
JUDICIAL REGRETS

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ABSTRACT

*U.S. Supreme Court Justices have often expressed regret about their most consequential rulings and opinions. Chief Justice Warren lamented his 1955 *Brown v. Board of Education* opinion ordering desegregation “with all deliberate speed”—ambiguous phrasing that enabled delays in integration. Justice Powell recanted his 1986 opinion in *Bowers v. Hardwick*, which upheld a Georgia law criminalizing same-sex intimacy. Justice O’Connor predicted in *Grutter v. Bollinger* that affirmative action policies would no longer be needed within twenty-five years—a prediction she later acknowledged was mistaken. These examples, among others discussed in this Article, illustrate that judicial regret is frequent and poignant, spanning several areas of law.*

Judicial regret influences legal development by shaping judicial behavior, informing legislative reform, and empowering social movements. Despite this significance, it remains largely unexplored in U.S. legal scholarship. This Article provides the first systematic analysis of judicial regret by drawing on multidisciplinary research on regret, previously unpublished judicial survey data, and judicial case studies. It examines how the law might better account for judicial regret and underscores insights about law and judging that stem from deeper understandings of it. Because such regret can catalyze legal reforms and rectify past harms, this Article proposes ways to incorporate it into legal interpretation and the treatment

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of precedent. By contemplating the legal and normative significance of this neglected judicial emotion, this Article aims to help the legal community avoid collectively discounting regret.

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INTRODUCTION

In 2003, Justice O'Connor famously predicted in *Grutter v. Bollinger* that race-conscious affirmative action policies would become unnecessary in twenty-five years.¹ In 2023, Supreme Court Justices in *Students for Fair Admissions (SFFA) v. Harvard* invoked this prediction in striking down affirmative action programs at Harvard College and the University of North Carolina, departing from a half-century of precedent and reshaping educational opportunity for millions.²

What the Court ignored was that Justice O'Connor herself appeared to regret her prediction.³ After retiring, she publicly acknowledged that her *Grutter* timeline was unrealistic⁴ and that any predetermined sunset for affirmative action was misguided.⁵ Yet this regret played no explicit role in the Court's analysis. Instead, some Justices elevated her acknowledged error to constitutional doctrine while disregarding her own repudiation of it.⁶

1. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

2. *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2175 (2023).

3. See *infra* Section I.B.5. For a detailed account of Justice O'Connor's timeline in *Grutter*, see Yuvraj Joshi, *Racial Time*, 90 U. CHI. L. REV. 1625, 1662–68 (2023) [hereinafter Joshi, *Racial Time*]. For media reports discussing Justice O'Connor's regret over her timeline, see, e.g., Tiana Headly, *Harvard Admissions Case Tests O'Connor's 2003 Call on Race Bias*, BLOOMBERG L. (Aug. 11, 2021, 1:45 AM), <https://news.bloomberglaw.com/us-law-week/harvard-race-admissions-case-tests-oconnors-25-year-prediction> [<https://perma.cc/QUX3-5E4X>] (reporting that “the justice came to regret using” her twenty-five year timeline); Ronald J. Hansen, *Sandra Day O'Connor, Supreme Court Trailblazer and Arizona Icon, Dies at 93*, AZCENTRAL (Jan. 4, 2024, 11:29 AM), <https://www.azcentral.com/story/news/local/arizona/2023/12/01/sandra-day-oconnor-obituary-legacy-first-woman-supreme-court/316869001> [<https://perma.cc/3C76-UJAW>] (noting that “14 years later she regretted that timetable”).

4. Evan Thomas, *Why Sandra Day O'Connor Saved Affirmative Action*, THE ATLANTIC (Mar. 19, 2019), <https://www.theatlantic.com/ideas/archive/2019/03/how-sandra-day-oconnor-saved-affirmative-action/584215> [<https://perma.cc/699P-WKHW>] (quoting Justice O'Connor as calling her twenty-five-year timeline a “misjudgment” on her part).

5. *Id.* (quoting Justice O'Connor as stating: “There’s no timetable. You just don’t know.”).

6. See Joshi, *Racial Time*, *supra* note 3, at 1667.

Justice O'Connor was not the only Justice to later express misgivings about a landmark equality or liberty opinion. Justice Douglas expressed regret about sanctioning Japanese American internment during World War II in *Korematsu v. United States*.⁷ Chief Justice Warren lamented his 1955 opinion in *Brown v. Board of Education* that ordered desegregation of schools "with all deliberate speed."⁸ This ambiguous phrasing enabled delays in integration.⁹ Justice Powell recanted his 1986 opinion in *Bowers v. Hardwick* upholding a Georgia law criminalizing same-sex intimacy,¹⁰ as well as his 1987 opinion in *McCleskey v. Kemp* upholding the death penalty.¹¹ Such instances of judicial second-guessing underscore the inherent challenges of legal interpretation and the near inevitability of regret. How should the legal system respond when judges later regret their own opinions?

This Article demonstrates how engaging with judicial regret can strengthen our legal system. A system that learns from judges' regrets offers advantages over one in which judges suppress their misgivings or where others disregard them. Accordingly, we should cultivate an environment in which judges feel empowered to acknowledge errors and express regret, rather than discourage these practices. By examining regret, we can gain fresh insights into judicial rulings and decision-making processes, as well as into the background conditions that lead judges to regret their opinions. Judicial regret can reinforce existing calls for legal and structural reforms and highlight overlooked areas requiring attention.

Regret has attracted significant interest across various fields. Psychologists define regret as a "state of feeling sorry for losses, transgressions, shortcomings, or mistakes," studying it as a complex cognitive and emotional phenomenon influenced by multiple factors.¹² Philosophers have categorized types of regret, evaluated when it is justified, and described its role in moral decision-making.¹³ Economists have

7. *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

8. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955).

9. See CHARLES J. OGLETTREE, ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF-CENTURY OF *BROWN V. BOARD OF EDUCATION* 10–14 (2004) (summarizing the significance of "with all deliberate speed" in *Brown II*).

10. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

11. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

12. See *infra* text accompanying notes 223–44.

13. See, e.g., Janet Landman, *Regret: A Theoretical and Conceptual Analysis*, 17 J. THEORY SOC. BEHAV. 135, 136 (2007); Rüdiger Bittner, *Is It Reasonable to Regret Things One Did?*, 89 J. PHIL. 262 (1992); Carla Bagnoli, *Value in the Guise of Regret*, 3 PHIL. EXPLS. 169, 178 (2000); Carolyn Price, *The Many Flavours of Regret*, 103 MONIST 143 (2020); ANNA GOTLIB, *Backward Glances: An Introduction to the Moral Psychology of Regret*, in THE MORAL PSYCHOLOGY OF REGRET 1 (Anna Gotlib ed., 2019); BRIAN PRICE, A THEORY OF REGRET (2017).

incorporated regret into decision-making models through concepts like regret aversion.¹⁴ Sociologists have explored how experiences and expressions of regret are socially constructed, shaped by cultural norms.¹⁵ Historians have analyzed societal regret, identifying practices once deemed acceptable that are later recognized as harmful.¹⁶

Despite this broad interest in regret, scholarship specifically examining judicial regret remains scarce.¹⁷ While some work has thoughtfully analyzed isolated instances of judicial regret,¹⁸ only one brief U.S. law review piece has examined it as a general phenomenon,¹⁹ offering a descriptive account without exploring its broader significance.²⁰ Legal scholarship has focused much more on regret experienced by non-judicial actors in areas like contract law,²¹ criminal sentencing,²² abortion,²³ and gender-affirming health care.²⁴ Law-and-emotion scholars have demonstrated the importance of emotions in legal analysis, touching on regret but not specifically among judges.²⁵

14. See, e.g., Terry Connolly & David Butler, *Regret in Economic and Psychological Theories of Choice*, 19 J. BEHAV. DECISION MAKING 139 (2006); Takashi Hayashi, *Regret Aversion and Opportunity Dependence*, 139 J. ECON. THEORY 242 (2008).

15. See, e.g., Maria Madalena d'Avelar, *On Regret: A Sociological Intersectional Approach*, 11 SOC. SCI. 50 (2022).

16. See, e.g., JEFFREY K. OLICK, *THE POLITICS OF REGRET: ON COLLECTIVE MEMORY AND HISTORICAL RESPONSIBILITY* (2013); STEVEN W. BENDER, *MEA CULPA: LESSONS ON LAW AND REGRET FROM U.S. HISTORY* (2015).

17. See *infra* text accompanying notes 301–66 (explaining judges' reluctance to admit fallibility and professional norms valuing consistency); *infra* Section II.B.3.iv (discussing gendered and racialized dynamics shaping judicial regret).

18. See, e.g., Marc S. Spindelman, *Reorienting Bowers v. Hardwick*, 79 N.C.L. REV. 359, 417–19 (2001) (analyzing regret over *Bowers v. Hardwick*); Josh Bowers, *McCleskey Accused: Justice Powell and The Moral Price of Institutional Pride*, 2 AM. J.L. EQUAL. 122, 147–49 (2022) (similar regarding *McCleskey v. Kemp*).

19. See Mark A. Graber, *Judicial Recantation*, 45 SYRACUSE L. REV. 807 (1994).

20. *Id.*

21. See, e.g., Louis E. Wolcher, *The Accommodation of Regret in Contract Remedies*, 73 IOWA L. REV. 797 (1987); Eric A. Posner, *Law and Regret*, 98 MICH. L. REV. 1486 (2019); Omri Ben-Shahar & John A. E. Pottow, *On the Stickiness of Default Rules*, 33 FLA. ST. U. L. REV. 651, 655 (2006).

22. See, e.g., Susan A. Bandes, *Remorse and Criminal Justice*, 8 EMOTION REV. 14 (2016); Mirko Bagaric & Kumar Amarasekara, *Feeling Sorry?—Tell Someone Who Cares: The Irrelevance of Remorse in Sentencing*, 40 HOWARD J. CRIM. JUST. 364 (2001); Rocksheng Zhong, *Judging Remorse*, 39 NYU REV. L. & SOC. CHANGE 133 (2015).

23. See, e.g., Chris Guthrie, Carhart, *Constitutional Rights, and the Psychology of Regret*, 81 S. CAL. L. REV. 877 (2008); Susan Frelich Appleton, *Reproduction and Regret*, 23 YALE J.L. & FEMINISM 255 (2011); Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protected Antiabortion Argument*, 57 DUKE L.J. 1641, 1682 (2008); Terry A. Maroney, *Emotional Common Sense as Constitutional Law*, 62 VAND. L. REV. 849, 889–902 (2008).

24. See, e.g., Noa Ben-Asher & Margot J. Pollans, *Gender Regrets: Banning Abortion and Gender Affirming Care*, 2024 UTAH L. REV. 763 (2024); Chan Tov McNamara, *Appeals to Regret and Affective Discrimination* (Nov. 10, 2023) (unpublished manuscript) (on file with author).

25. See, e.g., Kathryn Abrams & Hila Keren, *Who's Afraid of Law and the Emotions?*, 94 MINN. L. REV. 1997, 2017 (2010); Terry A. Maroney, *A Field Evolves: Introduction to the Special Section on Law and Emotion*, 8 EMOTION REV. 3, 4 (2016).

Thus, while previous scholarship has documented instances of regret in specific cases²⁶ and occasionally across areas of law,²⁷ no U.S. legal research has analyzed the broader normative and legal significance of judicial regrets.²⁸ This inattention is understandable given norms that prize judicial certainty and discourage second-guessing past rulings.²⁹ Nonetheless, this gap in legal literature—and the accompanying discounting of regret in the formal practice of law—warrants closer attention for at least four reasons.

First, judicial regret already shapes legal practice, whether formally acknowledged or not. Regret influences judicial behavior and decision-making and even the selection of future judges. Litigants, legislators, and advocates already invoke judicial regrets in their work. Ignoring this reality does not eliminate regret's influence, but merely ensures that the legal system engages with it unsystematically and without clear frameworks for evaluation.

Second, regretted judicial actions have had far-reaching and devastating consequences. Three of the seven Supreme Court Justices who upheld the death penalty in 1976, paving the way for over 1,550 executions,³⁰ later conveyed regret about their opinions.³¹ When decisions that judges themselves come to rue become the foundation for taking human lives, legal scholarship—and the legal system itself—cannot afford to treat such regrets as mere personal sentiments. If judicial regret reveals that foundational precedents rest on reasoning their own authors repudiated, the legal system must take notice.

Third, judicial regrets can shed light on systemic failures that produce erroneous decisions. Patterns of regret may draw attention to structural problems such as inadequate representation, insufficient time for judicial deliberation, institutional pressures toward premature certainty, and

26. See, e.g., Mark Tushnet, *Justice Lewis F. Powell and the Jurisprudence of Centrism*, 93 MICH. L. REV. 1854, 1879–81 (1995) (analyzing Justice Powell's regrets); Spindelman, *supra* note 18, at 417–19.

27. See, e.g., Graber, *supra* note 19 (observing judicial regrets across cases); Tushnet, *supra* note 26; Elisabeth Semel, *Reflections on Justice John Paul Stevens's Concurring Opinion in Baze v. Rees: A Fifth Gregg Justice Renounces Capital Punishment*, 43 U.C. DAVIS L. REV. 783, 791 (2010) (observing multiple Justices' regrets over *Gregg v. Georgia*).

28. For discussions of regret in legal scholarship, see text accompanying *supra* notes 18–24.

29. See, e.g., *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986) (stating that stare decisis ensures “the law will not merely change erratically”); *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) (requiring “departure from the doctrine of stare decisis demands special justification”); text accompanying *infra* notes 358–62 (discussing the emphasis placed on judicial consistency).

30. *Executions by State and Region Since 1976*, DEATH PENALTY INFO. CENT., <https://deathpenaltyinfo.org/executions/executions-overview/number-of-executions-by-state-and-region-since-1976> [<https://perma.cc/WM28-5Q3X>].

31. See *infra* Section I.B.3.

cognitive biases in decision-making.³² Acknowledging judicial regrets also challenges the presumption of judicial infallibility and makes judicial reasoning more transparent and therefore more democratically contestable.³³

Finally, judicial regrets serve important instrumental functions. Congress can invoke judicial acknowledgments of error to justify corrective legislation, as it did when Justice Douglas's *Korematsu* regret informed the Civil Liberties Act providing reparations for Japanese American internment.³⁴ Courts can consider judicial regret as evidence that a precedent's justificatory force has weakened or collapsed.³⁵ Advocates can cite judicial regrets to demonstrate that even the decisionmakers who developed particular doctrines recognize them as problematic, strengthening arguments for legal reform.³⁶

Against this backdrop, this Article argues that judicial regret that reflects failures of legal reasoning might provide probative evidence that precedent has lost justificatory force. While regret alone cannot override precedent, it serves as a valuable signal for courts evaluating whether to reconsider doctrine, for legislatures considering remedial measures, and for scholars assessing judicial reasoning. This Article does not contend that all expressions of regret merit equal weight, nor that judges' personal feelings should displace institutional judgments. Rather, it distinguishes regret that illuminates genuine failures in legal reasoning from regret that merely reflects preference change or strategic reputation management. The Article develops evaluative criteria for making these distinctions systematically, with the aim of bringing regret's existing influence into the open where it can be assessed and channeled toward a more self-corrective and just legal system.

While regret is salient in several areas of law,³⁷ this Article concentrates on Supreme Court cases concerning equality and liberty to highlight how neglecting judicial regret can harm marginalized groups.³⁸ These cases most vividly illustrate regret's significance, as they shape constitutional doctrine for generations and involve judgments about human dignity and fundamental rights in which misjudgments carry profound moral weight. Accounting for

32. See *infra* Section II.B.

33. See *infra* Part III.

34. *Id.*

35. See *infra* Section III.B.2.

36. *Id.*

37. See *infra* Section I.A (discussing judicial regrets in criminal, family, and other cases).

38. See *infra* Section I.B.

regret becomes especially important when judges revisit decisions affecting marginalized communities, as doing so can help address historical and ongoing injustices.³⁹

This Article proceeds in three Parts. Part I introduces readers to the landscape of judicial regret. Section I.A analyzes responses from the only known survey of judges' experiences with regret: a 2018 National Judicial College survey in which nearly 80% of responses reported regret over at least one ruling.⁴⁰ While methodological limitations counsel caution in generalizing from these findings, the survey provides rare qualitative insights into how judges conceptualize regret and how it influences their approaches to judging.⁴¹ Section I.B examines instances in which Supreme Court Justices later conveyed regret over landmark equality and liberty opinions, including cases involving Japanese American internment, school integration, capital punishment, LGBTQ+ rights, and affirmative action.⁴²

Drawing on these survey responses and case studies, Part II examines the anatomy of judicial regret. Section II.A provides a brief primer on regret generally, centering scientific studies that explore its impact on decision-making. Because research specifically addressing judicial regret remains scarce,⁴³ this broader regret literature provides valuable insights for analyzing both particular instances and the general phenomenon of judicial regret.

Section II.B then advances an analytical framework for distinguishing three dimensions of judicial regret: what judges feel (experiential), what they say (expressive), and how others perceive their regret (perceptual). It further examines how regret influences judicial behavior, how it varies across court hierarchies, interpretive philosophies, and social identities, and how it challenges professional norms that prize judicial consistency and certainty.

Part III proposes applications of judicial regret. Section III.A develops an evaluative framework for distinguishing regret that illuminates genuine reasoning failure from regret that merely reflects preference change or strategic calculation. Section III.B examines regret's doctrinal applications in legal interpretation and in precedent analysis, demonstrating how judicial

39. See *infra* text accompanying notes 480–83.

40. Nat'l Jud. Coll., Question of the Month Survey on Judicial Regret (Nov. 2018) (on file with author) [hereinafter Survey]; see also *infra* note 45.

41. *Id.*

42. These examples are not exhaustive of the regret expressed by Supreme Court Justices. See Richard M. Re, *Personal Precedent at the Supreme Court*, 136 HARV. L. REV. 824, 841 (2022) (documenting Justices' "personal regret[s]"). Through its analysis of case studies and survey responses, this Article demonstrates that judicial regret is multifaceted and context-dependent, inviting future research to expand on this analysis with additional case studies and data.

43. See *supra* text accompanying notes 18–25.

regret can provide probative evidence that a decision has lost justificatory force. Section III.C then explores extra-doctrinal applications including legislative reform, legal advocacy, scholarly analysis, and democratic engagement. Section III.D considers regret's systemic implications for judicial decision-making and institutional reform. Finally, Section III.E examines limitations and risks that shape what judicial regret can realistically accomplish. These limitations counsel careful engagement with regret rather than ignoring it altogether.

I. THE LANDSCAPE OF JUDICIAL REGRET

Part I documents judicial regret at both the lower court and Supreme Court levels through survey data and case studies, establishing the foundation for this Article's analysis. This context informs the broader examination of judicial regret undertaken in Parts II and III.

A. LOWER COURTS

In 2018, the National Judicial College ("NJC")⁴⁴ conducted the only known survey of judges' self-reported experiences of regret, with 392 of the 496 responses indicating regret over at least one ruling.⁴⁵ Initially sharing the survey results in a blog post,⁴⁶ the NJC has now made the full set of judges' anonymous responses available for this Article.⁴⁷ While the methodological limitations discussed below counsel caution in generalizing from these findings, the survey provides rare qualitative insights into how judges conceptualize regret. Section I.A analyzes these responses to explore how self-reported regret can affect judges' perceptions of past rulings, their approaches to future ones, and their understandings of judging and law.

44. Established in 1964, the National Judicial College ("NJC") "teaches courtroom skills to judges [who] . . . decide more than 95 percent of the cases in the United States." *More About the NJC*, NAT'L JUD. COLL., <https://www.judges.org/about> [<https://perma.cc/TCJ3-JCRM>].

45. This data was originally collected in November 2018 as part of the NJC's Question of the Month series, which began in 2017 and surveys its "more than 12,000 living alumni" with known email addresses. *Five Years of Question of the Month*, NAT'L JUD. COLL. (Feb. 15, 2022), <https://www.judges.org/news-and-info/five-years-of-question-of-the-month> [<https://perma.cc/SCB5-GL4F>]. The NJC does not attempt to obtain a random sample of respondents, so the results cannot be "characterized as conclusive research findings." *Id.*

46. Anna-Leigh Firth, *What Percentage of Judges Have Ever Regretted a Ruling?*, NAT'L JUD. COLL. (Nov. 8, 2018), <https://www.judges.org/news-and-info/what-percentage-of-judges-have-ever-regretted-a-ruling> [<https://perma.cc/ZDC8-MM5X>]. While Firth's 2018 piece reported responses from 464 judges, the raw data provided by the NJC in 2024 indicates 496 responses. Both sources indicate that nearly 80 percent of responses reported regret about at least one decision. This Article's analysis focuses on the narratives explaining these reported regrets or their absence rather than their prevalence.

47. While a few judges revealed their identities, most chose to remain anonymous. Survey, *supra* note 40.

1. Lower Court Judges' Encounters with Regret

Criminal cases, particularly sentencing decisions, were a frequent site of reported regret due to their unintended consequences and the weight of personal responsibility such decisions carry. One judge observed that “judges are required to essentially predict the future” in such cases, adding, “[o]bviously, when events turn out differently than expected, I regret my error.”⁴⁸

Judges described regretting both harsh and lenient sentences, though the sources of their regrets differed.⁴⁹ Some reported regretting harsh sentences, particularly when they had been swayed by prosecutorial recommendations or emotional arguments, and especially in cases involving young defendants whose punishments led to lifelong hardships.⁵⁰ Others expressed regret over lenient sentences when defendants later harmed others or themselves.⁵¹ Judges indicated that past regrets influenced their future decisions, sometimes creating conflicting impulses.⁵² As one judge poignantly expressed, “I have released an individual on bail who shortly thereafter committed a homicide, and I have declined to release an individual on bail who shortly thereafter committed suicide in the jail.”⁵³

Family-related cases, especially custody decisions, were another commonly reported site of regret due to their complex and far-reaching consequences on children and families.⁵⁴ As one judge admitted, “My hope for a positive outcome and healthy future relationship was not realized. The parties and their family would have been better helped had I ruled the other way.”⁵⁵ Judges described experiencing regret over custody arrangements

48. This judge reported feeling “individually responsible” after deeming a person not sexually dangerous, only for that person to assault a woman two months later. *Id.*; see Courtney M. Cox, *The Uncertain Judge*, 90 U. CHI. L. REV. 739, 751 (2023) (discussing judges’ empirical and normative uncertainty).

49. Sentencing is a known area of racial disparities. See U.S. SENT’G COMM’N, DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING 10 (2023), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2023/20231114_Demographic-Differences.pdf (finding that Black males received 13.4% longer sentences than White males, and Hispanic males received 11.2% longer sentences than White males).

50. Survey, *supra* note 40.

51. *Id.*

52. See generally Jochen Reb & Terry Connolly, *Myopic Regret Avoidance: Feedback Avoidance and Learning in Repeated Decision Making*, 109 ORG. BEHAV. & HUM. DEC. PROCESSES 182 (2009) (describing regret avoidance behaviors).

53. Survey, *supra* note 40.

54. *Id.* The boundary between criminal and family law is often blurred in the family regulation system. See DOROTHY ROBERTS, *TORN APART: HOW THE CHILD WELFARE SYSTEMS DESTROY BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD* (2022). One judge reported regret about ordering out-of-home placements for children allegedly subject to abuse or neglect. Survey, *supra* note 40.

55. Survey, *supra* note 40; see Reb & Connolly, *supra* note 52 (describing outcome regret).

that seemed appropriate at the time but were later perceived to have harmed children.⁵⁶ The challenge of determining a child's best interests, coupled with incorrect credibility assessments or unforeseen consequences, reportedly led to deeply felt regret.⁵⁷

Evidentiary challenges and inadequate advocacy complicated family cases, producing custody arrangements that judges later regretted. When domestic violence evidence was inadmissible⁵⁸ or uncontested statements later proved misleading,⁵⁹ judges sometimes regretted the resulting custody decisions. Long-distance parenting arrangements and out-of-jurisdiction visitations sometimes severely impacted parent-child relationships or created jurisdictional disputes, prompting regret.⁶⁰

Incomplete or inaccurate case information also produced regretted decisions.⁶¹ One judge expressed regret after learning that crucial information had been unavailable due to a litigant's lack of legal representation.⁶² Multiple judges described experiencing regret after acting on misleading statements by witnesses, litigants, or lawyers, with one recalling how an assistant prosecutor's misrepresentations led to an unjustified arrest warrant.⁶³

New scientific or social scientific information sometimes prompted judicial regret. One judge described regretting following sentencing guidelines during the 1980s crack epidemic after understanding their disproportionate impact on Black defendants.⁶⁴ Another reported regretting a prison sentence for a minor after learning about adolescent brain development research,⁶⁵ noting that they would have allowed for earlier parole given this information.⁶⁶ These examples suggest that data-driven

56. Survey, *supra* note 40.

57. *Id.*

58. *Id.*; see Dana Harrington Conner, *Abuse and Discretion: Evaluating Judicial Discretion in Custody Cases Involving Violence Against Women*, 17 AM. U. J. GENDER SOC. POL'Y & L. 163 (2009) (calling for particularized analysis in custody cases involving domestic or intimate partner violence).

59. Survey, *supra* note 40.

60. *Id.*

61. *Id.*; see also Cox, *supra* note 48, at 746 (describing judging under "empirical uncertainty").

62. Survey, *supra* note 40.

63. *Id.*

64. *Id.*; see Mona Lynch & Marisa Omori, *Crack as Proxy: Aggressive Federal Drug Prosecutions and the Production of Black-White Racial Inequality*, 52 L. & SOC'Y. REV. 773, 776 (2018); Max Matza, *US to End Crack and Powder Cocaine Sentencing Disparity*, BBC NEWS (Dec. 16, 2022), <https://www.bbc.com/news/world-us-canada-64009199> [<https://perma.cc/XDJ4-EX8X>].

65. Survey, *supra* note 40; see B.J. Casey, Sarah Getz & Adriana Galvan, *The Adolescent Brain*, 28 DEVELOPMENTAL REV. 62, 68 (2008); Laurence Steinberg, *Adolescent Brain Science and Juvenile Justice Policymaking*, 23 PSYCHOL. PUB. POL'Y & L. 410, 412 (2017).

66. Survey, *supra* note 40.

conclusions can inform judicial decision-making by provoking regret and associated avoidance behaviors.⁶⁷

Judges attributed regrets not only to informational and systemic issues, but also to personal lapses.⁶⁸ Multiple judges recounted decisions driven by emotions rather than reason, admitting they “should have waited to sentence when [they were] not emotional”⁶⁹ and acknowledging how “the unruly attitude of the accused caused anger in [them].”⁷⁰ One judge, after discovering a critical precedent that they had overlooked when ruling, wrote that they “[a]lways wanted to find the fellow and pay him out of [their] pocket the money he forfeited. It’s hard when you get it wrong and someone else suffers.”⁷¹ Another judge had dismissed a defense counsel’s argument about road conditions affecting their client’s driving, only to later drive on the same road and realize the argument’s merit.⁷² Some judges focused less on case outcomes and more on the manner in which they delivered their decisions,⁷³ with one reflecting, “[a]lthough the outcome was correct, it could have been written more thoughtfully. . . . I could have been more kind.”⁷⁴

2. How Lower Court Judges Process and Respond to Regret

Beyond identifying sources of regret, the survey responses illuminate how judges personally process and respond to regretted decisions. Judges described the sometimes profound personal impact of such decisions, with one recalling: “[I] [l]ost sleep, walked the living room late at night, slept on the sofa, for 2 decisions I made over a 25-year period.”⁷⁵ This response highlights how even a small number of regrets over a lengthy judicial career can deeply affect some judges.⁷⁶

Regret was said to both improve and inhibit judicial decision-making.⁷⁷ One judge explained that recurring thoughts of regret compelled them to examine cases more thoroughly: “Each time I think about a poor decision it

67. Cf. *McCleskey v. Kemp*, 481 U.S. 279, 314–15 (1986); see *infra* Section I.B.3.

68. These personal misjudgments might themselves have systemic explanations. See, e.g., Chris Guthrie, *Misjudging*, 7 NEV. L.J. 420, 428, 432–33, 438 (2007) (discussing “cognitive blinders,” including hindsight bias and self-serving bias, and “attitudinal blinders”).

69. Survey, *supra* note 40.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* Others, however, were less consumed by regret: “If you are a judge for any period of time, you will make a bad decision or 2.” *Id.*

77. See Reb & Connolly, *supra* note 52, at 189.

forces me to examine facts and the law closer—a good thing.”⁷⁸ However, this introspection occasionally led to delays in time-sensitive situations.⁷⁹

The tension between law and justice emerged as a recurring theme. Several judges associated regret with a fundamental “law v. justice dilemma”—feeling compelled to follow the law even when it leads to an unjust outcome.⁸⁰ This tension was exemplified by responses like “I had to follow the law and the law yielded the wrong result” and “sometimes by following the law, we enable an injustice.”⁸¹ However, some judges described avoiding feelings of regret by accepting that the law does not require them to do justice, stating, “I have never regretted making a ruling that was in accord with the law.”⁸² One minority judge described avoiding regret by actively accounting for how people are differently situated: “As a minority, I have never had the luxury of contentment that leads to cookie cutter decisions that disregard the person standing before the court.”⁸³ This response suggests that a judge’s own experiences with structural inequality may shape how they approach decisions and whether they experience regret.⁸⁴

Judges often viewed regretted decisions as valuable learning opportunities.⁸⁵ “A good judge should be haunted by his mistakes on the bench and should strive to learn from them,” one stated, while another reflected, “I learn from the mistake or misjudgment. I move on, but never forget the lesson.”⁸⁶ Some described how regrets had led to concrete procedural changes, such as revising release protocols after a released defendant committed a murder.⁸⁷

Acknowledging mistakes and regrets was widely viewed as essential for judicial growth. Some judges expressed concern about colleagues who claimed to have never regretted a decision, with one asserting, “If the ‘yes’ response does not receive 100% of the vote, I will be disappointed . . . with any judge who lacks the humility to accept that he or she has screwed up at

78. Survey, *supra* note 40.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* Judges also reported a tension between the need for finality and the desire to correct mistakes. Some judges expressed relief when given opportunities, like motions for reconsideration, to revise rulings they regret. *Id.*

84. This dynamic is more fully examined in Section II.B.3.iv.

85. Survey, *supra* note 40.

86. *Id.*

87. *Id.*

least once.”⁸⁸ However, others emphasized the importance of moving on. One judge advised, “Never look back. You do your best to do the right thing.”⁸⁹ Another said pragmatically, “Make the decision and put the file away. There are three people (or more) at the statehouse who are more than willing to review your work.”⁹⁰

The preceding analysis suggests some patterns in how lower court judges describe experiencing and responding to regret. Such feelings were especially evident in areas of significant judicial discretion,⁹¹ such as criminal sentencing and child custody,⁹² in which judges later became aware of adverse consequences.⁹³ Judges attributed these regrets to factors including incomplete information, unforeseen outcomes, emotional decision-making, and tension between legal requirements and perceived justice. Many described regret as prompting learning and change, though some emphasized moving forward rather than dwelling on past decisions.

These patterns should be understood as suggestive rather than definitive, given the survey’s methodological limitations. The 496 responses represent a small percentage of those contacted, raising selection bias concerns: judges who experienced memorable regrets may be more likely to respond,⁹⁴ and NJC alumni, having sought continuing education, may not represent the broader judiciary.⁹⁵ Moreover, the survey captures only what

88. *Id.*

89. *Id.*

90. *Id.* Another judge said, “Thank goodness there is appellate review to correct any error in the law that I’ve made.” *Id.*

91. See Marcel Zeelenberg, Kees van den Bos, Eric van Dijk & Rik Pieters, *The Inaction Effect in the Psychology of Regret*, 82 J. PERSONALITY & SOC. PSYCH. 314, 319 (2002) (linking regret to feelings of responsibility); Shawn D. Bushway & Anne Morrison Piehl, *Judging Judicial Discretion: Legal Factors and Racial Discrimination in Sentencing*, 35 L. & SOC’Y. REV. 733, 737 (2001) (discussing how judicial discretion contributes to racial disparities in sentencing); Conner, *supra* note 58, at 164 (examining judicial discretion in custody cases involving domestic violence). *But see* Joshua B. Fischman & Max M. Schanzenbach, *Racial Disparities Under the Federal Sentencing Guidelines: The Role of Judicial Discretion and Mandatory Minimums*, 9 J. EMPIRICAL LEGAL STUD. 729, 731 (2012) (“[R]acial disparities under the Guidelines are not attributable to judicial discretion; in fact, judicial discretion likely reduces racial disparities”); Clare Huntington, *Pragmatic Family Law*, 136 HARV. L. REV. 1501, 1544 (2023) (discussing judicial discretion in family law).

92. Judges’ expressions of regret appeared in contract, employment, eviction, probate, and other areas. Survey, *supra* note 40.

93. See Reb & Connolly, *supra* note 52, at 182 (linking regret to consciousness of unchosen options and feedback on the outcomes of chosen and unchosen actions); Philippe P.F.M. van de Calseyde, Marcel Zeelenberg & Ellen R.K. Evers, *The Impact of Doubt on the Experience of Regret*, 149 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 97, 100 (2018) (finding that a decision’s importance predicts regret).

94. Survey, *supra* note 40.

95. *Id.*

judges chose to report, which may differ from what they experienced.⁹⁶ Self-reporting faces well-documented limitations.⁹⁷ These constraints mean that the data cannot establish the prevalence of regret among judges generally and that findings should be treated as hypothesis-generating rather than conclusive.

What the survey does provide is a rare window into how judges themselves report making sense of regret.⁹⁸ These qualitative insights suggest that judicial regret is a promising area for future research with potential implications for reform.

While examining lower court judges' experiences of regret is especially important for understanding the law's impact on everyday lives, regret takes on heightened doctrinal significance when U.S. Supreme Court Justices later reconsider equality and liberty opinions that have shaped legal doctrine for decades. Highlighting these regrets at the highest level of the judiciary is the focus of the next Section.

B. SUPREME COURT

U.S. Supreme Court Justices have often conveyed regret over landmark rulings and opinions. While certain expressions have garnered widespread attention,⁹⁹ legal scholars have yet to explore connections between these

96. *Id.*

97. See Philip S. Brenner & John DeLamater, *Lies, Damned Lies, and Survey Self-Reports? Identity as a Cause of Measurement Bias*, 79 SOC. PSYCH. Q. 333, 349 (2016).

98. Public accounts of judicial regret are rare, though they do exist. In one prominent example, Kevin Sharp, a former federal judge, resigned from his lifetime appointment after only six years because he "regrettably" felt compelled to give criminal sentences with which he disagreed. See Kevin Sharp, *Powerless on the Bench*, CATO POL'Y REP., Jan./Feb. 2018, at 9, 10, <https://www.cato.org/sites/cato.org/files/serials/files/policy-report/2018/2/cpr-v40n1-4.pdf>. Sharp acted upon his regret by supporting the successful clemency application of Chris Young, a man he had sentenced to two life terms without parole. Wesley Bruer & Dianne Gallagher, *This Former Prisoner Had an Unlikely Supporter: The Judge Who Sentenced Him*, CNN (Feb. 1, 2021), <https://www.cnn.com/2021/02/01/us/chris-young-freed-with-help-from-judge-kevin-sharp/index.html> [<https://perma.cc/RA37-5TWE>].

99. See, e.g., Linda Greenhouse, *When Second Thoughts in Case Come Too Late*, N.Y. TIMES (Nov. 5, 1990) (discussing *Bowers v. Hardwick*, 478 U.S. 186 (1986)), <https://www.nytimes.com/1990/11/05/us/washington-talk-when-second-thoughts-in-case-come-too-late.html> [<https://web.archive.org/web/20240422094139/http://www.nytimes.com/1990/11/05/us/washington-talk-when-second-thoughts-in-case-come-too-late.html>]; Ruth Marcus, *Powell Regrets Backing Sodomy Law*, WASH. POST, Oct. 26, 1990, at A3 (same); Ed. Bd., *Justice Powell's New Wisdom*, N.Y. TIMES (June 11, 1994), <https://www.nytimes.com/1994/06/11/opinion/justice-powell-s-new-wisdom.html> [<https://web.archive.org/web/20250912092303/https://www.nytimes.com/1994/06/11/opinion/justice-powell-s-new-wisdom.html>] (discussing *McCleskey v. Kemp*); Nina Totenberg, *Justice Stevens: An Open Mind on a Changed Court*, NPR (Oct. 4, 2010, 12:01 AM), <https://www.npr.org/2010/10/04/130198344/justice-stevens-an-open-mind-on-a-changed-court> [<https://perma.cc/UQE7-BE2K>] (discussing Justice Stevens's death penalty jurisprudence).

instances.¹⁰⁰ Section I.B describes five contexts in which Justices have expressed misgivings over their equality and liberty opinions, laying essential groundwork for the analysis that follows in Parts II and III.

1. Japanese American Internment—Justice Douglas in *Korematsu v. United States*

In 1944, a 6-3 Supreme Court upheld Japanese American internment during World War II in *Korematsu v. United States*.¹⁰¹ Justice Hugo Black ruled that this practice was a valid exercise of the government's war powers, justified by military necessity.¹⁰² As a result, over 120,000 people were forcibly relocated to detention camps based solely on their ancestry.¹⁰³ Despite the lack of evidence of widespread disloyalty among Japanese Americans,¹⁰⁴ Justice Black remained publicly unrepentant about his role in the case.¹⁰⁵ In a 1967 interview, he stated, "I would do precisely the same thing today."¹⁰⁶

Unlike Justice Black, Justice Douglas came to express deep regret over his vote.¹⁰⁷ In his 1980 memoir, Douglas recognized that *Korematsu* was "the product of fear"¹⁰⁸ and that the dissenters had been right.¹⁰⁹ He lamented that "grave injustices had been committed" and "[f]ine American citizens had been robbed of their properties by racists—crimes that might not have happened if the Court had not followed the Pentagon so literally."¹¹⁰ Reflecting on his role, he wrote, "my vote to affirm was one of my mistakes,"¹¹¹ and "[t]he evacuation case . . . was ever on my conscience."¹¹²

100. On discussions of regret in legal scholarship, see *supra* text accompanying notes 18–24.

101. *Korematsu v. United States* 323 U.S. 214, 223 (1944). For scholarly accounts of *Korematsu* and its legacy, see, e.g., Susan Kiyomi Serrano & Dale Minami, *Korematsu v. United States: A "Constant Caution" in a Time of Crisis*, 10 *ASIAN L.J.* 37, 40–41, 48–50 (2003) (discussing criticisms of *Korematsu* and warning against its contemporary weaponization); Dean Masaru Hashimoto, *The Legacy of Korematsu v. United States: A Dangerous Narrative Retold*, 4 *UCLA ASIAN PAC. AM. L.J.* 72, 82–83, 84–92 (1996) (critiquing *Korematsu* and discussing its contemporary relevance); Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 *UCLA L. REV.* 933, 956–58 (2004) (discussing *Korematsu*'s racial dimensions).

102. *Korematsu*, 323 U.S. at 217–18.

103. *A Controversial Executive Order Leads to Internment Camps*, NAT'L CONST. CTR. (Feb. 19, 2024), <https://constitutioncenter.org/blog/a-controversial-order-leads-to-internment-camps>.

104. *Korematsu v. United States*, 584 F. Supp. 1406, 1419–20 (N.D. Cal. 1984).

105. Dennis J. Hutchinson, *Hugo Black Among Friends*, 93 *MICH. L. REV.* 1885, 1890 (1995).

106. *Id.*

107. WILLIAM O. DOUGLAS, *THE COURT YEARS 1939–1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS* 279–80 (1980).

108. *Id.* at 39; see also *id.* at 35.

109. *Id.* at 279–80.

110. *Id.* at 280.

111. *Id.* at 39.

112. *Id.* at 280.

Justice Douglas's regret was particularly poignant because the path to a better outcome could be easily imagined.¹¹³ Three separate dissents in *Korematsu* had condemned the decision as an endorsement of legalized racism.¹¹⁴ Douglas himself had initially planned to write an opinion that would have allowed the President to displace citizens during an emergency, but not to imprison them.¹¹⁵ However, Douglas later claimed that Justice Black, Douglas's ally, and Justice Frankfurter, whom Douglas respected, dissuaded him from writing a separate opinion.¹¹⁶ In hindsight, Douglas speculated that *Korematsu* "would never have been sustained except in the climate of war," though this did not alleviate his personal regret.¹¹⁷

2. Racial Integration—Chief Justice Warren in *Brown v. Board of Education II*

In 1954, *Brown v. Board of Education (Brown)* rejected *Plessy v. Ferguson*'s separate-but-equal doctrine, declaring racial segregation in public education unconstitutional.¹¹⁸ Faced with significant opposition to school integration, the Court's subsequent 1955 *Brown v. Board of Education (Brown II)* decision called for desegregation to be implemented "with all deliberate speed."¹¹⁹ This language reflected an approach of gradual integration, essentially allowing desegregation to proceed slowly with no firm timeline.¹²⁰

During arguments, then-NAACP lawyer Thurgood Marshall had argued for a different approach: "immediate desegregation" within no more than a year.¹²¹ The NAACP understood that some delays were inevitable given the realities of the South, but believed that the Court should mandate immediate desegregation, subject only to administrative delays.¹²² However, Justice Frankfurter persuaded his colleagues that the "deep South [would] yield . . . without [] violent resistance" to "step-by-step" desegregation.¹²³

113. See *infra* Section II.A.

114. See *Korematsu v. United States*, 323 U.S. 214, 225–33 (1944) (Roberts, J., dissenting); *id.* at 233–42 (Murphy, J., dissenting); *id.* at 242–48 (Jackson, J., dissenting).

115. DOUGLAS, *supra* note 107, at 279–80.

116. *Id.* at 280.

117. *Id.* at 38–39.

118. *Brown v. Bd. of Educ. (Brown)*, 347 U.S. 483, 494–95 (1954).

119. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955).

120. See *id.* at 300–01.

121. MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961* 206, 217–19 (1994).

122. *Id.* at 219. On legal failures to recognize Black political literacy, see Yuvraj Joshi, *Racial Equality Compromises*, 111 CALIF. L. REV. 529, 570 n.217 (2023) [hereinafter Joshi, *Racial Equality Compromises*].

123. TUSHNET, *supra* note 121, at 219.

Chief Justice Warren's biography reports that he came to believe he "had been sold a bill of goods" in accepting Justice Frankfurter's argument and the "all deliberate speed" language.¹²⁴ As the pace of desegregation proved frustratingly slow and opposition intense, Warren seemed to believe he had been misled.¹²⁵ He opined that ordering immediate desegregation would have avoided "much of the defiance" that occurred, as the South interpreted the phrasing to countenance "indefinite delay."¹²⁶ This may reflect Warren's regret not only about the ruling's consequences, but also about choosing Frankfurter's approach over Marshall's.¹²⁷

Critics of *Brown II* argue that the ruling allowed violent resistance to intensify¹²⁸ and subtler forms of opposition to undermine *Brown*'s promise.¹²⁹ By 1964, a decade after the original *Brown* decision, Southern defiance had resulted in only two percent of Southern Black students attending majority-white schools.¹³⁰ Thus, when the Supreme Court considered the one-person-one-vote principle in legislative apportionment that same year,¹³¹ Chief Justice Warren urged immediate enforcement, perhaps learning from his experience with and regret over "all deliberate speed."¹³²

3. Death Penalty—Justices Stevens, Blackmun, and Powell

Belated regrets have emerged most prominently in the Supreme Court's death penalty jurisprudence. In the 1976 *Gregg v. Georgia* decision, the Court upheld, 7-2, capital punishment statutes that provided certain guidance to juries.¹³³ Three of those seven Justices—Stevens, Blackmun, and

124. BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY* 124 (1983).

125. *Id.* at 123–24.

126. *Id.* at 124.

127. See Reb & Connolly, *supra* note 52, at 186 (describing outcome and self-blame regret).

128. See Doug Rendleman, *Brown II's "All Deliberate Speed" at Fifty: A Golden Anniversary or a Mid-Life Crisis for the Constitutional Injunction as a School Desegregation Remedy?*, 41 S.D. L. REV. 1575, 1587 (2004).

129. See OGLETREE, *supra* note 9, at 14.

130. See Erica Frankenberg, *70 Years After Brown vs. Board of Education, Public Schools Still Deeply Segregated*, CONVERSATION (Jan. 5, 2024, 8:47 AM), <https://theconversation.com/70-years-after-brown-vs-board-of-education-public-schools-still-deeply-segregated-219654> [<https://perma.cc/P9PX-4LG5>].

131. See *Wesberry v. Sanders*, 376 U.S. 1, 16–18 (1964).

132. BERNARD SCHWARTZ, *THE UNPUBLISHED OPINIONS OF THE WARREN COURT* 469 (1985).

133. *Gregg v. Georgia*, 428 U.S. 153, 179–80 (1976) (plurality opinion) (ending the four-year moratorium on the death penalty in *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam)). For scholarly accounts of *Gregg* and *Furman*, see, e.g., Sherod Thaxton, *Un-Gregg-ulated: Capital Charging and the Missing Mandate of Gregg v. Georgia*, 11 DUKE J. CONST. L. & PUB. POL'Y 145, 146 (2016) (critiquing the Court's "overly restrictive reading of its own rulings in *Furman* and *Gregg*"); Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1 (2007) (examining *Furman* and *Gregg*'s historical contexts).

Powell—later reversed their positions and conveyed regret over issuing opinions supporting capital punishment.¹³⁴

After three decades of implementing the death penalty at the Supreme Court, Justice Stevens renounced it in his 2008 concurrence in *Baze v. Rees*.¹³⁵ He concluded that capital punishment was unconstitutional, citing the “real risk of error” and the “irrevocable nature” of executions.¹³⁶ Moreover, he argued that the procedure for obtaining a “death qualified jury” effectively created a jury predisposed toward conviction.¹³⁷

In his autobiography, Justice Stevens specifically regretted his 1976 decision in *Jurek v. Texas*,¹³⁸ which upheld a statute that “played an important role in authorizing so many death penalty sentences in that state.”¹³⁹ Justice Stevens admitted to delegating review of the case’s facts to a law clerk rather than examining them closely himself.¹⁴⁰ “[I]f I had carefully stated the facts in *Jurek v. Texas*, I might well have changed my vote in that case,” he wrote.¹⁴¹ “My law clerk George Rutherglen urged me to change my vote in that case and I have lived to regret my failure to do so.”¹⁴²

Like Justice Stevens, Justice Blackmun later altered his stance on capital punishment.¹⁴³ Though Justice Blackmun never explicitly expressed regret over a specific death penalty case, his declaration to “no longer tinker with the machinery of death” has been widely interpreted as regret.¹⁴⁴

134. Frederic J. Frommer, *Three Justices Backed the Death Penalty—Then Changed Their Minds*, WASH. POST (June 29, 2022), <https://www.washingtonpost.com/history/2022/06/29/death-penalty-furman-blackmun-stevens> [<https://perma.cc/D5JK-F8GE>].

135. *Baze v. Rees*, 553 U.S. 35 (2008) (Stevens, J., concurring).

136. *Id.* at 85.

137. *Id.* at 84 (internal quotation marks omitted).

138. *Jurek v. Texas*, 428 U.S. 262 (1976).

139. Emily Bazelon, *Why Justice Stevens Turned Against the Death Penalty*, N.Y. TIMES (July 17, 2019), <https://www.nytimes.com/2019/07/17/opinion/stevens-supreme-court.html> [<https://perma.cc/BJ6M-JFQ3>].

140. JUSTICE JOHN PAUL STEVENS, *THE MAKING OF A JUSTICE: REFLECTIONS ON MY FIRST 94 YEARS* 143 (2019).

141. *Id.*

142. *Id.*

143. See Randall Coyne, *Marking the Progress of a Humane Justice: Harry Blackmun’s Death Penalty Epiphany*, 43 U. KAN. L. REV. 367, 367–68 (1995); Andrew H. Schapiro, *A Sober Second Thought*, 13 J. APP. PRAC. & PROCESS 75, 75–76 (2012).

144. See, e.g., Linda Greenhouse, *Documents Reveal the Evolution of a Justice*, N.Y. TIMES (Mar. 4, 2004), <https://www.nytimes.com/2004/03/04/us/documents-reveal-the-evolution-of-a-justice.html> [<https://perma.cc/DNY5-W8ZB>] (characterizing Justice Blackmun’s *Callins* opinion as indicating “lasting” “regret”); Austin Sarat, *Former Governors of Which State Just Came Out Against the Death Penalty?*, SLATE (May 31, 2023, 12:10 PM), <https://slate.com/news-and-politics/2023/05/alabama-governor-death-penalty-regret.html> [<https://perma.cc/ZT5J-XKDS>] (characterizing *Callins* as explaining Blackmun’s “regret”); Frommer, *supra* note 134 (noting Justice Blackmun’s “regret” about the death penalty); *The Death Penalty and Regret*, EQUAL JUST. INST. (May 30, 2023), <https://eji.org/news/the->

The seeds of Justice Blackmun's regret likely took root before he even joined the Court in 1970.¹⁴⁵ As a circuit judge in 1967, he had included a comment questioning capital punishment in a draft opinion.¹⁴⁶ When colleagues deemed his comment "gratuitous," he defended it as reflecting "sincerity and conviction."¹⁴⁷ Though he ultimately removed it, his regret over this incident stayed with him.¹⁴⁸ Months later, he wrote to his friend Warren Burger: "I continue to kick myself for withdrawing my comment about capital punishment. . . . I was right about it and one never should compromise when one is right."¹⁴⁹

On the Court, Justice Blackmun initially tried to develop constitutional rules to regulate capital punishment.¹⁵⁰ Despite his personal opposition to the death penalty, he dissented in *Furman v. Georgia* in 1972 when the Court struck down existing death penalty laws,¹⁵¹ and then voted in *Gregg* to uphold a revised statute.¹⁵² In *Furman*, he expressed his "distaste, antipathy, and indeed abhorrence, for the death penalty" while maintaining that personal beliefs should not guide judicial decision-making.¹⁵³

Justice Blackmun's disillusionment with the death penalty grew over time.¹⁵⁴ In 1987, he dissented forcefully in *McCleskey v. Kemp*, arguing that racial discrimination in the justice system should invalidate a conviction.¹⁵⁵ However, he did not reject the death penalty outright, still believing that appropriate guidelines could address its flaws.¹⁵⁶ As protections like habeas review eroded, Justice Blackmun began questioning the death penalty's

death-penalty-and-regret [<https://perma.cc/WK8R-VNVB>]; *Three Supreme Court Justices Later Regretted Supporting the Death Penalty*, AMNESTY INT'L (Oct. 8, 2010), <https://www.amnestyusa.org/updates/what-might-have-been-3-supreme-court-justices-later-regretted-supporting-the-death-penalty> [<https://web.archive.org/web/20260126193732/https://www.amnestyusa.org/blog/what-might-have-been-3-supreme-court-justices-later-regretted-supporting-the-death-penalty>].

145. See *Blackmun's First Action on High Court Is Dissent*, N.Y. TIMES (June 30, 1970), <https://www.nytimes.com/1970/06/30/archives/blackmuns-first-action-on-high-court-is-dissent.html> [<https://perma.cc/NE46-GLWX>].

146. LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY* 33 (2007).

147. *Id.* at 34.

148. See Greenhouse, *supra* note 144 (noting that Justice Blackmun's "regret was lasting").

149. *Id.*

150. Schapiro, *supra* note 143, at 78–80.

151. *Id.*

152. *Id.*

153. *Furman v. Georgia*, 408 U.S. 238, 405–14 (1972) (Blackmun, J., dissenting).

154. Schapiro, *supra* note 143, at 81.

155. *McCleskey v. Kemp*, 481 U.S. 279, 365 (1987) (Blackmun, J., dissenting).

156. *Id.*

constitutionality itself.¹⁵⁷ By 1994, he told his clerks he was ready to renounce the death penalty entirely.¹⁵⁸

In that year's *Callins v. Collins* decision, Justice Blackmun declared that the "death penalty experiment has failed" and he would "no longer [] tinker with the machinery of death."¹⁵⁹ He concluded that "no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies."¹⁶⁰ However, by then, the Court's strongest death penalty opponents had retired, leaving Justice Blackmun alone in his opposition.¹⁶¹ From that point forward, his dissent to every death penalty opinion warned that "the death penalty cannot be imposed fairly within the constraints of the Constitution."¹⁶²

Justice Powell, another member of the *Gregg* Court, later renounced his opinions supporting the death penalty.¹⁶³ His biographer called it "the most profound irony in Justice Powell's service on the Supreme Court that the 1976 death penalty cases were a victory he came to regret."¹⁶⁴

Justice Powell's regret came after the 1987 case of *McCleskey v. Kemp*, which presented powerful statistical evidence revealing racial disparities in Georgia's administration of the death penalty.¹⁶⁵ Research by David Baldus showed that, even accounting for hundreds of non-racial factors, defendants convicted of killing white victims were four to eleven times more likely to receive death sentences than those whose victims were Black.¹⁶⁶ Warren McCleskey, a Black man sentenced to death for killing a white police officer,

157. Schapiro, *supra* note 143, at 84.

158. Linda Greenhouse, *Death Penalty is Renounced by Blackmun*, N.Y. TIMES (Feb. 23, 1994), <https://www.nytimes.com/1994/02/23/us/death-penalty-is-renounced-by-blackmun.html> [<https://perma.cc/4PB5-S83V>].

159. *Callins v. Collins*, 510 U.S. 1141, 1145 (1993) (Blackmun, J., dissenting).

160. *Id.*

161. See Greenhouse, *supra* note 158.

162. GREENHOUSE, *supra* note 146, at 179.

163. See Ed. Bd., *supra* note 99.

164. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 442 (1994).

165. *McCleskey v. Kemp*, 481 U.S. 279, 284–89 (1987). For scholarly accounts of *McCleskey v. Kemp*, see, e.g., Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1389 (1988) (comparing *McCleskey* with anticanonical decisions); Bowers, *supra* note 18, at 131–44 (characterizing Justice Powell's *McCleskey* opinion as contradictory and "sloppy"); Reva B. Siegel, *Blind Justice: Why the Court Refused to Accept Statistical Evidence of Discriminatory Purpose in McCleskey v. Kemp—and Some Pathways for Change*, 112 NW. U.L. REV. 1269, 1288–89 (2018) (explaining Justice Powell's apprehensions about statistical evidence).

166. *McCleskey*, 481 U.S. at 284–89. On the death penalty's role in perpetuating racial subordination, see, e.g., Charles J. Ogletree, Jr., *Black Man's Burden: Race and the Death Penalty in America*, 100 OR. L. REV. 437 (2002); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but For the Worst Lawyer*, 103 YALE L.J. 1835 (1994).

challenged Georgia's capital punishment system as racially discriminatory, citing the Baldus study's findings.¹⁶⁷

Justice Powell's biography reveals he was "uneasy" with such statistical evidence, admitting his "limited to zero" understanding of statistical analysis.¹⁶⁸ He struggled to understand how differential treatment of defendants based on the victims' race could amount to race discrimination against defendants.¹⁶⁹ From what Justice Powell did grasp of the Baldus study, he concluded that "the system operates rationally as a general matter," viewing some outcome variation as an inevitable aspect of discretion rather than latent racism.¹⁷⁰

Writing for a 5-4 majority, Justice Powell acknowledged that the study showed a "risk that the factor of race entered into some capital sentencing decisions," but maintained that it failed to prove racial influence in McCleskey's specific case.¹⁷¹ Justice Powell reasoned that general statistical patterns, without proof of intentional discrimination in the particular case, could not establish an equal protection violation.¹⁷² This set an almost unattainable bar for using statistics and large datasets to challenge racial bias in charging and sentencing decisions.¹⁷³

Just four years after *McCleskey*, Justice Powell confided to his biographer that he regretted his vote, having "come to think that capital punishment should be abolished."¹⁷⁴ He said that he would "vote the other way in any capital case," including *McCleskey*, and commented elsewhere that "if I were in the state legislature, I would vote against capital punishment."¹⁷⁵

His reversal stemmed not from moral qualms about racial inequity, but from pragmatic concerns about death penalty litigation's "unnecessary repetition and delay."¹⁷⁶ This reflects what scholars call "intellectual regret" rather than "moral regret"—recognition that a decision was procedurally unworkable rather than fundamentally unjust.¹⁷⁷ Capital litigation had

167. *Id.*

168. JEFFRIES, *supra* note 164, at 439.

169. *Id.*

170. *Id.*

171. *McCleskey*, 481 U.S. at 291 n.7 (emphasis omitted).

172. *Id.* at 297.

173. See David C. Baldus, George Woodworth & Charles A. Pulaski, Jr., *Reflections on the "Inevitability" of Racial Discrimination in Capital Sentencing and the "Impossibility" of Its Prevention, Detection, and Correction*, 51 WASH. & LEE L. REV. 359, 364 (1994).

174. JEFFRIES, *supra* note 164, at 451.

175. *Id.*

176. *Id.* at 446, 452.

177. See Trudy Govier & Wilhelm Verwoerd, *The Promise and Pitfalls of Apology*, 33 J. SOC. PHIL.

proved “personally costly” for Justice Powell, who had to handle “more than his share of last-minute requests for stays of execution” as Circuit Justice for Georgia and Florida.¹⁷⁸ His frustration with “excessively repetitious” capital litigation despite attempted judicial fixes suggests that *McCleskey* may have been a tipping point in his doubts about the Court’s ability to resolve the death penalty’s systemic flaws.¹⁷⁹

4. Queer Rights—Justice Powell in *Bowers v. Hardwick*

Justice Powell’s regrets extended beyond capital punishment. In 1986, amid the AIDS moral panic,¹⁸⁰ his decisive vote in *Bowers v. Hardwick* saved Georgia’s sodomy law.¹⁸¹ At the private conference following oral arguments, Justice Powell initially cast the decisive fifth vote to strike down Georgia’s law, concerned that its severe penalties might constitute cruel and unusual punishment prohibited by the Eighth Amendment.¹⁸² However, he reversed course just days later, ultimately voting to uphold the law.¹⁸³

Justice Powell’s private papers reveal that while he accepted *Roe v. Wade*’s constitutional right to privacy, he struggled to identify a limiting principle that would decriminalize same-sex acts without also invalidating laws against other private practices he viewed as legitimately prohibited, such as sex work.¹⁸⁴ Justice Powell also questioned whether the plaintiff Michael Hardwick, who was never prosecuted, had suffered a genuine harm from the law’s enforcement, and whether a civil lawsuit was the appropriate vehicle for the challenge.¹⁸⁵

Justice Powell’s opinion was probably shaped by the internal dynamics of his chambers, including a Mormon clerk’s advocacy for Georgia’s

67, 68–69 (2002) (drawing this distinction and describing moral regret as “other-oriented”).

178. JEFFRIES, *supra* note 164, at 444–45.

179. *Id.* at 451.

180. See Yuvraj Joshi, *Respectable Queerness*, 43 COLUM. HUM. RTS. L. REV. 415, 425–30 (2012) (noting the legal significance of the AIDS epidemic).

181. *Bowers v. Hardwick*, 478 U.S. 186 (1986). For scholarly accounts of *Bowers v. Hardwick*, see, e.g., Frank I. Michelman, *Law’s Republic*, 97 YALE L.J. 1493, 1494 (1988) (characterizing *Bowers* as “resist[ing] . . . political freedom”); Thomas B. Stoddard, *Bowers v. Hardwick: Precedent by Personal Predilection*, 54 U. CHIC. L. REV. 648, 649 (1987) (describing *Bowers* as judging “by fiat”); Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick*, 79 VA. L. REV. 1721, 1770 (1993) (critiquing *Bowers*’s “homophobic power”); Kendall Thomas, *The Eclipse of Reason: A Rhetorical Reading of Bowers v. Hardwick*, 79 VA. L. REV. 1805, 1806 (1993) (critiquing *Bowers*’s “homophobic ideology”).

182. See DAVID A. J. RICHARDS, *THE SODOMY CASES: BOWERS V. HARDWICK AND LAWRENCE V. TEXAS* 89 (2009).

183. *Id.* at 92.

184. *Id.* at 91.

185. *Id.*

sodomy law.¹⁸⁶ Justice Powell's claimed unfamiliarity with LGBTQ+ people may have further complicated matters. During private Court discussions, Justice Powell remarked that he had never known a gay person, a statement that astonished Justice Blackmun, who was aware that one of Justice Powell's current clerks was gay.¹⁸⁷ However, Justice Blackmun chose not to disclose this to Justice Powell.¹⁸⁸

While Justice Powell appears to have seen little practical impact from rarely-enforced sodomy laws, the mere existence of such laws stigmatized queer people as a "criminal class," exposing them to heightened risks of harassment and discrimination.¹⁸⁹ *Bowers* was also invoked to reject equal protection claims based on sexual orientation,¹⁹⁰ effectively sanctioning discrimination against LGBTQ+ people for seventeen years, until the Court reversed it in 2003.¹⁹¹

Four years after *Bowers*, the retired Justice Powell conveyed regret about his decisive vote while speaking to NYU law students.¹⁹² "I think I probably made a mistake in that one," he admitted.¹⁹³ Though he never fully explained his change of heart, he acknowledged that the dissenting arguments had been stronger and his own *Bowers* vote "inconsistent" with *Roe v. Wade*.¹⁹⁴

Justice Powell's statements suggest he may have lacked a full grasp of the case's real-world impact, dismissing it as "not a major case" and a "frivolous" test suit.¹⁹⁵ He claimed that he had not "devoted half an hour" of further thought to the case since casting his vote.¹⁹⁶ Despite the equivocal nature of his regret, his second thoughts undermined the moral authority of the majority opinion in *Bowers*.¹⁹⁷ As Laurence Tribe predicted, "future

186. See Graber, *supra* note 19, at 808.

187. RICHARDS, *supra* note 182, at 104.

188. *Id.* Notably, the clerk recalls introducing his boyfriend to Justice Powell and believes that the Justice was likely aware of his sexual orientation. See Adam Liptak, *Exhibit A for a Major Shift: Justices' Gay Clerks*, N.Y. TIMES (June 8, 2013), <https://www.nytimes.com/2013/06/09/us/exhibit-a-for-a-major-shift-justices-gay-clerks.html> [https://perma.cc/KV2R-WUEF].

189. See Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 103-04 (2000).

190. See, e.g., *High Tech Gays v. Defense Indus. Sec. Clearance Off.*, 895 F.2d 563, 571 (9th Cir. 1990) (citing *Bowers* to deny heightened scrutiny to sexual orientation discrimination).

191. See *Lawrence v. Texas*, 539 U.S. 558 (2003).

192. Linda Greenhouse, *Black Robes Don't Make the Justice, but the Rest of the Closet Just Might*, N.Y. TIMES (Dec. 4, 2002), <https://www.nytimes.com/2002/12/04/us/black-rob-don-t-make-the-justice-but-the-rest-of-the-closet-just-might.html> [https://perma.cc/AKW8-VW2V].

193. *Id.*

194. *Id.*

195. Joshua Matz, *Tribe's Trajectory & LGBTQ Rights*, 88 U. CHIC. L. REV. 1733, 1747 (2021).

196. Marcus, *supra* note 99.

197. *Id.*

generations” would view the decision as flawed based on the admission of its own essential fifth vote.¹⁹⁸

5. Affirmative Action—Justice O’Connor in *Grutter v. Bollinger*

Finally, we return to the case that opened this Article.¹⁹⁹ Justice O’Connor’s 2003 majority opinion in *Grutter v. Bollinger* allowed some consideration of race in college admissions, but maintained that such reliance “must be limited in time.”²⁰⁰ Justice O’Connor acknowledged that race-sensitive admissions policies were still needed due to serious racial disparities in education.²⁰¹ Based on the progress she perceived over the previous twenty-five years, she predicted that “25 years from now, the use of racial preferences will no longer be necessary,” without specifying the kinds of changes that would be required to make that prediction a reality.²⁰²

After retiring, Justice O’Connor admitted her timeline “may have been a misjudgment.”²⁰³ Reflecting on her *Grutter* opinion in a Harvard Law School lecture in 2008, she remarked: “In today’s America, I’m inclined to think that race still matters in painful ways.”²⁰⁴ She added, “I frankly haven’t seen enormous changes in this country in the last five years,”²⁰⁵ noting that state bans on affirmative action had hindered progress and highlighting the need for greater equality in childhood education.²⁰⁶ When asked years later to predict how long affirmative action would be necessary, she told her biographer: “There’s no timetable. You just don’t know.”²⁰⁷

Justice O’Connor’s remarks suggest that she regretted not only specifying a twenty-five-year timeline, but also proposing any timeline at all. This admission was especially remarkable given that she generally resisted reconsidering her legal opinions. For a Justice who discouraged “second

198. *Id.*

199. See *supra* text accompanying notes 1–6.

200. *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003). For scholarly accounts of *Grutter*, see, e.g., Yuvraj Joshi, *Racial Indirection*, 52 U.C. DAVIS L. REV. 2495, 2516–20 (2019) [hereinafter Joshi, *Racial Indirection*] (detailing *Grutter*’s approval of “indirect” reliance on race); Kevin R. Johnson, *The Last Twenty Five Years of Affirmative Action?*, 21 CONST. COMMENT. 171 (2004) (discussing Justice O’Connor’s timeline); Joshi, *Racial Time*, *supra* note 3, at 1662–68 (same); Derrick Bell, *Diversity’s Distractions*, 103 COLUM. L. REV. 1622 (2003) (critiquing *Grutter*’s diversity rationale).

201. *Grutter*, 539 U.S. at 338.

202. *Id.* at 343.

203. Thomas, *supra* note 4.

204. Emily Dupraz, *Affirmative Action Is Still Necessary, Says O’Connor in HLS Keynote Address*, HARV. L. TODAY (Oct. 27, 2008), <https://hls.harvard.edu/today/affirmative-action-is-still-necessary-says-oconnor-in-hls-keynote-address> [https://perma.cc/V8Q9-F8C5].

205. *Id.*

206. *Id.*

207. Thomas, *supra* note 4.

thoughts”²⁰⁸ and actively taught the value of non-regret to colleagues and clerks²⁰⁹ to repeatedly express regret about *Grutter* suggests that her prediction weighed on her. Yet, the damage was done, and despite Justice O’Connor’s later remarks, her *Grutter* timeline became a staple argument used by affirmative action opponents.²¹⁰

In *SFFA v. Harvard*, these opponents recast Justice O’Connor’s timeline as a declaration of when affirmative action must be terminated, as opposed to a prediction of when it would no longer be necessary as a result of the elimination of racial disparities.²¹¹ This recharacterization belied both Justice O’Connor’s original reasoning and her later disavowal of arbitrary deadlines,²¹² treating her initial speculation as inviolable precedent despite her regret about having made it.²¹³

Ultimately, Chief Justice Roberts’s majority opinion elevated Justice O’Connor’s passing remark into a purported legal mandate, demanding a definitive endpoint that *Grutter* never prescribed.²¹⁴ Justice Kavanaugh’s concurrence similarly characterized *Grutter* as definitively settling the timeline issue, despite Justice O’Connor’s own later acknowledgment that she could not foresee when such policies would no longer be necessary in light of enduring racial disparities.²¹⁵

The preceding survey responses and case studies demonstrate judicial regret as both a personal experience and a sociolegal phenomenon.²¹⁶ The NJC survey data illustrates how lower court judges process regret in areas like criminal sentencing and child custody. The Supreme Court case studies demonstrate how even the most carefully considered equality and liberty opinions can become sources of profound regret as factual predicates collapse and social understandings evolve. But what exactly *is* judicial regret? How does it function? And how is it shaped by, and how might it in turn shape, the broader legal culture? Part II takes up these questions.

208. Joan Biskupic, *Sandra Day O’Connor Reflects on Life Before, During and After the Supreme Court*, CNN (Mar. 20, 2019), <https://www.cnn.com/2019/03/20/politics/sandra-day-oconnor-supreme-court-evan-thomas-book/index.html> [<https://perma.cc/C7ZT-UM7E>] (quoting Justice O’Connor, “second thoughts don’t do you a lot of good”).

209. See *infra* Section II.B.2.

210. See Joshi, *Racial Time*, *supra* note 3, at 1663–66.

211. *Id.*

212. *Id.*

213. *Id.*

214. *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2141 (2023).

215. *Id.* at 2222–23 (Kavanaugh, J., concurring).

216. For other contexts of judicial regret, see *supra* note 43.

II. THE ANATOMY OF JUDICIAL REGRET

Waste no time on . . . regret

—Justice O’Connor’s advice to Justice Ginsburg²¹⁷

Over 18 years, there has been more than one decision I have regretted, most often attributed to insufficient facts, but there have been some caused simply by poor judgment on my part. And I wonder how many more there have been—there must be many more. We’re told to forget and move on, but that’s not easy to do.

—Anonymous judge²¹⁸

Though we would like to live without regrets, and sometimes proudly insist that we have none, this is not really possible, if only because we are mortal.

—James Baldwin²¹⁹

Part II provides a deeper exploration of judicial regret than previous scholarship, which has primarily focused on documenting individual instances without analyzing their collective significance.²²⁰ Section II.A explores regret as a psychological phenomenon and examines how it influences decision-making, providing essential context for understanding judicial regret specifically. Section II.B then develops a framework for analyzing judicial regret by distinguishing three dimensions: what judges feel (experiential), what they say (expressive), and what others perceive (perceptual). It further examines how regret influences judicial behavior, how it varies across court hierarchies, judicial philosophies, and social identities, and how it challenges conventional professional norms that prize judicial consistency and certainty.

A. REGRET GENERALLY

Psychological research characterizes regret as a “cognitive/affective state of feeling sorry for losses, transgressions, shortcomings, or mistakes,”²²¹ typically arising from recognition that a different action could

217. JUSTICE RUTH BADER GINSBURG, MY OWN WORDS 90 (2019). Despite this advice, Justice O’Connor herself later expressed regret about her *Grutter* timeline, illustrating how even judges who resist regret may ultimately acknowledge error.

218. Survey, *supra* note 40.

219. James Baldwin, *God’s Country*, N.Y. REV. BOOKS (Mar. 23, 1967) (reviewing ELIA KAZAN, THE ARRANGEMENT (1967)), <https://www.nybooks.com/articles/1967/03/23/gods-country> [<https://perma.cc/V2PF-4RBV>].

220. See *supra* text accompanying notes 12–28.

221. Landman, *supra* note 13, at 153; see also Marcel Zeelenberg, Wilco W. van Dijk, Antony S.R. Manstead & Joop van der Pligt, *On Bad Decisions and Disconfirmed Expectancies: The Psychology of*

have led to a better outcome.²²² Although direct research on judicial regret is limited,²²³ broader regret research offers insights that can help us understand how judges may experience regret.²²⁴

Regret often involves feeling responsible for a decision and believing that “one should have known better.”²²⁵ Different types of regret stem from different loci of perceived failure. “Outcome regret” occurs when one evaluates the consequences of a chosen course of action against unchosen alternatives, expected outcomes, the pre-existing status quo, or others’ outcomes.²²⁶ “Self-blame regret” occurs when one impugns their own decision-making process, such as believing a decision was made in haste or with insufficient information.²²⁷ Both of these types of regret can arise in judicial contexts, for instance, when a judge fails to anticipate certain practical implications or adequately engage with certain arguments.²²⁸

People can experience regret from action or inaction, but these forms of regret differ in important ways.²²⁹ The “action effect” describes regret over actions taken, whereas the “inaction effect” refers to regret over forgone opportunities.²³⁰ While action-driven regret predominates in the short-term, inaction-driven regret becomes more prominent over time, as people ruminate over paths not taken.²³¹ As this Article’s case studies illustrate,

Regret and Disappointment, 14 COGNITION & EMOTION 521, 523–24 (2000) (exploring the nature of regret); Thomas Gilovich, Victoria Husted Medvec & Daniel Kahneman, Theoretical Note, *Varieties of Regret: A Debate and Partial Resolution*, 105 PSYCH. REV. 602, 603–04 (1998) (defining three “emotional profiles” of regret).

222. See Zeelenberg et al., *supra* note 221, at 524. While regret might suggest a desire for different choices, it can also indicate an appreciation for the value of unchosen paths and an acknowledgment of the constraints that shaped one’s decision. See Bagnoli, *supra* note 13, at 178; Katherine Gasdaglis, *Moral Regret and Moral Feeling(s)*, 64 INQUIRY 424, 427 (2019) (observing that regret can be expressed “despite the fact that [an agent] made the right choice and [the agent] knows it”). Regret is closely related to remorse and doubt, though each has distinct characteristics. While regret involves the feeling “I should have known better,” remorse evokes the thought “I have done wrong,” aligning more closely with guilt. See Landman, *supra* note 13, at 148. Regret is also closely related to doubt, as post-decisional doubt has been found to predict and intensify regret. See van de Calseyde et al., *supra* note 93. This relationship suggests that where overt expressions of regret are constrained, as in judicial decision-making, strong expressions of doubt may signal underlying regret. See *infra* text accompanying notes 296–355 (explaining judges may not publicly express their privately experienced regret).

223. See *supra* text accompanying notes 18–25 (noting limited direct research on judicial regret); *infra* notes 296–355 (discussing judges’ hesitancy to openly acknowledge feelings of regret).

224. See Marcel Zeelenberg, *Anticipated Regret: A Prospective Emotion About the Future Past*, in THE PSYCHOLOGY OF THINKING ABOUT THE FUTURE 276, 280–86 (2018) (describing regret theory).

225. See Zeelenberg et al., *supra* note 221, at 534.

226. See Reb & Connolly, *supra* note 52, at 182.

227. *Id.*

228. *Id.*

229. See Zeelenberg et al., *supra* note 91, at 314.

230. *Id.*

231. See Thomas Gilovich & Victoria Husted Medvec, *The Experience of Regret: What, When, and Why*, 102 PSYCH. REV. 379, 390 (1995) [hereinafter Gilovich & Medvec, *Experience of Regret*]; see also

judges may regret not merely their actual votes or opinions,²³² but also instances in which they considered departing from precedent, voting differently, or writing separately, but ultimately did not—resulting in decisions they later deemed incorrect.²³³

Regret exerts a powerful influence on subsequent behavior and decision-making through mechanisms including behavioral undoing, whereby individuals seek to resolve or compensate for perceived mistakes;²³⁴ emotion management, whereby they alter future conduct to reduce the likelihood of similar regrets;²³⁵ and decision avoidance, whereby anticipated regret causes people to delay or evade decisions altogether.²³⁶ These mechanisms do not depend on outward expressions of regret.²³⁷ Even privately experienced regret can profoundly shape how judges view their prior rulings and approach future ones.²³⁸

While often viewed as a negative emotion, regret can serve productive purposes.²³⁹ It can provide valuable context around past events, facilitate learning and better social relations, yield self-awareness about one's limitations and dispositions, and enable better preparation for future decisions and avoidance of similar mistakes.²⁴⁰ By revealing significant unchosen alternatives, regret can help people better understand their own values, potentially leading to more value-consistent decisions in the future.²⁴¹ Part III explores various constructive applications of judicial regret.²⁴² But before examining those applications, we must first understand how judicial regret manifests and operates in practice.

Thomas Gilovich & Victoria Husted Medvec, *The Temporal Pattern to the Experience of Regret*, 67 J. PERSONALITY & SOC. PSYCH. 357, 364 (1994); Gilovich, Medvec & Kahneman, *supra* note 221, at 605.

232. *See supra* Section I.B.

233. *See supra* Sections I.B.1, I.B.3, and I.B.5.

234. Zeelenberg et al., *supra* note 221, at 526.

235. *Id.* at 527.

236. *Id.* at 534.

237. *See supra* Section I.A.

238. *Id.*; *see also* Amy Summerville & Joshua Buchanan, *Functions of Personal Experience and of Expression of Regret*, 40 PERSONALITY & SOC. PSYCH. BULL. 463, 466 (2014) (exploring privately experienced and publicly expressed regret).

239. *See* Colleen Saffrey, Amy Summerville & Neal J. Roese, *Praise for Regret: People Value Regret Above Other Negative Emotions*, 32 MOTIVATION & EMOTION 46, 48 (2008) (finding that “beliefs about regret tended on average to be more favorable than those regarding other negative emotions”).

240. *Id.*

241. *See* Bagnoli, *supra* note 13, at 178.

242. *See infra* Part III.

B. JUDICIAL REGRET SPECIFICALLY

Building on the preceding research on regret in general, this Section examines judicial regret specifically. Understanding judicial regret requires first identifying how it manifests across three key dimensions, then examining its behavioral consequences, and finally exploring the contextual factors that shape its occurrence and expression.

1. Dimensions of Regret

Judicial regret manifests across three dimensions: experiential, expressive, and perceptual. The experiential dimension describes judges' internal feelings of regret. The expressive dimension describes judges' outward expressions of regret. The perceptual dimension concerns how others interpret judges' actions and statements as regret. Attending to all three dimensions shows that judicial regret operates beyond judges' inner lives, shaping legal doctrine and culture as well as public understanding of judicial authority.

i. Experiential Regret

Experiential regret—what judges feel internally about their past decisions—can be prompted by several distinct sources. While judges often render decisions based on the record and their background assumptions, additional information that later comes to light can undermine the basis for their original ruling, prompting regret.²⁴³ Such new information can take the form of changing social feedback, as shifts in public opinion render once-accepted legal perspectives outdated or biased.²⁴⁴ For instance, shifts in societal views concerning racial discrimination likely contributed to Justice Douglas's regret over *Korematsu*.²⁴⁵

At times, judicial opinions are based on expectations that turn out to be false, causing feelings of regret.²⁴⁶ Justice O'Connor's expectation that the United States would achieve educational equity within a generation proved misguided,²⁴⁷ as did Justice Blackmun's hope that formulating appropriate guidelines could address problems with the death penalty.²⁴⁸ In other instances, unforeseen implications or long-term consequences of court

243. See Reb & Connolly, *supra* note 52 (describing self-blame). On lower court judges' regrets, see *supra* notes 61–67 and accompanying text.

244. See BENDER, *supra* note 16, at 3.

245. See *supra* text accompanying notes 108–17; see also Sumi Cho, *Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown, and a Theory of Racial Redemption*, 19 B.C. L. REV. 73, 125–26 (1998) (describing Justice Earl Warren's search for redemption after *Korematsu*).

246. See *supra* text accompanying note 48.

247. See *supra* text accompanying notes 204–08.

248. See *supra* text accompanying notes 144–62.

rulings can cause regret.²⁴⁹ Chief Justice Warren lamented using “all deliberate speed” in *Brown II* once it became clear that the South interpreted this phrase as permission to indefinitely delay integration.²⁵⁰

The internal dynamics of a court can help shape opinions that judges later come to regret.²⁵¹ Both Justice Douglas and Chief Justice Warren cited Justice Frankfurter’s influence in shaping their approaches to *Korematsu*²⁵² and *Brown II*,²⁵³ respectively—decisions they ultimately lamented. As judges evolve personally and professionally over their tenures, they may come to view their earlier opinions through new perspectives.²⁵⁴ For Warren, his regret over *Brown II* may have been intertwined with his earlier regret over supporting Japanese American internment,²⁵⁵ and it may have deepened by his increasingly assertive stance on equality rights and his strained relationship with Frankfurter.²⁵⁶ Similarly, as Douglas evolved into a staunch civil libertarian,²⁵⁷ his early ruling in *Korematsu* likely became a source of mounting regret and embarrassment.

Authoring the majority opinion or casting the deciding vote can heighten a judge’s sense of responsibility and regret over a case’s outcome.²⁵⁸ Such regrets can be further amplified by compelling dissents, as seen in *Korematsu*²⁵⁹ and *Bowers*,²⁶⁰ which reveal alternative paths the judge could have followed²⁶¹ and add poignancy to later admissions that they “should have known better.”²⁶²

249. See *supra* notes 54–57 and accompanying text.

250. See *supra* text accompanying notes 125–30.

251. See Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615, 633 (2000) (noting that judges may “appeal to one or more of [their] peer groups”).

252. See *supra* text accompanying note 117.

253. See *supra* text accompanying note 125.

254. One judge reflected, “I have evolved after 15 years on the bench” and “I would certainly change some prior decision[s].” Survey, *supra* note 40.

255. See Cho, *supra* note 245 (tracing Justice Warren’s longer arch from *Korematsu* to *Brown*).

256. See Bernard Schwartz, *Felix Frankfurter and Earl Warren: A Study of a Deteriorating Relationship*, 1980 SUP. CT. REV. 115, 117 (1980) (documenting these changes).

257. See Anthony Lewis, *Justice Douglas*, N.Y. TIMES (Nov. 11, 1973), <https://www.nytimes.com/1973/11/11/archives/liberal-conscience-at-large-justice-douglas-law.html> [<https://perma.cc/G9CX-BJ5V>] (describing Justice Douglas as “likely the most persistent civil-libertarian in that court’s history”).

258. See Zeelenberg et al., *supra* note 91, at 319 (linking regret and feelings of responsibility).

259. See *Korematsu v. United States*, 323 U.S. 214, 225–33 (1944) (Roberts, J., dissenting); *id.* at 233–42 (Murphy, J., dissenting); *id.* at 242–48 (Jackson, J., dissenting).

260. See *Bowers v. Hardwick*, 478 U.S. 186, 199–214 (1986) (Blackmun, J., dissenting); *id.* at 214–20 (Stevens, J., dissenting).

261. See Zeelenberg et al., *supra* note 221, at 524.

262. *Id.*

Not all judges experience regret when confronted with new information and shifting societal values.²⁶³ Individual and structural factors can shield judges from experiencing regret over past opinions. On an individual level, a lack of internal regret could signal “one’s refusal to honestly engage with one’s past” or an “inability to do so.”²⁶⁴ It might reflect a reluctance to be guided by moral principles or empathy, a moral worldview that absolves certain actions from regret, a belief that one’s decisions were natural and thus undeserving of regret, or a disregard for those adversely affected by those decisions.²⁶⁵ Additionally, some judges may—like Edith Piaf’s famous song on non-regret²⁶⁶—view past mistakes as authentic reflections of their former selves, acknowledging them as part of personal growth.²⁶⁷

Structurally, legal formalism allows judges to attribute the law’s harms to legal rules and principles, rather than their own interpretive acts.²⁶⁸ Formalism holds that a judge’s “job is to apply the law, not make it, and that if the law is unjust or unfair, it is the legislature’s job to fix it.”²⁶⁹ Since regret is associated with feelings of responsibility and self-blame,²⁷⁰ judges adhering to this formalist perspective may not feel personally responsible for enforcing laws they did not create.²⁷¹ For some, as Justice O’Connor implied in the epigraph above, regret may seem a “waste” of time that hinders performing judicial duties.²⁷² Valuing the separation of reason and emotion, such judges may regard regret “as a mistake in itself.”²⁷³ As discussed below, certain judicial dispositions and jurisprudential commitments, including a

263. See Richard Delgado & Jean Stefancic, Review, *What Do We Regret and Why?*, 4 TEX. A&M L. REV. 123, 131 (2016) (observing “courts and other legal actors often seem to go through life with clear consciences”).

264. GOTLIB, *supra* note 13, at 3.

265. On the absence of regret, see Gasdaglis, *supra* note 222, at 448–49 (linking an absence of regret to a psychological lack of moral agency); Price, *supra* note 13, at 1 (describing the absence of regret as “an expression of conviction”); Maura Priest, *Reasonable Regret*, in THE MORAL PSYCHOLOGY OF REGRET 98, 107 (Anna Gotlib ed., 2019) (identifying regret as a sign of respect for others).

266. See Darby, *Non, Je Ne Regrette Rien Lyrics and Translation—Edith Piaf*, FRENCH LYRICS & TRANSLATION (Aug. 8, 2016), <https://www.frenchlyrictranslations.com/non-je-ne-regrette-rien-edith-piaf-french-lyrics-and-english-translation> [<https://perma.cc/ZXG6-Q9ZJ>].

267. A judge who reported experiencing no regret noted that while they “would certainly change some prior decisions” from their fifteen-year judicial career, “we can only do the best we can.” Survey, *supra* note 40.

268. See Robert M. Cover, Essay, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986) (“Legal interpretation takes place in a field of pain and death.”).

269. Delgado & Stefancic, *supra* note 263, at 133–34.

270. See Zeelenberg et al., *supra* note 91, at 319 (linking regret and feelings of responsibility).

271. One judge expressed: “[I]f I wanted to change the law rather than follow it, I’d run for the legislature.” Survey, *supra* note 40.

272. See *supra* text accompanying note 218.

273. Price, *supra* note 13, at 4.

lack of humility and strict originalism or textualism, can further reduce judges' propensity to experience regret.²⁷⁴

ii. Expressive Regret

Expressive regret—what judges say publicly or privately about their past decisions—can diverge from what they feel internally. It encompasses both straightforward forms—publicly expressed regret in autobiographies or speeches,²⁷⁵ privately admitted regret in surveys or conversations²⁷⁶—and more complex manifestations, including insincere expressions without genuine feeling,²⁷⁷ strategic displays for personal gain,²⁷⁸ and indirect expressions where direct acknowledgement is constrained.²⁷⁹ This taxonomy illustrates the multifaceted nature of judicial regret, highlighting how it can be internal or external, genuine or performative, and direct or indirect.

Judges' public expressions of regret vary in time, place, and manner. Some judges express regret relatively quickly, such as Justice Powell reconsidering *Bowers* after just four years, having apparently been persuaded by the dissenting opinions,²⁸⁰ or Justice O'Connor expressing misgivings about her *Grutter* timeline within five years, observing little progress in racial conditions.²⁸¹ In other instances, regrets may accumulate gradually, as may have happened with Justice Douglas voicing regret over *Korematsu* after nearly four decades.²⁸² Research suggests that regret from inaction can linger longer than regret from action²⁸³—a dynamic that might have been relevant for Douglas, who considered writing separately in *Korematsu* but was dissuaded by colleagues.²⁸⁴

Some judges express regret only after retiring,²⁸⁵ possibly due to a gradual buildup of regret over time,²⁸⁶ biographical reflection in later life,²⁸⁷

274. See *infra* Sections II.B.3 & II.B.4.

275. *Id.* (discussing publicly expressed regret).

276. *Id.* (acknowledging privately expressed regret).

277. See *infra* text accompanying notes 296–300.

278. See *infra* text accompanying notes 479–81.

279. See *supra* note 223 (noting the relationship between doubt and regret and suggesting that strong expressions of post-decisional doubt could indicate regret in certain contexts); *infra* text accompanying notes 296–355 (explaining why judges may not publicly express their privately experienced regret).

280. See *supra* text accompanying notes 193–98.

281. Thomas, *supra* note 4.

282. DOUGLAS, *supra* note 107, at 279–80.

283. See Zeelenberg et al., *supra* note 91.

284. See *supra* text accompanying notes 114–17.

285. See *supra* Section I.B.1 (Justice Douglas), Sections I.B.3 and I.B.4 (Justice Powell), and Section I.B.5 (Justice O'Connor).

286. See Gilovich & Medvec, *Experience of Regret*, *supra* note 231, at 381 (discussing the buildup of regret over time).

287. See d'Avelar, *supra* note 15 (observing that regret “can be key in determining an individual’s biography”).

or reduced consequences for expressing regret.²⁸⁸ Mark Graber suggests that political pressures constrain Justices' perspectives while on the bench.²⁸⁹ He echoes Alexander Bickel that only after leaving the bench do Justices gain the "leisure . . . and the insulation' necessary 'to follow the ways of the scholar in pursuing the ends of government.'"²⁹⁰

The venues in which judges reveal regrets often encourage such candor. When Justice Powell recanted *Bowers* during a conversation with NYU law students in 1990, he may have anticipated a receptive audience for his contrition, as *Bowers* had faced heavy scholarly criticism.²⁹¹ A year earlier, Yale law students had protested Justice Powell's graduation speech due to the "egregious misalignment in values" of having the decisive vote in *Bowers* speak about "justice, the courts, and the role of the legal profession."²⁹² While it is impossible to pinpoint when and how Justice Powell's regret emerged, it is plausible that the feedback on his decision and the informal academic setting facilitated his expression of regret.

Yet such moments of candor remain the exception rather than the norm. Professional norms and institutional constraints discourage judges from expressing regret.²⁹³ As discussed below, legal culture generally prizes judicial consistency and certainty over acknowledgment of error, a dynamic that creates powerful barriers to expressing regret even when it is experienced.²⁹⁴ Moreover, judges' social identities and positions within power structures can create additional barriers, as gendered and racialized expectations shape the willingness to express regret and how such expressions are received.²⁹⁵

iii. Perceptual Regret

Perceptual regret—how others interpret a judge's statements and actions as regret—can exist independently of what the judge feels or intends to communicate. Subtle cues in a judge's statements or actions can generate perceptions of regret even when the judge did not directly express it. Conversely, even explicit statements of regret may be received as insincere or strategic. These perceptions can shape understandings of judging and law,

288. Graber, *supra* note 19, at 809.

289. *Id.*

290. *Id.* at 814 (quoting ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 25–26 (1962)).

291. See, e.g., Michelman, *supra* note 181, at 1494; Stoddard, *supra* note 181, at 656.

292. E-mail from Karen Porter, Assoc. Dean of Acad. & Student Success, Brook. L. Sch., to author (May 21, 2024, at 9:33 AM ET) (on file with author).

293. See BENDER, *supra* note 16, at 4 ("Of the various legal actors and policymakers in the United States, arguably judges have the largest stake in decision making on the right side of history.").

294. See *infra* Section II.B.4.

295. See *infra* Section II.B.3.iv.

regardless of whether they align with the judge's actual emotional state or outward expressions.

A historical example illustrates how perceptions of regret can shift dramatically over time. In the landmark 1829 North Carolina Supreme Court case of *State v. Mann*,²⁹⁶ Justice Ruffin's ruling, which granted enslavers "absolute" authority over enslaved people and immunity from prosecution for violence against them, was accompanied by expressions of personal regret.²⁹⁷ Ruffin wrote of the "severe" struggle between his feelings as a man and his duty as a magistrate, lamenting the necessity of such judgments.²⁹⁸ While commentators sometimes treated Ruffin's words as sincere "statements of regret," later scholars have interpreted them as a calculated rhetorical performance to cast him in a favorable light and shield him from responsibility for the system he helped enforce.²⁹⁹ This shifting perception of Ruffin's professed regret has invited a broader reassessment of his life and legacy.³⁰⁰

Distinguishing between experiential, expressive, and perceptual regret is important, as each operates differently and demands different responses. Experiential regret suggests that judges' personal feelings of regret can influence judicial behavior, necessitating an understanding of how the legal system should respond to such regret. Expressive regret involves judges conveying messages through their words and actions, requiring careful consideration of the meaning and sincerity of these communications. Perceptual regret involves stakeholders interpreting and responding to perceived regret, which in turn shapes understandings of law and judging.

The relationship between experiential, expressive, and perceptual regret is complex. The experience of regret does not always lead to its expression, expressed regret may not reflect genuine feelings, and perceived regret can diverge from both experienced and expressed regret. Neglecting any one of them would yield an incomplete account of how judicial regret operates in the legal system. Having established how judicial regret manifests across

296. *State v. Mann*, 13 N.C. (2 Dev.) 263 (1829).

297. *Id.* at 264.

298. *Id.*

299. Compare MARK V. TUSHNET, SLAVE LAW IN THE AMERICAN SOUTH: *STATE V. MANN* IN HISTORY AND LITERATURE 84–85 (2003), with Eric L. Muller, *Judging Thomas Ruffin and the Hindsight Defense*, 87 N.C. L. REV. 757, 780 (2009), and Sally Greene, *State v. Mann Exhumed*, 87 N.C. L. REV. 701, 707 (2009).

300. See Muller, *supra* note 299; Greene, *supra* note 299.

these three dimensions, we are now better equipped to examine how it operates in practice.

2. Regret's Influence on Judicial Behavior and Decision-Making

Regret can influence judicial behavior and decision-making in ways that reflect the broader patterns identified in regret research.³⁰¹ It can shape how judges view their past rulings and how they approach future ones. Consider Justices Stevens and Blackmun, who developed misgivings about previously upholding capital punishment and later repudiated it in subsequent opinions, though too late to shift established doctrine.³⁰² Regret can also prompt deeper reflection on the circumstances behind regretted decisions, as when Justice Douglas speculated that *Korematsu* "would never have been sustained except in the climate of war."³⁰³

Public expressions of regret can serve as an instrument for social learning within the judiciary. When one judge candidly acknowledges regret, it can influence how other jurists approach decision-making and understand their judicial role. Inspired by Justice Blackmun's vow to "no longer tinker" with capital punishment, Judge Lewis observed that while lower courts must apply Supreme Court precedent, judges should "reflect upon the law" and express "genuine and unfeigned" views.³⁰⁴ He added that Justice Blackmun's "plaintive voice . . . truly crying in the wilderness" should "haunt and remind us that 'the desired level of fairness has [not] been achieved.'"³⁰⁵ Judges giving voice to regret can shape how their peers view their responsibilities, potentially encouraging more candid reflection on whether the laws they uphold are truly fair or even constitutional.³⁰⁶ Conversely, when judicial regret goes unexpressed, this silence may allow errors and injustices to continue in the name of following established norms of judicial restraint and can deprive courts of the learning that accompanies the acknowledgment of regrets.³⁰⁷

Private expressions of regret can be equally consequential, even if less observable. Occurring in chambers, conference rooms, and conversations with colleagues and confidantes, such regret can profoundly influence legal

301. See Zeelenberg et al., *supra* note 221, at 526 (discussing behavioral undoing); *id.* at 527 (discussing emotion management); Reb & Connolly, *supra* note 52 (discussing decision avoidance).

302. See *supra* Section I.B.3.

303. DOUGLAS, *supra* note 107, at 38.

304. *Flamer v. Delaware*, 68 F.3d 736, 772 (3d Cir. 1995) (Lewis, J., dissenting).

305. *Id.* (quoting *Callins v. Collins*, 510 U.S. 1141, 1130 (1994) (Blackmun, J., dissenting)).

306. See *supra* text accompanying notes 80–81 (noting that several judges associated regret with a "law v. justice dilemma").

307. See Summerville & Buchanan, *supra* note 238, at 464 (noting that "the social benefits of regret are contingent on public expression").

opinions and approaches.³⁰⁸ Justice O'Connor's advice to Justice Ginsburg in the epigraph above exemplifies how judges privately discuss regret and learn from each others' experiences.³⁰⁹ Judges may share their understandings of regret with trusted law clerks and mentees, who carry these lessons into their own careers in legal practice, academia, and the judiciary. As Judge Friedland learned from her mentor, Justice O'Connor: "[T]here is room for deep reflection, but not for regret."³¹⁰ These private exchanges create a ripple effect of learning that extends beyond the immediate circle of judges.

Even unexpressed regret can shape future judicial decisions by motivating judges to avoid similar errors.³¹¹ This regret-avoidance can have both beneficial and detrimental effects on judicial decision-making.³¹² On the productive side, judges may engage in private counterfactual thinking to improve future performance.³¹³ Less productively, anticipation of regret might lead to second-best decisions to avoid the personal emotional pain of regret.³¹⁴ Judges may also avoid seeking information about their rulings' real-world impacts or how different opinions might have prevented unintended consequences, stymieing their professional growth.³¹⁵ The mere anticipation of regret is likely weighed as a cost of a particular action, and judges may adjust decision-making and evidence gathering to circumvent feeling regret. Thus, judicial regret's reach extends far beyond public admissions, permeating private discussions, mentor-mentee relationships, and personal introspection in ways difficult to quantify but nonetheless significant.

308. See *id.* at 466 (acknowledging privately expressed regret).

309. See *supra* text accompanying note 217.

310. Judge Michelle Friedland, *Lessons from My Mentor, Justice Sandra Day O'Connor*, 133 YALE L.J. 2526, 2527 (2024).

311. For instances of privately experienced regret, see *supra* Section I.A.

312. See, e.g., Marcel Zeelenberg, *The Use of Crying Over Spilled Milk: A Note on the Rationality and Functionality of Regret*, 12 PHIL. PSYCH. 325, 336 (1999) (arguing that regret can lead to both rational and irrational decision-making).

313. See Summerville & Buchanan, *supra* note 238, at 463 (characterizing regret as involving counterfactual thoughts "beneficial to learning and planning").

314. See Zeelenberg et al., *supra* note 221, at 537 ("Anticipated regret promotes choices that shield one from painful feedback on foregone options.").

315. See Reb & Connolly, *supra* note 52, at 188 (observing that "anticipated and experienced outcome regret might lead [people] to avoid feedback in repeated decision situations, possibly resulting in less learning").

3. Contextual Variations in Judicial Regret

How regret is experienced, expressed, and perceived—and whether it surfaces at all—is context dependent on various factors.³¹⁶ This Section highlights four particularly important sources of variation: regret's origins, its manifestation across judicial hierarchies, its relationship to interpretive philosophies, and the influence of judges' social backgrounds and positions.

i. Origins of Regret

Judicial regret stems from at least five distinct origins. Some regrets arise from predictive errors—as when Justice O'Connor's *Grutter* timeline³¹⁷ or Justice Blackmun's faith in capital punishment guidelines³¹⁸ proved misguided—highlighting judges' inherent limitations in forecasting social and legal change. Others stem from incomplete or misleading information due to inadequate representation, evidentiary constraints, or the limited facts available at the time of decision.³¹⁹ Another source involves cognitive biases and constraints, as Justice Powell's difficulty understanding statistical evidence in *McCleskey* illustrates.³²⁰ Regrets can emerge from changed circumstances that render once-accepted decisions problematic, as Justice Douglas later recognized when societal evolution made *Korematsu*'s injustices impossible to ignore.³²¹ Finally, regret may arise from institutional dynamics that produce decisions judges come to rue, exemplified by Chief Justice Warren's and Justice Douglas's later regrets about decisions shaped by Justice Frankfurter's persuasive influence.³²²

Failing to distinguish between these drivers risks treating all judicial regret identically and missing opportunities for targeted responses. For instance, a judge who regrets a decision shaped by cognitive bias may require different institutional supports than one who regrets a predictive failure.³²³

316. Other factors shaping judicial regret may include the political climate or public reaction, the time elapsed since the original decision, the availability of new information, institutional and collegial dynamics, the judge's career stage, changes in the judge's personal circumstances or worldview, and the nature of the harms caused by the decision. Future research could examine how these and other factors interact to produce judicial regret.

317. See *supra* Section I.B.5.

318. See *supra* Section I.B.3.

319. See *supra* Section I.A.

320. See *supra* Section I.B.3.

321. See *supra* Section I.B.1.

322. See *supra* Sections I.B.1 & I.B.3.

323. These two issues may be intertwined where biases inform legal predictions. See Joshi, *Racial Time*, *supra* note 3, at 1626 (discussing the racialized nature of some legal predictions).

ii. Variations Across Court Hierarchies

Judicial regret manifests differently across levels of the judiciary. Lower court judges may experience regret most immediately and personally. Because they decide cases individually, they may face intense individual responsibility and attendant feelings of regret.³²⁴ These judges often confront the consequences of their rulings most directly, seeing how decisions affected lives and receiving feedback unavailable to appellate judges insulated from outcomes. Where they retain ongoing jurisdiction, lower court judges may also have greater opportunities for behavioral undoing than appellate judges.³²⁵

For intermediate appellate judges, deciding collegially in panels requires compromises that can produce lasting regret, as Justice Blackmun's appellate experience illustrates.³²⁶ Their regrets may also remain hidden, as intermediate appellate decisions receive less scrutiny than Supreme Court decisions and judges often lack the public platforms available to Justices.

Supreme Court Justices' regret carries particular weight and visibility. The Court's position as final arbiter amplifies the consequences of decisions and the significance of regrets about them. When Justice Powell recanted *Bowers* and *McCleskey*, he acknowledged errors in precedents binding all courts and affecting millions.³²⁷ This higher profile may create reticence about expressing regret while also making such expressions more influential. Supreme Court Justices' unique platforms, particularly post-retirement when constraints on expression diminish,³²⁸ allow their regrets to shape public understanding far beyond legal audiences, as Justices' statements about the death penalty demonstrated.³²⁹

iii. The Role of Judicial Philosophy

A judge's judicial philosophy affects what counts as valid grounds for regret. Living constitutionalists, who embrace evolving legal interpretations, remain structurally open to the emerging information and changing social understandings that typically prompt regret.³³⁰ Originalists and textualists

324. See *supra* Section I.A.

325. Zeelenberg et al., *supra* note 221, at 526.

326. See *supra* Section I.B.3.

327. See *supra* Sections I.B.3 & I.B.4.

328. See *supra* Section II.B.1.ii.

329. See *supra* Section I.B.3.

330. "Living constitutionalism refers to modes of interpreting the Constitution that allow its meaning to evolve in history." Reva B. Siegel, *The History of History and Tradition: The Roots of Dobbs's Method (and Originalism) in the Defense of Segregation*, 133 YALE L.J. F., Nov. 6, 2023, at 99, 104 n.28.

are less amenable to these sources of reconsideration, though they are not immune to regret entirely.³³¹

Justice Powell's experience illustrates how judicial philosophy shapes the conditions under which regret becomes possible. According to his biographer, Justice Powell believed that the U.S. Constitution "plainly contemplated" capital punishment and he never altered his view on constitutional text and history.³³² Nevertheless, he conveyed regret about upholding capital punishment in *McCleskey* because "[b]y 1991 the intent of the Framers seemed no longer decisive and not nearly so important as the actual experience under the new law of capital punishment."³³³ Justice Powell's growing willingness to credit empirical evidence over fixed historical meaning appears to have enabled him to recognize flaws in the death penalty system and ultimately convey regret about *McCleskey*.³³⁴

Judicial philosophy shapes not only whether judges experience regret but also whether they credit the regrets of others. For example, in *Compassion in Dying v. Washington*, Judge Reinhardt cited Justice Powell's regret over *Bowers v. Hardwick* to support an "evolving" substantive due process doctrine.³³⁵ However, an originalist dissent dismissed Justice Powell's regret as "irrelevant," focusing solely on the Fourteenth Amendment's original meaning.³³⁶ For an originalist, Justice Powell's regret was not just unpersuasive but categorically outside the bounds of relevant legal argument.

331. Originalist theories assume that "the original meaning" of the Constitution "is fixed at the time each provision is framed and ratified." Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 474 (2013). Textualist theories assert that "legislatures enact texts, not the intentions or purposes of the texts' authors." See Richard H. Fallon, Jr., *The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1280 (2015).

332. JEFFRIES, *supra* note 164, at 411.

333. *Id.* at 453.

334. *Id.*; cf. *Ingraham v. Wright*, 430 U.S. 651, 670–71 n.39 (1977) ("The applicability of the Eighth Amendment always has turned on its original meaning, as demonstrated by its historical derivation."). Originalist judges may experience regret for methodological rather than outcome-based reasons. For instance, Justice Thomas's *Apprendi* concurrence expressed regret over his earlier position in *Almendarez-Torres* because he concluded that it contradicted originalist principles. See *Apprendi v. New Jersey*, 530 U.S. 466, 520 (2000) (Thomas, J., concurring) (calling his earlier position "an error to which [he] succumbed"). This suggests that judicial philosophy shapes the propensity for regret and the types of reasons judges view as valid grounds for regret. Furthermore, some originalists view originalism itself as a safeguard against regrettable decisions. See JUSTICE NEIL M. GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 111–16 (2019). Future research might explore regret patterns among originalist judges and what they reveal about originalist methodology.

335. *Compassion in Dying v. Washington*, 79 F.3d 790, 803 n.16 (9th Cir. 1996) (en banc), *rev'd on other grounds sub nom.*, *Washington v. Glucksberg*, 521 U.S. 702 (1997).

336. *Compassion in Dying v. Washington*, 85 F.3d 1440, 1449 (9th Cir. 1996) (Trott, J., dissenting from order rejecting request for rehearing en banc).

These methodological commitments have also influenced judicial appointment strategies. Originalist methodology limits the relevance of the kinds of evolving social facts that prompted regret in earlier Justices,³³⁷ and this resistance to societal evolution has become a deliberate feature of conservative appointment strategies. The evolution of Republican appointees like Justices Souter, O'Connor, Stevens, and Powell disappointed conservative legal elites and contributed to calls for nominees with staunch methodological commitments.³³⁸ These strategies favor judges who are less responsive to societal change and less likely to evolve in their own methodological commitments, reducing the likelihood of the kinds of regrets that emerged among earlier Justices. In Justice Thomas's words, they seek judges who "ain't evolving."³³⁹

Whether originalist philosophy can insulate judges from outcome-based regret remains an open empirical question. The Court's recent high-profile decisions, particularly *Dobbs*,³⁴⁰ may eventually test whether even some methodologically committed judges acknowledge regret when confronted with adverse consequences.³⁴¹

337. See Lawrence B. Solum, Essay, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1244 (2018).

338. See Lawrence Baum & Neal Devins, *How the Federalist Society Became the De Facto Selector of Republican Supreme Court Justices*, SLATE (Jan. 31, 2017, 10:12 AM), <https://slate.com/news-and-politics/2017/01/how-the-federalist-society-became-the-de-facto-selector-of-republican-supreme-court-justices.html> [<https://perma.cc/X9QP-HA3X>] (noting calls for "no more Souters"); Cristian Farias, *The Supreme Court Sandra Day O'Connor Left Behind Is Dead, Too: Her Successors Abandoned the Principles of Pragmatism and Compromise She Represented*, N.Y. MAG. (Dec. 2, 2023), <https://nymag.com/intelligencer/2023/12/the-court-sandra-day-oconnor-left-behind-is-dead-too.html> [<https://web.archive.org/web/20241001002531/https://nymag.com/intelligencer/2023/12/the-court-sandra-day-oconnor-left-behind-is-dead-too.html>] (noting sentiments of "no more O'Connors"); Vincent Blasi, *Judge Him Unpredictable*, N.Y. TIMES (June 19, 1994), <https://www.nytimes.com/1994/06/19/books/judge-him-unpredictable.html> [<https://perma.cc/8UJX-C94E>] (noting that Justice Powell "disappointed many conservatives"); Ed Kilgore, *John Paul Stevens and the Legacy of Liberal Republican Judges*, N.Y. MAG (July 17, 2019), <https://nymag.com/intelligencer/2019/07/john-paul-stevens-and-a-legacy-of-liberal-republican-judges.html> [<https://web.archive.org/web/20250913000215/https://nymag.com/intelligencer/2019/07/john-paul-stevens-and-a-legacy-of-liberal-republican-judges.html>] (linking Justice Stevens's long tenure to conservatives' focus on judicial nominations).

339. Jill Abramson, *This Justice Is Taking Over the Supreme Court, and He Won't Be Alone*, N.Y. TIMES (Oct. 15, 2021), <https://www.nytimes.com/2021/10/15/opinion/clarence-thomas-supreme-court.html> [<https://archive.ph/XrBAz>] ("Justice Clarence Thomas assured his law clerks, 'I ain't evolving' . . . [H]e would not soften his sharp conservative edges or change ideological stripes as did some of his fellow justices."); see also Collins, *infra* note 353, at 870 (finding that extremist justices were more likely to be consistent in their decision-making).

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

341. Linda Greenhouse, *Is There Any Twinge of Regret Among the Anti-Abortion Justices?*, N.Y. TIMES (June 23, 2023), <https://www.nytimes.com/2023/06/23/opinion/abortion-supreme-court-dobbs.html> [<https://perma.cc/9VHT-LQ6P>]; see also Kelly Baden, Joerg Dreweke & Candace Gibson, *Clear and Growing Evidence That Dobbs Is Harming Reproductive Health and Freedom*, GUTTMACHER INST. (May 2024), <https://www.guttmacher.org/2024/05/clear-and-growing-evidence-dobbs-harming-reproductive-health-and-freedom> [<https://perma.cc/S722-JG38>].

The causal relationship between judicial philosophy and regret may also run in the opposite direction. Judges temperamentally less inclined to reconsider their decisions may be drawn to originalist philosophy because it legitimizes a resistance to the evolution that might otherwise prompt regret. This would be a case of judicial philosophy chosen to fit an existing disposition rather than disposition shaped by philosophy.³⁴²

iv. Gender and Race in Judicial Regret

Judicial regret is also shaped by a judge's social identities and positions within structures of power.³⁴³ Gendered expectations can shape whether judges view expressing regret as appropriate³⁴⁴ and how others receive those expressions.³⁴⁵ Research has shown that female leaders are often viewed as more emotional than their male counterparts³⁴⁶ and face harsher criticism for displaying "negative" emotions, such as remorse.³⁴⁷ This creates "emotional landmines" for women in leadership roles, where expressing certain emotions carries different consequences depending on the leader's gender.³⁴⁸ Legal culture may likewise apply gendered expectations to judicial regret, praising it as intellectual courage in male judges while viewing it as weakness or uncertainty in female judges.³⁴⁹ If the same expression of regret enhances a male judge's reputation while undermining a female judge's authority, the effect is to systematically discourage certain judges from the kinds of introspection this Article argues has value.

Racialized experiences may shape judicial regret in related but distinct ways.³⁵⁰ One survey respondent, identifying as a minority judge, noted: "As

342. On originalism as a political project, see Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 *FORDHAM L. REV.* 545 (2006); Reva B. Siegel, *Memory Games: Dobbs's Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 *TEX. L. REV.* 1127 (2023).

343. See d'Avelar, *supra* note 15, at 9 (describing regret as "personal and situational, social and cultural, individual and collective," and "undoubtedly intersectional").

344. *Id.* at 5 (discussing gendered notions of "when regret is required or prohibited, legitimate or unfounded, and appropriate or unreasonable").

345. See Beth Polin, Sarah P. Doyle, Sijun Kim, Roy J. Lewicki & Nitya Chawla, *Sorry to Ask But . . . How Is Apology Effectiveness Dependent on Apology Content and Gender?*, 109 *J. APPLIED PSYCH.* 339, 339 (2024) (finding that "apologies were perceived to be relatively more effective when they contradicted gender stereotypes").

346. See Victoria L. Brescoll, *Leading With Their Hearts? How Gender Stereotypes of Emotion Lead to Biased Evaluations of Female Leaders*, 27 *LEADERSHIP Q.* 415 (2016).

347. See Thomas Sy & Daan van Knippenberg, *The Emotional Leader: Implicit Theories of Leadership Emotions and Leadership Perceptions*, 42 *J. ORG. BEHAV.* 885, 899 (2021). On regret and remorse, see *supra* note 222 and accompanying text.

348. Brescoll, *supra* note 346, at 420.

349. See Sy & van Knippenberg, *supra* note 347. As Section II.B.4 explores, tributes to male Justices have often praised their expressions of regret, while tributes to Justice O'Connor have highlighted her relative lack of regret.

350. Studies in the medical field have found that Black men experience greater decisional regret

a minority, I have never had the luxury of contentment that leads to cookie cutter decisions that disregard the person standing before the court.”³⁵¹ For judges with experiences of marginalization, the gap between law as articulated in doctrine and law as experienced in communities may be more viscerally apparent, heightening the stakes of each decision and the potential for regret when doctrine falls short.

4. Legal Culture and the Normative Status of Regret

Judges and scholars often prize judicial consistency,³⁵² believing it “increases confidence in the judicial system” and lends legitimacy to judicial decisions.³⁵³ Significant departures from prior rulings must be justified³⁵⁴ and judges are expected to ground their reasoning in “neutral” legal principles³⁵⁵ rather than sentiments like empathy. Judges who reverse course risk criticism for yielding to public pressure, undermining stare decisis, or revealing that earlier convictions were less settled than they appeared.³⁵⁶ Consistency also helps cultivate a recognizable jurisprudential “brand” that signals independence, steadiness, and professional discipline.³⁵⁷ This culture of valuing consistency and certainty was aptly captured by Justice O’Connor’s famous pillow inscription: “Maybe in error but never in doubt.”³⁵⁸ In such a culture, judicial regret—which can motivate or accompany changes in previously held positions—might appear undesirable.

Yet regret can result in beneficial forms of inconsistency.³⁵⁹ Justin Driver cites Justice Blackmun’s evolving stance against capital punishment

compared to non-Black men, partly due to a heightened medical mistrust rooted in historical and ongoing racial discrimination. See BA Mahal, M-H. Chen, CL Bennett, MW Kattan, O Sartor, K Stein, AV D’Amico & PL Nguyen, *The Association Between Race and Treatment Regret Among Men with Recurrent Prostate Cancer*, 18 PROSTATE CANCER & PROSTATIC DISEASE 38 (2015); Donna L. Berry, Fangxin Hong, Traci M. Blonquist, Barbara Halpenny, Niya Xiong, Christopher P. Filson, Viraj A. Master, Martin G. Sanda, Peter Chang, Gary W. Chien, Randy A. Jones, Tracey L. Krupski, Seth Wolpin, Leslie Wilson, Julia H. Hayes, Quoc-Dien Trinh & Mitchell Sokoloff, *Decision Regret, Adverse Outcomes, and Treatment Choice in Men with Localized Prostate Cancer: Results from a Multi-Site Randomized Trial*, 39 UROLOGIC ONCOLOGY: SEMINARS & ORIGINAL INVESTIGATIONS 493 (2021).

351. See *supra* text accompanying note 83.

352. See Justin Driver, Essay, *Judicial Inconsistency as Virtue: The Case of Justice Stevens*, 99 GEO. L.J. 1263, 1271 (2010).

353. See Paul M. Collins, Jr., *The Consistency of Judicial Choice*, 70 J. POL. 861, 870 (2008).

354. See Re, *supra* note 42, at 854; see also Driver, *supra* note 352, at 1271.

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

356. Driver, *supra* note 352, at 1271.

357. *Id.*; Re, *supra* note 42, at 831.

358. See Dahlia Lithwick, *What the Women of SCOTUS Know*, SLATE (Dec. 15, 2016, 12:56 PM), <https://slate.com/human-interest/2016/12/in-troubled-times-the-women-of-the-supreme-court-are-the-role-models-we-need.html> [<https://perma.cc/P949-ULTM>].

359. On desirable forms of judicial consistency, see Driver, *supra* note 352.

as a noble instance of judicial inconsistency.³⁶⁰ While consistency holds value, he argues, overvaluing it can “constrain our constitutional understanding.”³⁶¹ A degree of inconsistency through regret and evolved perspectives allows constitutional interpretations to progress.³⁶² The willingness to regret and reevaluate, so often treated as weakness, becomes on this view a form of intellectual courage.³⁶³

That intellectual courage is closely related to judicial humility. While humility is often associated with judicial deference and restraint,³⁶⁴ scholars have proposed broader definitions³⁶⁵ that encompass realistic self-assessment and recognizing “one’s errors in judgment.”³⁶⁶ Sherry Colb notes that judges sometimes forget the potential for error—and its potential outsized effect—that accompanies their power.³⁶⁷ Voicing regret might help counter judicial arrogance that can arise when a judge’s immense power outstrips their ability to discern truth.³⁶⁸ From this lens, Justice O’Connor’s regret-filled statements about her affirmative action timeline might be seen as a humble, if ineffective, corrective to the arrogance of her original prediction.³⁶⁹

The notion of regret as a judicial virtue is reinforced by the way some judges’ regrets positively shaped their legacies. In several prominent examples, male Justices did not lose legitimacy for voicing regret and were even praised for it. Justice Powell was commended for his “courage and candor” for acknowledging errors in *Bowers*³⁷⁰ and *McCleskey*.³⁷¹ Tributes to Justice Stevens celebrated that “he wasn’t shy about expressing remorse

360. *Id.* at 1277.

361. *Id.* at 1273.

362. *See id.*

363. *See id.* at 1272.

364. *See* Zachary K. German & Robert J. Burton, *Constitutional Humility: The Contested Meaning of a Judicial Virtue*, 10 AM. POL. THOUGHT 238, 243 (2021) (observing this trend).

365. *See* Katharina Stevens, *Humility as a Necessary Virtue in Common-Law Decision Making*, 14 JURIS. 443, 451 (2023) (proposing judicial humility as a “community-virtue”); Amalia Amaya, *The Virtue of Judicial Humility*, in THE FACES OF VIRTUE IN LAW 97 (2020) (presenting an “egalitarian conception of judicial humility”); German & Burton, *supra* note 364, at 249 (expounding a “constitutional humility” that “requires judges to possess—and act in accordance with—some degree of knowledge about their own capacities and limitations”); *see also* Dan M. Kahan, Foreword, *Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 62 n.347 (2011) (contrasting “aporia,” which “emphasizes the limited amenability of the *problem* to a satisfactory solution, along with apprehension of the same,” with “humility,” which “connotes consciousness of one’s *own* limits in solving a problem”).

366. R. George Wright, *Judicial Humility in an Age of Certitude*, 58 IND. L. REV. 381, 385 (2024).

367. *See* Sherry F. Colb, *Judicial Arrogance*, DORF ON LAW (Feb. 15, 2012), <https://www.dorfonlaw.org/2012/02/judicial-arrogance.html> [<https://perma.cc/5F3Z-N5W3>].

368. *See id.*

369. *See supra* text accompanying notes 203–07.

370. JEFFRIES, *supra* note 164, at 530.

371. Ed. Bd., *supra* note 99.

and regret” and named “his ability to recognize his errors” as “one of his many strengths.”³⁷² Justice Blackmun’s vow to cease to “tinker with the machinery of death” was “perhaps the most widely praised” statement of his career.³⁷³ (Reflecting potentially gendered dynamics in how judicial regret is received,³⁷⁴ tributes to Justice O’Connor highlighted her relative lack of regret or repentance,³⁷⁵ with some regarding this as an admirable quality for other women to emulate.³⁷⁶)

How legal culture perceives judicial regret thus shapes not only whether judges express it, but also whether it is understood as intellectual courage or professional failure. The praise lavished on Justices Powell, Stevens, and Blackmun suggests that legal culture can embrace regret as a virtue. Yet the broader legal-cultural resistance to acknowledging error, combined with potentially gendered expectations about emotional expression, means that the path from experiencing regret, to expressing it, to having that expression positively received remains fraught with barriers.

A legal culture that equates authority with unwavering consistency and decisiveness may ultimately undermine the legitimacy it seeks to protect. Courts claim authority based partly on reasoned judgment and careful analysis, yet institutional resistance to acknowledging when that judgment proves mistaken can suggest either claimed infallibility or intransigence, neither of which bolsters legitimate authority. When legal culture treats acknowledgment of error as weakness, judges may defensively maintain positions even while recognizing their flaws, perpetuating mistakes rather than correcting them, and projecting false certainty rather than the honest reasoning on which legitimate judicial authority depends.³⁷⁷

372. Andrew Cohen, *Regrets, He Had a Few: The Legacy of John Paul Stevens*, BRENNAN CTR. FOR JUST. (July 18, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/regrets-he-had-few-legacy-john-paul-stevens> [https://perma.cc/XWM6-JBCR]; see also Richard Wolf, *Retired Supreme Court Justice John Paul Stevens Dead at Age 99*, USA TODAY (July 16, 2019), <https://www.usatoday.com/story/news/politics/2019/07/16/john-paul-stevens-supreme-court/546358001> [https://perma.cc/XJ4N-VEYQ] (linking Justice Stevens’ regret over *Gregg v. Georgia* and his reputation as a “modest man”).

373. Driver, *supra* note 352, at 1277.

374. See *supra* Section II.B.3.iv.

375. See, e.g., Linda Greenhouse, *Sandra Day O’Connor, First Woman on the Supreme Court, Is Dead at 93*, N.Y. TIMES (Dec. 1, 2023), <https://www.nytimes.com/2023/12/01/us/sandra-day-oconnor-dead.html> [https://perma.cc/8KLL-LY2B].

376. See Lithwick, *supra* note 358.

377. See Richard H. Fallon, Jr., *A Theory of Judicial Candor*, 117 COLUM. L. REV. 2265, 2294 (2017) (noting the importance of “honesty and sincerity in argument” while recognizing constraints).

These observations about how judicial regret functions underscore why systematic engagement with it is necessary. When judges lose sleep over decisions,³⁷⁸ when Justice Blackmun's renunciation of capital punishment energizes reform movements,³⁷⁹ and when Justice O'Connor's advice to avoid regret informs others' approaches to judging,³⁸⁰ judicial regret is already operating as a force in law. This Article therefore aims to bring regret's existing influence into the open, where it can be evaluated and channeled productively. Part III develops a framework for evaluating which expressions of judicial regret warrant serious legal consideration and demonstrates applications across doctrinal and extra-doctrinal contexts.

III. APPLICATIONS OF JUDICIAL REGRET

Korematsu has not been overruled . . . but each part of the decision . . . has been discredited or abandoned.

—Congressional Commission on Wartime Relocation and Internment of Civilians, invoking Justice Douglas' regret over *Korematsu*³⁸¹

This Court firmly believes that McCleskey was wrongly decided

—Chief Judge Castillo, citing Justice Powell's regret about *McCleskey*³⁸²

Part III explores practical applications of judicial regret for courts, legislators, advocates, and scholars. Section III.A develops an evaluative framework for distinguishing regret that illuminates genuine failures in reasoning from regret reflecting strategic calculation or preference change. Building on that framework, Section III.B examines regret's doctrinal applications in legal interpretation and precedent analysis, while Section III.C explores extra-doctrinal applications including legislative reform, advocacy, scholarly analysis, and democratic engagement. Section III.D considers systemic implications for judicial decision-making and institutional reform, and Section III.E examines the significant limitations and risks that shape what judicial regret can accomplish.

378. See *supra* Section I.A.2.

379. See *infra* text accompanying note 428.

380. See *supra* text accompanying note 310.

381. PERSONAL JUSTICE DENIED: REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS 239 (1982) [hereinafter PERSONAL JUSTICE DENIED].

382. United States v. Brown, 299 F. Supp. 3d 976, 997 (N.D. Ill. 2018).

A. EVALUATING JUDICIAL REGRET

Not all instances of judicial regret warrant the same attention. This Section develops a framework for identifying the forms of judicial regret that may matter most in legal deliberations, while recognizing that scholars working from different theoretical commitments may draw the line elsewhere. The framework distinguishes between regret that reflects mere preference change and regret that reflects recognition of reasoning failure—an acknowledgment by a decision’s own participant that its justificatory premises did not hold.³⁸³ When Justice Blackmun concluded that “the death penalty experiment has failed,” he was acknowledging that his own attempts to cabin arbitrary capital punishment through procedures had not succeeded.³⁸⁴ It is this insider recognition of justificatory collapse, from a participant uniquely positioned to assess whether the decision’s reasoning proved sound, that gives judicial regret its legal relevance. The framework proceeds in two steps.

Step 1: Substantive Threshold—Does the Regret Address Justificatory Failure?

Step 1 asks whether judicial regret concerns a failure of reasoning that bears on legal analysis. The following four categories identify common forms of regret that may satisfy this threshold, though they are suggestive rather than exhaustive, and other forms of regret may qualify depending on context. These four categories are recognition of error, acknowledgment of failed expectation, recognition of changed understanding, and acknowledgment of unjustified harm.

Recognition of error occurs when a judge acknowledges that facts central to the decision were misunderstood, law was misapplied, or critical information was unconsidered at the time of decision. Justice Stevens stated in his autobiography that he failed to examine facts carefully in *Jurek v. Texas*, delegating review to a clerk, and would have voted differently had he scrutinized the record himself.³⁸⁵ This represents recognition that the decision-making process was flawed from the outset.

Acknowledgment of failed expectation involves recognizing that predictions or expectancies essential to an opinion’s justification did not materialize. Justice O’Connor’s *Grutter* timeline presumed racial disparities in education would diminish sufficiently within twenty-five years to render

383. See Seidman & Tushnet, *infra* note 425, at 254–55 (noting that post-judicial comments may be treated with “no weight” or even as “improper” since the law is only the law if “promulgated by the court” as an institution); see also Re, *supra* note 42, at 841.

384. Callins v. Collins, 510 U.S. 1141, 1141 (1993).

385. STEVENS, *supra* note 140, at 143.

affirmative action unnecessary.³⁸⁶ When she later acknowledged “there’s no timetable,” she recognized that her predictive premise had failed.³⁸⁷

Recognition of changed understanding means acknowledging that facts, circumstances, or social meanings have evolved such that the earlier decision appears problematic in ways not fully appreciated at the time. Justice Douglas’s regret over *Korematsu* likely reflected both his personal evolution and society’s growing recognition of the injustice of Japanese American internment.³⁸⁸ His acknowledgment that “grave injustices had been committed” suggested that the decision looked fundamentally different with that evolved understanding.³⁸⁹

Acknowledgment of unjustified harm involves recognizing that the decision inflicted harms that were not justified even under the decision’s own articulated logic or values. Justice Blackmun’s renunciation of capital punishment acknowledged that despite attempting to create guidelines ensuring fair administration, the death penalty caused unjustified harm in practice.³⁹⁰

These four categories each identify regret concerning justificatory failure rather than mere preference change or strategic calculation. When a judge expresses regret falling within these categories, the regret provides information about whether the original decision’s reasoning has held up. Conversely, certain regrets falling outside these categories—such as discomfort with a decision’s political reception or purely philosophical evolution unconnected to the specific legal analysis—may provide little or no evidence relevant to evaluating the soundness of the original decision’s reasoning.

Step 2: Evidentiary Assessment—How Much Weight Should Regret Receive?

Satisfying Step 1’s threshold question is necessary but not sufficient. A regret that clears Step 1 may still warrant different evidentiary weight depending on whether it is isolated, vague, or grounded in considerations other than genuine recognition of error. Step 2 therefore asks how much weight the regret deserves as evidence. It identifies three evaluative criteria—pattern, specificity, and basis—as a starting point for analysis rather than an exhaustive checklist; other factors may be relevant depending on context.

386. See *supra* Section I.B.5.

387. Thomas, *supra* note 4.

388. See *supra* Section I.B.1.

389. DOUGLAS, *supra* note 107, at 279–80.

390. *Baze v. Rees*, 553 U.S. 35, 67 (2008) (Alito, J., concurring).

Pattern analysis asks whether a judge's regret represents an isolated statement or whether multiple judges reached similar conclusions independently. Regret expressed by multiple judges may provide stronger evidence of justificatory failure than one judge's statement, though isolated regrets can also be probative. In death penalty jurisprudence, three of the seven Justices in the *Gregg* majority—Stevens, Blackmun, and Powell—independently came to renounce capital punishment.³⁹¹ This pattern suggests systematic problems with the *Gregg* line of cases rather than idiosyncratic second thoughts.

Specificity assessment evaluates whether the regret includes an explanation of what went wrong and why, or is vague and general. Specific identification of reasoning failures provides greater probative value than abstract expressions of discomfort. Justice Blackmun's *Callins* dissent did not merely state he had changed his mind about capital punishment. He explained why “no combination of procedural rules or substantial regulations ever can save the death penalty from its inherent constitutional deficiencies,” detailing exactly how and why the regulatory approach failed.³⁹²

Basis evaluation considers whether the regret reflects genuine recognition of error grounded in evidence and experience or suggests strategic reputation management or other problematic influences. Justice Powell's regret about *McCleskey* came after years as Circuit Justice handling “more than his share of last-minute requests for stays of execution,”³⁹³ suggesting pragmatic learning from direct experience. However, it also came post-retirement when it could enhance his image without constraining his judicial role, raising the possibility of strategic legacy management.³⁹⁴ Mixed motivations of this kind do not automatically disqualify regret, but they do raise questions about how much it reflects reasoned learning rather than strategic positioning. A regret that is partly strategic but also grounded in genuine experiential learning may still provide useful evidence of justificatory failure.

Judicial regret exhibiting a strong pattern, detailed specificity, and a sound basis provides greater probative evidence than its weaker counterparts. These criteria exist along continua, with stronger showings on each dimension increasing the regret's evidentiary value. This two-step evaluative framework favors identification of specific reasoning failures over mere expression of discomfort. And it treats regret as probative

391. See *supra* Section I.B.3.

392. *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

393. JEFFRIES, *supra* note 164, at 444–45.

394. Tushnet, *supra* note 26, at 1879–81.

evidence rather than dispositive authority, meaning regret that passes both steps warrants serious consideration without automatically overriding other legal considerations. Ultimately, the framework is designed to encourage systematic engagement with judicial regret rather than its suppression or inadvertent influence. Regret already influences law covertly, as the NJC survey revealed, so bringing it into the light enables evaluation and intervention rather than hidden operation.

B. DOCTRINAL APPLICATIONS

Judicial regret has applications in legal interpretation and, through existing stare decisis doctrine, in precedent analysis.

1. Legal Interpretation

Courts are not strangers to regret as a legally relevant consideration, though their engagement with it has been uneven and at times analytically confused. In *Gonzales v. Carhart*, for example, the Supreme Court invoked potential regret by women to restrict abortion rights.³⁹⁵ Chris Guthrie has criticized this ruling for misunderstanding regret,³⁹⁶ while Susan Appleton argues that it exemplifies courts' gendered use of regret.³⁹⁷ If regret warrants legal consideration at all, then regret grounded in a judge's own assessment of whether their reasoning held up rests on firmer analytical footing.³⁹⁸

When judges regret reasoning failures in landmark decisions, their regret can produce interpretive insights in subsequent cases. Justice O'Connor's *Grutter* regret illustrates why this form of regret can matter for legal interpretation. Unlike the regret attributed to abortion patients in *Carhart*, Justice O'Connor's regret arose from her own assessment of whether her reasoning has held up. Her regret identified a specific justificatory failure: her expectation that twenty-five years would suffice to eliminate racial disparities requiring affirmative action proved incorrect. It was also specific about what had gone wrong (her prediction of racial progress), was reiterated in multiple contexts (Harvard lecture, biographical interviews), and appeared grounded in observation of empirical reality (continuing racial disparities) rather than mere strategic calculation. These features of Justice O'Connor's regret strengthen its probative value for understanding what she meant by the twenty-five-year timeline in *Grutter*.

395. *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007) (using the word "women" to describe pregnant persons).

396. Guthrie, *supra* note 23, at 882.

397. Appleton, *supra* note 23, at 324–25.

398. This underscores the importance of context-specific and scientifically-grounded approaches to regret in legal reasoning. See generally McNamara, *supra* note 24; Guthrie, *supra* note 23.

Given the evidentiary weight of Justice O'Connor's regret, its absence in the arguments in *SFFA v. Harvard* is especially notable, and symptomatic of the broader discounting of judicial regret this Article documents.³⁹⁹ Affirmative action advocates could have invoked Justice O'Connor's regret both defensively, to rebut arguments that recast her timeline as a mandate rather than a prediction she herself later disavowed, and affirmatively, to demonstrate that even *Grutter*'s author recognized affirmative action's continued necessity.⁴⁰⁰

The Court's analysis suffered from the same omission. Incorporating Justice O'Connor's regret would have strengthened *SFFA v. Harvard*'s legal analysis in three ways. First, it would have prevented the misleading presentation of her original timeline as her definitive view.⁴⁰¹ Second, it would have clarified the timeline's nature: not as a mandate for when affirmative action must end, but as a prediction of when it might become unnecessary, based on an assumption about diminishing racial disparities that she later acknowledged as overly optimistic.⁴⁰² Third, acknowledging her regret would have better aligned the case with affirmative action jurisprudence's fundamental rationale: that race-conscious measures are necessary tools for transitioning to a society in which race no longer matters.⁴⁰³ While *Grutter* recognized the need for such measures during this transition period,⁴⁰⁴ Justice O'Connor's later regret powerfully underscored that Justices cannot reliably predetermine a timeline for this transition.⁴⁰⁵ The Court's analysis would have been more robust had it engaged with the logic of both Justice O'Connor's initial prediction and her subsequent regret. Overlooking her well-documented regret robs *SFFA v. Harvard* of an important source of legal insight and of the air of careful legal reasoning.

While judicial regret can inform legal interpretation in individual cases, its most significant doctrinal application may lie in precedent analysis.

399. A Westlaw search of court filings and review of the oral arguments in *SFFA v. Harvard* revealed several references to Justice O'Connor's timeline from *Grutter*, but none to her subsequent regrets.

400. See Joshi, *Racial Time*, *supra* note 3, at 1661–62 (discussing legal debates over the necessity and duration of affirmative action).

401. See *supra* text accompanying notes 204–11.

402. *Id.*

403. On transitional rationales in racial equity cases, see Yuvraj Joshi, *Racial Transitional Justice in the United States*, in *RACE & NAT'L SEC.* 189, 191 (Matiangai V.S. Sirleaf ed., 2023); Joshi, *infra* note 442, at 1220–26; Yuvraj Joshi, *Affirmative Action as Transitional Justice*, 2020 WIS. L. REV. 1, 1–9 (2020); Joshi, *Racial Indirection*, *supra* note 200, at 2536–39; Yuvraj Joshi, *The Law of Racial Resentment*, 72 UCLA L. REV. 424, 426–33 (2025).

404. *Grutter v. Bollinger*, 539 U.S. 306, 338 (2003).

405. See Joshi, *Racial Time*, *supra* note 3, at 1663.

2. Precedent Analysis

Regret's relationship to precedent has long been hinted at in legal scholarship. Nearly 50 years ago, Ronald Dworkin observed that a precedent's "gravitational force" could be diminished when that decision has been "recanted or in some other way taken as a matter of institutional regret."⁴⁰⁶ Richard Posner has similarly noted that the Supreme Court can overrule its own precedents partly because "[r]igid adherence to precedent would magnify the consequences of a mistaken or deeply regretted decision enthroned as a precedent."⁴⁰⁷ These observations suggest that when judicial regret reflects reasoning failure, it bears on a precedent's continuing justificatory force.

Despite these insights, the relationship between judicial regret and legal precedent remains underexplored in the literature and in doctrine. Building on Dworkin and Posner's observations, this Article explores how judicial regret can be integrated into precedent analysis through existing stare decisis doctrine.

In *Planned Parenthood v. Casey*, the Supreme Court articulated considerations for evaluating whether to overrule precedent.⁴⁰⁸ Among the factors courts must consider is whether changed facts or perspectives have "robbed the old rule of significant application or justification."⁴⁰⁹ This Article proposes that judicial regret—when assessed through the framework developed in Section III.A—provides probative evidence that precedent has lost justificatory force.⁴¹⁰ Stare decisis does not require the Court's adherence to decisions whose justificatory premises have collapsed, and judicial regret, properly considered, is one means of establishing that such collapse has occurred. The framework's operation becomes clearer through application to two case studies.

Applying the framework to death penalty jurisprudence, *Gregg*'s central premise was that "guided discretion" statutes could channel prosecutorial and jury decision-making to prevent the arbitrary and

406. Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1093 (1975).

407. RICHARD A. POSNER, HOW JUDGES THINK 154 (2008).

408. *Planned Parenthood v. Casey*, 505 U.S. 833, 854–55 (1992).

409. *Id.*

410. It is uncertain whether *Dobbs* has overruled *Casey* as a "precedent about precedent." Compare Nina Varsava, *Precedent, Reliance, and Dobbs*, 136 HARV. L. REV. 1845, 1911 (2023) (suggesting that this "appears to" be the case), with Melissa Murray, *Stare Decisis and Remedy*, 73 DUKE L.J. 1501, 1514 (2024) (observing post-*Dobbs* that the Court "regularly nods to" *Casey*'s stare decisis factors). Regardless of whether *Casey*'s stare decisis framework has lost some precedential power post-*Dobbs*, this discussion illustrates how a legal framework for deciding whether to overrule precedent could acknowledge judicial regrets.

capricious application condemned in *Furman*.⁴¹¹ Three of the seven Justices who provided the decisive votes in *Gregg* later acknowledged that this central premise had failed, indicating that their regret reflected recognition of justificatory failure rather than a mere change in preference. The regret also exhibited strong evidentiary markers: pattern (multiple Justices reached similar conclusions independently, suggesting recognition of a broader systemic problem rather than idiosyncratic second thoughts), specificity (especially Justice Blackmun's *Callins* dissent detailing why procedural fixes failed), and sound basis (the regret reflected experiential learning from direct engagement with capital cases).

Applying the framework to the LGBTQ+ rights context, Justice Powell's regret about *Bowers* acknowledged that the decision was "inconsistent" with established privacy jurisprudence and that he had been persuaded by the *Bowers* dissenting arguments that he initially rejected. While Mark Tushnet suggests that Justice Powell's regret may have reflected an effort to shape his legacy,⁴¹² the regret was also grounded in an internal critique of *Bowers*' doctrinal reasoning and thus retained evidentiary value as to the decision's lack of justificatory force. When the Court overruled *Bowers* seventeen years later in *Lawrence*, it was entitled to consider this evidence that even the decision's decisive vote had come to regard its reasoning as unsound.⁴¹³

C. EXTRA-DOCTRINAL APPLICATIONS

Beyond doctrinal applications, judicial regret can catalyze legal reform, strengthen advocacy, enrich scholarship, and empower democratic engagement. These applications are typically forward-looking, and often operate through democratic rather than judicial processes, thereby sidestepping many of the stare decisis and rule-of-law concerns that attend direct invocation in precedent analysis. While the evaluative framework developed in Section III.A remains relevant here, the stakes of applying it are lower when regret is considered through political rather than adjudicative channels.

411. *Gregg v. Georgia*, 428 U.S. 153, 206–07, 220 (1976).

412. Tushnet, *supra* note 26, at 1855.

413. Judicial regret serves as one basis for determining changed facts or perspectives alongside other *Casey* considerations, including reliance interests, workability, and doctrinal development. *Casey*, 505 U.S. at 854–55.

1. Legislative Reform

Judicial regret can provide legislative actors with the impetus and the legitimacy to correct what courts themselves will not. After Justice Douglas expressed regret over *Korematsu* in his autobiography, his words became a basis for securing that decision's "anticanon" status and redressing its harms.⁴¹⁴ The 1983 report *Personal Justice Denied* by the Commission on Wartime Relocation and Internment of Civilians expressly cited Justice Douglas' regret to demonstrate how *Korematsu*'s legal principles, though not overruled, had been "discredited or abandoned."⁴¹⁵ Echoing Justice Douglas's words,⁴¹⁶ the Commission concluded that Japanese American internment during World War II was a "grave injustice" and recommended legislative remedies.⁴¹⁷ In response, Congress passed the 1988 Civil Liberties Act, which apologized and paid reparations to over 82,200 Japanese Americans.⁴¹⁸ Even as Justice Black remained unrepentant about his role in *Korematsu*, Justice Douglas' contrition helped repair some of the ruling's harm.

Legislative bodies can incorporate judicial regret both retrospectively and prospectively. *Ex post* responses to regret mitigate the consequences of past decisions, as when the Civil Liberties Act provided reparations to internment victims following recognition of the injustices in *Korematsu*. *Ex ante* measures aim to reduce the incidence of regret-worthy rulings by addressing the systemic conditions that produce them. For example, patterns of regret over inadequate representation in capital cases may support legislation designed to ensure more effective capital defense, while regret tied to incomplete information can support procedural reforms that promote fuller fact development. Regret arising from cognitive bias can, in turn, bolster judicial training programs or decision-making protocols. By learning from judges' regrets, legislatures can translate judicial experiences into structural reforms that reduce the likelihood of similar errors.⁴¹⁹

414. See Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 458–59 (2011).

415. PERSONAL JUSTICE DENIED, *supra* note 381, at 239.

416. DOUGLAS, *supra* note 107, at 279–80.

417. PERSONAL JUSTICE DENIED, *supra* note 381, at 18, 225.

418. See H.R. 442 - Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (codified at 50 U.S.C. §§ 1989–1989b-9 (2000)).

419. See *supra* Section I.A (proposing prioritizing criminal and family law reforms based on expressed judicial regrets).

2. Legal Advocacy

Judicial regret already serves as a basis for advocacy and argumentation by litigants, commentators, and courts.⁴²⁰ The *New York Times* relied on Justice Powell's regret over *McCleskey v. Kemp* in endorsing the proposed 1994 Racial Justice Act,⁴²¹ and the NAACP Legal Defense Fund has invoked Justice Powell's regret in death penalty litigation.⁴²² Law professors have similarly cited Justice Powell's *McCleskey* regret in amicus briefs and scholarship,⁴²³ and in 2018, a district court relied on that regret in asserting that *McCleskey* was wrongly decided.⁴²⁴ Beyond *McCleskey*, Justice Powell's repudiation of *Bowers v. Hardwick* may also have contributed to its "anticanon" status while limiting its deleterious reach.⁴²⁵ In 1993, when *Bowers* was still good law, a Florida district court cited Justice Powell's regret while upholding same-sex adoption rights.⁴²⁶

Practitioners invoke judicial regret through at least three types of arguments. Defensive arguments rebut opponents' reliance on precedent by emphasizing that even a judge who joined the decision later questioned its reasoning, as affirmative action advocates could have done to rebut the weaponization of Justice O'Connor's timeline.⁴²⁷ Affirmative arguments use judicial regret to demonstrate that a precedent has lost justificatory force and

420. See, e.g., *The Death Penalty and Regret*, EQUAL JUST. INST. (May 30, 2023), <https://eji.org/news/the-death-penalty-and-regret> [<https://perma.cc/ZPY4-F7H8>]; Ben Jones, *The Death Penalty's Role in Racial Oppression*, EQUAL JUST. USA (Aug. 9, 2016), <https://ejusa.org/the-death-penaltys-role-in-racial-oppression> [<https://perma.cc/FFC9-N8VH>]; *Three Supreme Court Justices Later Regretted Supporting the Death Penalty*, AMNESTY INT'L USA (OCT. 8, 2010), <https://www.amnestyusa.org/updates/what-might-have-been-3-supreme-court-justices-later-regretted-supporting-the-death-penalty> [<https://web.archive.org/web/20240624063738/https://www.amnestyusa.org/updates/what-might-have-been-3-supreme-court-justices-later-regretted-supporting-the-death-penalty>].

421. Ed. Bd., *supra* note 99 (hoping that Powell's "public recantation will help persuade wavering senators"); Racial Justice Act H.R. 4017, 103rd Cong., 2d sess. (1994), <https://www.congress.gov/bills/103rd-congress/house-bill/4017> (allowing the use of statistical evidence to challenge racial bias in death sentences).

422. See, e.g., Brief of Amicus Curiae NAACP Legal Defense & Educational Fund, Inc. in Support of Defendant-Appellant at 14, *State v. Burke*, 843 S.E.2d 246 (N.C. 2020) (No. 181A93-4), 2019 WL 944787, at *14; Brief of Amicus Curiae NAACP Legal Defense & Educational Fund, Inc. at 20, *Cox v. Commonwealth*, 218 A.3d 384 (Pa. 2019) (Nos. 102 EM 2018 & 103 EM 2018), 2019 WL 4640124, at *20; Brief of Amicus Curiae NAACP Legal Defense and Educational Fund, Inc. in Support of Defendants-Appellants at 15, *State v. Augustine*, 847 S.E.2d 729 (N.C. 2020) (No. 130A03-2), 2018 WL 3598188, at *15.

423. See, e.g., Brief of Amici Law Professors and Scholars in Support of Defendant-Appellant at 14, *State of Kansas, Plaintiff, v. Frazier Geenn Cross, Jr.* (No. 15-114919-S), 2021 WL 937438, at *14; Daniel S. Harawa, *Black Redemption*, 48 FORDHAM URB. L.J. 701, 716 (2021).

424. *United States v. Brown*, 299 F. Supp. 3d 976, 997 (N.D. Ill. 2018).

425. Louis Michael Seidman & Mark Tushnet, *When Judges Tell Us What They Mean*, 5 GRAVEN IMAGES 254, 256 (2002).

426. See *State Dep't of Health & Rehab. Servs. v. Cox*, 627 So. 2d 1210, 1223 (Fla. Dist. Ct. App. 1993), *approved in part, quashed in part sub nom.* 656 So. 2d 902, 903 (Fla. 1995).

427. See *supra* text accompanying notes 399–400.

should therefore be reconsidered or narrowed, as the NAACP Legal Defense Fund has done in invoking Justice Powell's *McCleskey* regret.⁴²⁸ Finally, remedial arguments support legislative or executive action by demonstrating that a judge later acknowledged an error requiring remediation, as Douglas's *Korematsu* regret supported the case for reparations legislation.⁴²⁹

Responsible invocation of judicial regret requires careful contextualization. Advocates should aim to identify the precise object of regret, what prompted the judge's reassessment, whether other judges expressed similar concerns, and whether the judge's subsequent behavior reflected learning from the regret. Such contextualization helps guard against opportunistic invocation of regret while preserving its genuine insights.

3. Scholarly Analysis

Scholarly engagement with judicial regret can generate fresh insights into doctrinal development and judicial behavior. Regrets can be used to examine a judge's approach⁴³⁰ and expectations⁴³¹ in rendering particular decisions.⁴³² They can shed light on specific legal cases and areas as well as broader ideas and debates, such as the role of dissents in prompting majority contrition,⁴³³ the conditions under which precedents become matters of "institutional regret,"⁴³⁴ and the relationship between judicial philosophy and willingness to learn from experience.

Recognizing judicial regret opens rich avenues for legal and interdisciplinary research. Doctrinal scholars could examine how judicial regret illuminates doctrinal development across cases and bodies of law. Empirical scholars could study regret's prevalence and patterns across courts and jurisdictions. Interdisciplinary research could explore connections between judicial regret and related phenomena studied in psychology and sociology. Comparative scholars could examine how different legal systems address judicial error and regret. Beyond the judiciary, future work might

428. See *supra* text accompanying note 422.

429. See *supra* text accompanying notes 414–18.

430. See *supra* text accompanying notes 334 (noting the argument that Justice Powell's *McCleskey* regret involved a deprioritization of originalist philosophy).

431. See *supra* text accompanying note 405 (observing how Justice O'Connor's *Grutter* regret underscores the problems with her original predication).

432. See, e.g., Tushnet, *supra* note 26, at 1879–81; Spindelman, *supra* note 18, at 417–19.

433. See Justice Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 3–4 (2010).

434. See Jack M. Balkin, *Wrong the Day It Was Decided: Lochner and Constitutional Historicism*, 85 B.U. L. REV. 677, 677 (2005).

examine how different institutional contexts shape how regret arises and operates, for instance, by extending the framework to “legislative regrets” over enacted statutes or “administrative regrets” over agency decisions.

These lines of scholarly inquiry extend naturally into pedagogy. Law professors could incorporate judicial regrets into the classroom by analyzing expressions of regret alongside subsequent treatments of landmark cases. By exposing the human fallibility underlying even the highest court’s most consequential rulings, this approach may encourage students to engage with legal opinions more critically, rather than assuming that majority opinions are inherently correct.⁴³⁵

4. Democratic Engagement

Even absent broader institutional change, a judge’s expression of regret can deeply affect those impacted by a legal decision. When Justice Douglas admitted *Korematsu* was “ever on [his] conscience,” he lent validation to decades of civil rights activism challenging that decision’s legitimacy.⁴³⁶ When Justice Blackmun vowed to “no longer . . . tinker with the machinery of death,” he energized abolition movements and prompted Bruce Callins—on whose case Justice Blackmun wrote⁴³⁷—to thank him for addressing “the unfairness of how the death penalty is being applied.”⁴³⁸ When Justice Powell acknowledged error in *Bowers*,⁴³⁹ he strengthened the arguments of LGBTQ+ rights advocates fighting discrimination,⁴⁴⁰ even as Michael Hardwick himself died feeling bitter about his case.⁴⁴¹ As the Supreme Court increasingly resists structural accounts of inequality⁴⁴² and sidelines communities most affected by it,⁴⁴³ judicial expressions of regret can

435. On the value of critical reading for law students, see Debra Moss Curtis & Judith R. Karp, “*In a Case, in a Book, They Will Not Take a Second Look!*”: *Critical Reading in the Legal Writing Classroom*, 41 WILLAMETTE L. REV. 293, 295 (2005).

436. DOUGLAS, *supra* note 107, at 280; Megan Asaka, *The Movement for Japanese American Redress*, OX. RSCH. ENCYCL. AM. HIST. (Apr. 26, 2019).

437. Callins v. Collins, 510 U.S. 1141, 1145 (1994).

438. LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN’S SUPREME COURT JOURNEY 180 (2005).

439. See *supra* Section I.B.4.

440. See Marcus, *supra* note 99, at A3.

441. Richard Fausset, *Unlikely Allies in a Gay Rights Battle in Georgia*, N.Y. TIMES (Mar. 6, 2015), <https://www.nytimes.com/2015/03/07/us/unlikely-allies-in-a-gay-rights-battle-in-georgia.html> [<https://web.archive.org/web/20251007021549/https://www.nytimes.com/2015/03/07/us/unlikely-allies-in-a-gay-rights-battle-in-georgia.html>].

442. On the Supreme Court’s denial of structural racism, see Yuvraj Joshi, *Racial Transition*, 98 WASH. U. L. REV. 1181, 1202–34 (2021).

443. See Angelique M. Davis & Rose Ernst, *Racial Gaslighting*, 7 POL. GRPS. IDENTITIES 761, 763–65 (2019) (defining “racial gaslighting” and tracing it in Supreme Court opinions); Priya Baskaran & Alicia Plerhoples, *Race and Entrepreneurship: Reclaiming Narratives*, 30 CLINICAL L. REV. 7, 17 (2023) (highlighting the importance of counternarratives for challenging racial gaslighting).

validate the experiences and perspectives of communities confronting systemic inequality.⁴⁴⁴

Lani Guinier coined the phrase “demosprudence through dissent” to describe how judges’ dissents could “expand the audience for judicial decisionmaking” and “engage that audience in democratic deliberation.”⁴⁴⁵ Similarly, this Article proposes a demosprudence through regret. Judges’ expressions of regret can advance democratic engagement by inspiring people to pursue social and legal change through other forums.⁴⁴⁶ These regrets can demystify the Court’s veneer of infallibility and empower people to exercise democratic control over judicial power.⁴⁴⁷ This demosprudential approach extends the audience for judicial regrets beyond lawyers and legal scholars to affected communities and society at large.⁴⁴⁸

In sum, judicial expressions of regret have significance beyond legal doctrine, as they can shape public discourse, validate lived experiences, empower social movements, and remind citizens that judicial decisions are not inevitable or infallible. As discussed below, such expressions can also serve crucial democratic functions by piercing the Court’s aura of untouchable authority and reminding people that they, not nine Justices, are the ultimate source of constitutional meaning.

D. SYSTEMIC IMPLICATIONS

Judicial regret illuminates the human dimension of judging, challenging Chief Justice Roberts’s claim that judges merely “call balls and strikes” when deciding cases.⁴⁴⁹ It highlights how judges’ inner lives shape their decision-making in ways the law’s official narrative obscures.⁴⁵⁰ It

444. See Schwartzberg, *infra* note 453, at 585 (observing that challenging powerful actors’ assertions of infallibility requires the “public . . . to have greater confidence in their own judgment”); Monica C. Bell, *The Community in Criminal Justice: Subordination, Consumption, Resistance, and Transformation*, 16 DU BOIS REV. 197, 208 (2019) (arguing that marginalized communities may be especially knowledgeable about systemic injustices and remedies).

445. Lani Guinier, *Demosprudence through Dissent*, 122 HARV. L. REV. 4, 16 (2008).

446. See *id.* at 14.

447. See Schwartzberg, *infra* note 453, at 585.

448. See Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2750 (2014); Jocelyn Simonson, *The Place of “the People” in Criminal Procedure*, 119 COLUM. L. REV. 249, 266 (2019); Monica Bell, Stephanie Garlock & Alexander Nabavi-Noori, *Toward a Demosprudence of Poverty*, 69 DUKE L.J. 1473, 1527–28 (2020). On the interplay between courts and social movements, see Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 946 (2006); Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877, 891 (2013).

449. See *Roberts’s Opening Statement Before Senate Panel*, N.Y. TIMES (Sept. 12, 2005), <https://www.nytimes.com/2005/09/12/politics/politicsspecial/robertss-opening-statement-before-senate-panel.html> [https://perma.cc/6TC2-KVWJ].

450. See Allison P. Harris & Maya Sen, *Bias and Judging*, 22 ANN. REV. POL. SCI. 241, 242, 247 (2019).

challenges the assumption that judges rarely err, and that when they do, such errors are inconsequential or easily remedied through appeals.⁴⁵¹ Justice Robert Jackson's famous quip that the Supreme Court is "infallible only because we are final" takes on new meaning when viewed through the lens of judicial regret.⁴⁵² Judicial regret exposes the paradox of a system that projects certainty and finality while being composed of fallible human beings capable of error and change.⁴⁵³

At a time when the Court faces criticism for perceived hubris,⁴⁵⁴ judicial regret serves as a powerful reminder of its fallibility.⁴⁵⁵ When multiple *Gregg* Justices later renounced their positions on capital punishment, they acknowledged that even carefully reasoned constitutional judgments can prove fundamentally flawed. When Justice O'Connor renounced her *Grutter* timeline, she demonstrated that confident predictions about social progress may reflect a situated perspective rather than objective analysis. Such acknowledgments carry particular importance in a legal culture that often venerates judges to the point of stifling humility and discouraging admissions of error.⁴⁵⁶ By embracing regret as a normal aspect of judging, we might foster a legal culture that values humility and accountability.⁴⁵⁷

Recognizing judicial acknowledgments of error does not transfer interpretive authority to retired Justices. Instead, it undermines the Court's claims to infallibility in ways that open space for democratic actors to contest legal meaning. When Justice Douglas admitted that *Korematsu* was "ever on [his] conscience," he gave Japanese American communities and ultimately Congress an additional basis to pursue reparations through the Civil Liberties Act.⁴⁵⁸ When Justice Powell recanted *Bowers*, his acknowledgment of error strengthened the arguments of the advocacy communities already

451. See Guthrie, *supra* note 68, at 421.

452. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result).

453. Political theorists since Bentham have warned that claims of infallibility can corrupt judgment and impede necessary reforms. See JEREMY BENTHAM, *THE BOOK OF FALLACIES: FROM UNFINISHED PAPERS OF JEREMY BENTHAM* (John Hunt & H. L. Hunt eds., 1824); Melissa Schwartzberg, *Jeremy Bentham on Fallibility and Infallibility*, 68 J. HIST. IDEAS 563, 583–84 (2007). Elizabeth Anderson argues that democratic decision-making must acknowledge its fallibility and implement feedback mechanisms for improvement. See Elizabeth Anderson, *The Epistemology of Democracy*, 3 EPISTEME 8, 12 (2006).

454. See, e.g., AARON TANG, *SUPREME HUBRIS: HOW OVERCONFIDENCE IS DESTROYING THE COURT—AND HOW WE CAN FIX IT* (2023); Ian Millhiser, *The Supreme Incompetents*, VOX (July 8, 2024, 8:15 AM), <https://www.vox.com/scotus/359206/supreme-court-incompetent-abortion-trump-immunity> [<https://perma.cc/ZQ9W-RZHU>].

455. John Stuart Mill proposed "persuading possessors of power to give up a part of it . . . by reminding them of . . . their own fallibility." See Schwartzberg, *supra* note 453, at 564.

456. See Samuel Moyn, *Resisting the Juristocracy*, BOSTON REV. (Oct. 5, 2018), <https://www.bostonreview.net/articles/samuel-moyn-resisting-juristocracy> [<https://perma.cc/763L-5E7H>].

457. Such a culture might also encourage other legal professionals, including law professors, to recognize their own fallibility.

458. DOUGLAS, *supra* note 107, at 280.

challenging that precedent.⁴⁵⁹ Regret, properly considered, disperses rather than concentrates interpretive power.

In addition to challenging infallibility, judicial regret can catalyze reforms by highlighting the complexity of problems and the contingent nature of judicial solutions. Regret may reveal judges' awareness of better, potentially non-judicial alternatives.⁴⁶⁰ Moreover, though court rulings typically project an image of legal continuity,⁴⁶¹ regret shows that judges' willingness to defend their opinions can change dramatically with new circumstances and insights. By revealing the contingency of judicial judgments, regret can demonstrate that existing legal arrangements may not be necessary or defensible, opening space for legal reform.⁴⁶²

Recognition of the fallibility and contingency that regret makes visible can inform specific institutional reforms. If judges themselves acknowledge that even carefully considered constitutional judgments can prove mistaken, this recognition supports structural measures designed to limit the consequences of judicial error.⁴⁶³ For example, supermajority requirements could create higher thresholds for courts to invalidate democratic decisions given judges' acknowledged capacity for error.⁴⁶⁴ Likewise, judicial selection processes could incorporate assessment of candidates' capacity for intellectual humility and willingness to acknowledge error.⁴⁶⁵ While no institutional design can eliminate judicial fallibility, reforms informed by patterns of regret might reduce the incidence and severity of such errors.

Because courts can be slow to repudiate problematic precedents, decisions like *Korematsu* may not be formally overruled until long after society deems them unjust.⁴⁶⁶ Individual judges' regret, like Justice

459. See *supra* Section I.B.4.

460. See Kahan, *supra* note 365, at 60–63 (discussing the benefits of judges conveying complexity and ambivalence rather than rendering unequivocal rulings); *supra* text accompanying note 180 (noting Justice Powell's rejection of judicial fixes concerning capital punishment).

461. See Alison L. LaCroix, *Temporal Imperialism*, 158 U. PA. L. REV. 1329 (2010) (discussing the Supreme Court's role as "an actor in time").

462. On law's contingency, see Richard Delgado, *Rodrigo's Thirteenth Chronicle: Legal Formalism and Law's Discontents*, 95 MICH. L. REV. 1105, 1126–29 (1997).

463. On Supreme Court reform proposals, see, e.g., Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148 (2019); Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CAL. L. REV. 1703 (2021).

464. See Doerfler & Moyn, *supra* note 463, at 1727 (discussing a supermajority requirement for judicial review).

465. See Robert Post & Reva Siegel, *Questioning Justice: Law and Politics in Judicial Confirmation Hearings*, 115 YALE L.J. POCKET PART 38 (2006) (discussing the democratic value of judicial confirmation processes).

466. See Rosalind Dixon, *A Democratic Theory of Constitutional Comparison*, 56 AM. J. COMP. L. 947, 967 (2008) (discussing how "burdens of inertia" impede legal development).

Douglas's about *Korematsu*,⁴⁶⁷ can presage and reflect societal change before the full Court catches up. When multiple judges regret previously supported opinions, as three Justices did with respect to capital punishment,⁴⁶⁸ this provides strong normative grounds to reassess those precedents' legitimacy. Regret concentrated in particular areas may signal systematic problems requiring institutional responses rather than case-by-case correction. Courts might also use judicial regret to recognize "evolving standards" in relevant doctrinal contexts, with regret signaling broader societal shifts in perception.⁴⁶⁹

These systemic implications are particularly important when the regret concerns decisions that inflicted injustice on marginalized communities. *Korematsu* underscores how legal rationales rooted in dominant ideas of morality, safety, or security can enable injustice,⁴⁷⁰ and how the dangers of those rationales may become visible to judges only after they confront the full scope of the harms inflicted.⁴⁷¹ What judges initially perceive as justified may depend in part on their own social position. Russell Robinson explains that discrimination is perceived differently by "insiders" and "outsiders," and argues that a judge's ingroup or outgroup status similarly shapes judicial perspectives.⁴⁷² These insights might help explain Justice O'Connor's ill-fated prediction that another generation would resolve centuries of racial subordination,⁴⁷³ and Justice Powell's failure to perceive queer people's plight.⁴⁷⁴ Both instances of regret arguably reflected the systematic limitations of dominant perspectives rather than an isolated individual error.

When judges initially fail to comprehend marginalized claims to equality and later develop deeper understandings, their regret carries significant normative weight. Recognizing this kind of regret is one step toward legal doctrine that takes seriously what dominant perspectives have historically failed to perceive, though, as Section III.E explains, regret alone cannot accomplish that transformation.

467. See *supra* Section I.B.1.

468. See *supra* Section I.B.3.

469. See Corinna Barrett Lain, *The Unexceptionalism of "Evolving Standards,"* 52 UCLA L. REV. 365, 368–69 (2009) (discussing courts' development of "evolving standards" doctrine beyond Eighth Amendment cases).

470. See BENDER, *supra* note 16, at 16 (observing the Court's "justifications in the interest of public health or safety or of the economy" in support of later regretted policies); Yuvraj Joshi, *Weaponizing Peace*, 123 COLUM. L. REV. 1411, 1412 (2023) (demonstrating how legal appeals to "peace, stability, and harmony" can endanger racial equality); Yuvraj Joshi, *Racial Justice and Peace*, 110 GEO. L.J. 1325 (2022) (discussing legal appeals to peace).

471. See Harris & Sen, *supra* note 450 (discussing judicial bias).

472. Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1151 (2008).

473. See Joshi, *Racial Time*, *supra* note 3, at 1663.

474. See *supra* text accompanying note 197.

E. LIMITATIONS AND RISKS

While Sections III.B through III.D explored judicial regret's applications and implications, this Section turns to its limits. These constraints arise from the risk of unintended consequences and the structural limits of relying on individual judges' regrets to address systemic issues.

1. Unintended Consequences

Incorporating judicial regret into legal practice could alter incentives for a range of actors, including judges themselves. If judicial regret is routinely invoked in legal and political discourse, some judges may become more cautious about expressing it, or suppress it altogether, to avoid having others strategically invoke their regrets. These dynamics risk undermining the candor and intellectual humility this Article seeks to promote.

Judges might also strategically express regret themselves, for instance, as a form of self-exculpation rather than genuine reflection.⁴⁷⁵ Regret can reflect "a self-indulgent attitude" of "unburdening oneself" or "a manipulative, egocentric" way of "demanding attention and forgiveness."⁴⁷⁶ Distinguishing genuine from performative regret is difficult.⁴⁷⁷ Justice Powell's post-retirement regrets about *Bowers* and *McCleskey*, for instance, came when they could enhance his image without constraining his judicial role—a timing that Mark Tushnet suggests may have reflected a desire to be viewed favorably by history.⁴⁷⁸ Some scholars similarly view Justice Ruffin's regret over *State v. Mann* as self-interested, noting that his expressions of anguish about enforcing slavery may have softened the decision's reception while deflecting moral responsibility.⁴⁷⁹

These risks create challenges for incorporating judicial regret into legal decision-making. The two-step framework can identify expressions meriting serious consideration versus those warranting skepticism, but it cannot definitively separate genuine regret from strategically expressed regret. The possibility of strategic expression therefore counsels careful evaluation, but it does not negate regret's potential value. Even when regret is strategically expressed, it may still validate those harmed by judicial actions and empower reform efforts.

475. See Schauer, *supra* note 251, at 627–30 (explaining that a desire for reputation in legal and intellectual communities can influence a Justice's view).

476. See Bagnoli, *supra* note 13, at 184.

477. *Id.*

478. Tushnet, *supra* note 26, at 1879–81.

479. See *supra* text accompanying notes 297–300.

Similar incentive distortions could affect legislators and lawyers. Legislatures hostile to particular rights might invoke judicial regret to justify restricting those rights, just as litigants might invoke it to attack precedents they dislike. In an era of aggressive precedent-overruling,⁴⁸⁰ judicial regret could be weaponized to cloak motivated reasoning in the language of self-correction.

2. Structural Limits

Judicial regret faces structural limits that no framework for its use can fully overcome. First, judges often recognize error only after it is too late to remedy the worst consequences. For those whose lives were diminished or destroyed by a decision, the judge's later recognition offers cold comfort.⁴⁸¹ The human cost of delayed recognition becomes vivid in individual stories. Warren McCleskey was executed on September 25, 1991, just months after Justice Powell told his biographer he had been wrong in *McCleskey*.⁴⁸² Michael Hardwick died of AIDS in 1995, still bitter over the outcome in his case, five years after Justice Powell recanted *Bowers*.⁴⁸³ These individual tragedies underscore that judicial regret, however valuable for future doctrinal and democratic change, cannot undo harms already inflicted.

Second, even when timing permits prospective benefits, regret alone cannot transform institutions. Jean Stefancic and Richard Delgado argue against the “empathic fallacy” in law, the assumption that revealing cruelty or injustice through new narratives will naturally produce reflection and reform.⁴⁸⁴ Meaningful change, they argue, requires collective reckoning with the harms that law perpetuates.⁴⁸⁵ Individual expressions of regret may illuminate injustices, but they cannot by themselves secure such reckoning.⁴⁸⁶ Indeed, focusing on a judge's change of heart risks obscuring the structural conditions that produce regret-worthy decisions in the first place.⁴⁸⁷

480. See Charles Fried, *Not Conservative*, HARV. L. REV. BLOG (July 3, 2018).

481. Dennis J. Hutchinson, *Judicial Biography: Amicus Curiae*, 70 N.Y.U. L. REV. 723, 726 (1995).

482. *Warren McCleskey Is Dead*, N.Y. TIMES (Sept. 29, 1991), <https://www.nytimes.com/1991/09/29/opinion/warren-mccleskey-is-dead.html> [<https://perma.cc/87U6-W3FW>].

483. Fausset, *supra* note 441.

484. Delgado & Stefancic, *supra* note 263, at 134.

485. *Id.*

486. *Id.* at 135; see also Price, *supra* note 13, at 21 (observing that regretting a decision does not necessarily lead one to “imagine an entirely different mode of political organization”).

487. Apology is associated with an expression of regret or sorrow over one's actions. See NICHOLAS TAVUCHIS, *MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION* 20 (1991). On the limits of apologies without accompanying remedial measures, see Pablo de Greiff, *The Role of Apologies in National Reconciliation Processes: On Making Trustworthy Institutions Trusted*, in *THE AGE OF APOLOGY: FACING UP TO THE PAST* 120 (2008). On the legitimizing effects of political regrets, see Bradford Vivian, *The Paradox of Regret: Remembering and Forgetting the History of Slavery in George*

Third, expressed regret is not always epistemically reliable. A judge's evolved view may reflect new misjudgments rather than deeper wisdom.⁴⁸⁸ For example, a lower court judge reported regretting a ruling after discovering a lawyer's misrepresentation, but then overgeneralized from this experience that "liberal professors" were teaching dishonesty.⁴⁸⁹ While judicial regret may reflect genuine insight, individual reflections should not be uncritically treated as superior reasoning.

Finally, judicial regret does not inherently advance justice or stronger protections for marginalized groups. Judges may express regret over rulings that proved more transformative or emancipatory than anticipated, or that faced significant pushback from dominant groups.⁴⁹⁰ Such regret may become an impetus for retrenchment rather than progress.

Despite these limitations, judicial regret remains essential for understanding adjudication. Recognizing that judging is a deeply human practice shaped by regret reveals dimensions of legal decision-making that a purely technical account obscures. Even those who would limit regret's role in formal doctrine must confront the ways it already informs judicial reasoning. The question, then, is not whether to engage with judicial regret, but how.

CONCLUSION

Judicial regret, though significant, has remained largely unexamined. This neglect has allowed errors and injustices to persist while forfeiting opportunities for institutional learning and growth. This Article has shown that engaging with judicial regret can strengthen legal reasoning and the legal system more broadly. The frameworks developed here provide a basis for moving from ad hoc treatment of judicial regret to a more systematic approach to assessing its legal significance.

The absence of regret can be as revealing as its presence. Justice Thomas's declaration that he "ain't evolving,"⁴⁹¹ exemplifies a resistance to the kinds of introspection that produced regrets in earlier eras. Whether decisions like *Dobbs* will eventually prompt acknowledgment of regret as their consequences unfold remains to be seen. What is clear is that when courts foreclose self-correction, the burden of reckoning with judicial error

W. Bush's Gorée Island Address, 24 HIST. MEM. 5, 6 (2012); OLICK, *supra* note 16.

488. See Zeelenberg, *supra* note 312, at 336 (arguing that regret can lead to irrational decision-making).

489. Survey, *supra* note 40.

490. One judge regretted departing from sentencing guidelines due to negative press and public backlash. *Id.*

491. Abramson, *supra* note 339.

falls on legislatures, advocates, scholars, and the communities most affected by it.

Judicial regret gives each of these actors something to work with. Law professors and students can use it to develop fresh perspectives on jurisprudence and to engage more critically with legal opinions. Congress and state legislatures can invoke regret when exercising their authority to remedy perceived judicial errors, as they did when Justice Douglas's *Korematsu* regret informed the Civil Liberties Act. Reformers can leverage expressed regrets to advance legal reinterpretation, as when the NAACP Legal Defense Fund cited Justice Powell's *McCleskey* regret in death penalty cases. And those affected by judicial decisions can derive meaning from judges' admissions of regret, as when Justice Blackmun's renunciation of capital punishment energized abolition movements and validated Bruce Callins's experience of injustice.

Warren *McCleskey*'s execution months after Justice Powell reconsidered *McCleskey* reminds us that regret cannot undo injustice already inflicted, and that legal change requires far more than individual judges' retrospective acknowledgments of error. But such limitations counsel careful engagement with judicial regret rather than ignoring it altogether. The question is whether a legal system that learns from its judges' regrets is better equipped to self-correct than one that suppresses or ignores them. This Article has argued that it is, provided such engagement remains disciplined by evaluative frameworks and aimed at structural reforms.

By examining judicial regret, this Article has opened a conversation about an under-studied yet consequential aspect of U.S. legal culture. Future research can build on this foundation by examining regret within and across doctrinal areas and tracing its influence on legal development. Whatever one's normative stance on judicial regret, understanding it remains essential for understanding how judges reason and how a legal system committed to justice should respond when its own participants acknowledge they got it wrong.

