such factors as the level of expected societal regret, one’s confidence in such predictions, the amount of doctrinal friction an act of moral prophecy would yield, and cultural receptiveness to the prompt implementation of future norms.

In practicing moral prophecy, however, judges should take care not to overvalue present practical difficulties. For it is precisely this failure to imagine offsetting imperatives that has led the judiciary to ratify gross injustices. That judges must be tactful in avoiding moral disaster is no reason to doubt the enterprise’s importance.

CONCLUSION

Justice Stevens sensed that his colleagues were making a tragic mistake. It was June 2000, and the Court would soon hold that the Boy Scouts of America enjoyed a constitutional entitlement to fire gay scoutmasters.³²¹ Stevens viewed this ruling as “the latest in a long line of decisions

317. See Klein, *supra* note 63 (predicting that “[h]ow we treat farm animals today will be seen . . . as a defining moral failing of our age”).

318. U.S. CONST. amend. XIII.

319. As Professor H. Jefferson Powell has noted, lawyers—like most people—“find it difficult to maintain beliefs that are at odds with the assumptions and certainties that dominate the social world around them.” POWELL, *supra* note 147, at 191.

320. See DANIEL FARBER & NEIL S. SIEGEL, UNITED STATES CONSTITUTIONAL LAW 5 (2019) (explaining that the Justices “have learned from hard experience the potential hazards . . . of deciding cases in ways that are outside the political mainstream of the period”).

321. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 661 (2000).

influenced by historical prejudices.”³²² His draft dissent echoed Justice Harlan’s *Plessy* premonition: “Some day, these prejudices will fade away completely—as, too, will today’s opinion, like *Bradwell* and *Dred Scott* before it.”³²³

Justice Stevens stood alone in seeking to broaden the historical aperture. One by one, his fellow dissenters urged him to tone down his opinion’s moral intensity.³²⁴ “*Dred Scott* is a bit rough,” Justice Souter warned.³²⁵ Justice Ginsburg feared that such charged comparisons would “distract the uncommitted.”³²⁶ Justice Breyer likewise saw slavery analogies as needlessly inflammatory. He later thanked Stevens for softening his stance: “I am glad you eliminated the reference to *Dred Scott*.”³²⁷

This late-June courtesy likely helped safeguard the Justices’ social relations. It may well have forestalled a string of messy headlines. And it surely made Stevens’s dissent more legally legible. But did this change really leave the judicial system better off? Should visionary jurists shrink from anticipating cultural condemnation, as Stevens ultimately did?

As today’s Court increasingly seeks legal legitimation in the past, it would do well to consider the risk of future regret. No one today celebrates the craftsmanship of decisions that condoned moral wrong. We instead curse their authors for having sacrificed human decency in flawed displays of judicial modesty. In truth, no Justice—and no methodology—can escape the reshaping force of moral revulsion. Existing beliefs inevitably give way when they elicit societal horror. Just as *Plessy* and *Korematsu* are decried without the slightest attempt to situate them within earlier intellectual milieus, today’s judges will not be absolved of injustices committed in a spirit of legal fidelity. It is thus ironic that judicial moral prophecy could be resisted as unawfully. For it, more than any other interpretive device, seeks legal continuity between past, present, and future.

322. Joan Biskupic, *Behind the Scenes in 2000 When Supreme Court Liberals Thought Nazi and Dred Scott References in Gay Rights Dissent Were Distracting*, CNN (May 18, 2023, 5:00 AM) (footnotes omitted), <https://www.cnn.com/2023/05/18/politics/gay-rights-stevens-ginsburg-supreme-court-boy-scouts/index.html> [<https://perma.cc/RN2Y-X2SR>].

323. *Id.*

324. *See id.* (“[F]ellow liberal dissenters David Souter, Ruth Bader Ginsburg and Stephen Breyer argued in a series of personal memos that Stevens’ fury could undermine the force of their legal arguments.”).

325. *Id.* (italics added). Souter continued: “I hope you won’t blame me for trying to cut your great head of steam a bit.” *Id.*

326. *Id.*

327. *Id.* (italics added).