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# OUR FOUNDING FEELINGS: EMOTION, COMMITMENT, AND IMAGINATION IN CONSTITUTIONAL CULTURE

*Doni Gewirtzman* \*

## I. INTRODUCTION

From the dawn of the American republic, constitutional law and theory have treated emotion as destructive to the creation and maintenance of constitutional commitments. If a constitution's purpose is to advance rule-of-law values like stability, consistency, and predictability over time and across generations,<sup>1</sup> emotion—viewed as an unstable, inconsistent, and unpredictable force—threatens these values, thereby undermining the legitimacy and vitality of constitutional commitments and institutions. Thus, the argument goes, emotion should have as little to do with constitutional lawmaking and interpretation as possible.<sup>2</sup>

This dominant account of the relationship between emotion and constitutional law informed core features of American constitutional design and practice. The framers saw rationality and reason as essential elements of sound public decision making, and

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1. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2831 (2007) (Breyer, J., dissenting) (“The Founders meant the Constitution as a practical document that would transmit its basic values to future generations through principles that remained workable over time.”); Larry Alexander & Frederick Schauer, *On Extra-judicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1372–81 (1997).

2. See Erwin Chemerinsky, *Seeing the Emperor's Clothes: Recognizing the Reality of Constitutional Decision Making*, 86 B.U. L. REV. 1069, 1069–71 (2006) (describing the “false allure of formalism” in constitutional judging, which claims that the judges’ views, ideologies, and experiences do not affect their decisions).

selected deliberative decision-making structures that maximized opportunities for legislators to explain and test their underlying reasoning. For example, Article I's bicameralism and presentment requirements, which mandate that proposed legislation gain approval from multiple decision makers representing vastly different constituencies,<sup>3</sup> use the cold and slow realities of constitutional procedure to slow the hot impulse of emotion. The amendment process—a lengthy procedure that generally requires assent from supermajorities of federal and state representatives<sup>4</sup>—was also insulated from the whims of popular passion. And judges, trained in legal methodologies that recognized the primacy of reason and the need for consistency, came to be seen as the sole and final arbiters of constitutional meaning.

This “Chinese wall” characterization of the relationship between emotion and constitutional law<sup>5</sup> has had remarkable staying power. And under the influence of its spell, contemporary constitutional scholarship contains only a very limited discussion about how emotion *actually* works or impacts public decision making.<sup>6</sup> Unlike their counterparts in the criminal law arena,<sup>7</sup>

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3. See U.S. CONST. art. I, §§ 2–3, 7.

4. U.S. CONST. art. V.

5. See THE ECONOMIST, DICTIONARY OF BUSINESS 58 (Graham Bannock et al. eds., 2003).

6. For examples of how constitutional scholars address social- and natural-science research on emotions, see Jeremy A. Blumenthal, *Abortion, Persuasion, and Emotion: Implications of Social Science Research on Emotion for Reading Casey*, 83 WASH. L. REV. 1 (2008) (discussing emotional influence in informed-consent abortion laws); Chris Guthrie, Carhart, *Constitutional Rights, and the Psychology of Regret*, 81 SO. CAL. L. REV. 877 (2008); Terry A. Maroney, *Emotional Common Sense as Constitutional Law*, 62 VAND. L. REV. (forthcoming 2009); Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605, 626–35 (2003) (exploring how fear impacts decision making in an emergency context); Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 74–75 (2000) (investigating how social influences on behavior and limited “argument pools” cause deliberative bodies to decide in accordance with their members’ “pre-deliberation tendencies”). Constitutional theorists are not alone in neglecting how emotions actually work. See G.E. Marcus, *Emotions in Politics*, 3 ANN. REV. POL. SCI. 221, 221 (2000) [hereinafter Marcus, *Emotions in Politics*] (referencing “the dominant view in political theory that progress and democratic politics require less emotion and more reason”). For large segments of the twentieth century, economics, psychology, and political science were dominated by rational-actor, cognition-based explanations for human behavior. See JEROME BRUNER, *ACTS OF MEANING* 1–4 (1990) (describing the “cognitive revolution” in psychology); Donald R. Kinder, *Reason and Emotion in Political Life*, in BELIEFS, REASONING, AND DECISION MAKING 277, 278 (Roger C. Schank & Ellen Langer eds., 1994) (critiquing the lack of exploration of emotion in political science); George Loewenstein & Jennifer S. Lerner, *The Role of Effect in Decision Making*, in HANDBOOK OF AFFECTIVE SCIENCES 619, 619 (Richard J. Davidson et al. eds., 2003); George E. Marcus, *Emotions and Politics: Hot Cognitions and the Rediscovery of Passion*, 30 SOC. SCI. INFO.

constitutional theorists have for the most part been content to rely on a set of broad generalizations about human behavior.<sup>8</sup> As a result, constitutional theory has largely ignored a voluminous body of empirical and theoretical literature about emotion that has accumulated over the past twenty years.<sup>9</sup> Meanwhile, social scientists in a range of disciplines—social psychology,<sup>10</sup> neurobiology,<sup>11</sup> philosophy,<sup>12</sup> political science,<sup>13</sup> sociology,<sup>14</sup> and economics<sup>15</sup>—have created a much richer and more nuanced account of how emotion affects the way individuals interpret the world around them, determines preferences and attitudes, and helps make decisions. This new research threatens to turn long-held assumptions about emotion and human behavior on their collective head.

This article explores the potential implications of this research for constitutional law and theory. It concludes that emotion (1) critically affects two behaviors that are central to the continued legitimacy and survival of constitutional values and institutions: commitment and imagination; (2) enhances individuals' ability to maintain commitments over time by reinforcing habits, acting as a stabilizing force for popular attitudes within a large and hete-

195, 196 (1991) [hereinafter Marcus, *Emotions and Politics*].

7. See, e.g., Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361 (1996); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269 (1996); Terry A. Maroney, *Emotional Competence, "Rational Understanding," and the Criminal Defendant*, 43 AM. CRIM. L. REV. 1375, 1375–76 (2006).

8. See RICHARD D. PARKER, "HERE, THE PEOPLE RULE": A CONSTITUTIONAL POPULIST MANIFESTO 88–93 (1994).

9. See DANIEL GOLEMAN, *EMOTIONAL INTELLIGENCE* xi (1995) (describing "an unparalleled burst of scientific studies of emotion" in recent years).

10. See, e.g., DANIEL GILBERT, *STUMBLING ON HAPPINESS* (2006); JONATHAN HAIDT, *THE HAPPINESS HYPOTHESIS: FINDING MODERN TRUTH IN ANCIENT WISDOM* (2006).

11. See, e.g., ANTONIO D. DAMASIO, *DESCARTES' ERROR: EMOTION, REASON, AND THE HUMAN BRAIN* (1994); JOSEPH LEDOUX, *THE EMOTIONAL BRAIN: THE MYSTERIOUS UNDERPINNINGS OF EMOTIONAL LIFE* (1996).

12. See, e.g., CHERYL HALL, *THE TROUBLE WITH PASSION: POLITICAL THEORY BEYOND THE REIGN OF REASON* 11–20 (2005).

13. See, e.g., TED BRADER, *CAMPAIGNING FOR HEARTS AND MINDS: HOW EMOTIONAL APPEALS IN POLITICAL ADS WORK* (2006); GEORGE E. MARCUS, *THE SENTIMENTAL CITIZEN: EMOTION IN DEMOCRATIC POLITICS* (2002); DREW WESTEN, *THE POLITICAL BRAIN: THE ROLE OF EMOTION IN DECIDING THE FATE OF THE NATION* (2007).

14. See, e.g., *PASSIONATE POLITICS: EMOTIONS AND SOCIAL MOVEMENTS* (Jeff Goodwin et al. eds., 2001) [hereinafter *PASSIONATE POLITICS*].

15. See, e.g., ROBERT H. FRANK, *PASSIONS WITHIN REASON: THE STRATEGIC ROLE OF THE EMOTIONS* (1988); Jennifer S. Lerner et al., *Heart Strings and Purse Strings: Carryover Effects of Emotions on Economic Decisions*, 15 PSYCHOL. SCI. 337 (2004).

rogeneous polity, and helping individuals interpret and prioritize constitutional commitments; and (3) makes imagination possible, allowing constitutional communities to reassess and revise prior commitments.

Each conclusion runs contrary to standard accounts of emotion as a destabilizing and destructive force in constitutional law. This article is an effort to rectify that situation and to create a closer link between constitutional theory and the social practice of constitutionalism.

In turn, these social practices can potentially alter a range of ongoing debates within constitutional theory. An enhanced recognition of emotion's positive impact on constitutional culture calls into question the Supreme Court of the United States' status as the final arbiter of constitutional meaning, certain assumptions about the Court's ability to impact public opinion, the appropriate standards for constitutional amendment, and the design of democratic institutions.

Part II of this article argues that the Constitution's drafters subscribed to a theory of human behavior that is embedded throughout American constitutional structure and practice. The theory consisted of two widely accepted propositions that still enjoy widespread acceptance in contemporary constitutional culture: (1) a rigid dualism that sets reason and emotion in irreconcilable opposition to one another and (2) a strong preference for rational, deliberate decision making over making choices based on feelings or intuition. This theory guided core aspects of constitutional design and has been perpetuated by subsequent generations of constitutional judges, lawyers, and scholars.

Parts III and IV challenge the notion that emotion represents a threat to the constitutional order. Part III uses research in the social and natural sciences to argue that emotion helps individuals keep and maintain commitments. This, in turn, enables a large and heterogeneous polity to operate in stable and predictable ways, and allows constitutional commitments to transcend generational and demographic shifts. Moreover, emotion helps structure the process of interpreting existing commitments and integrally contributes to the exercise of rational thought. Part IV argues that emotion enables the imagination to conceive of new commitments, and therefore is essential to the process of constitutional revision and renewal. In particular, emotion informs per-

ceptions of existing commitments, enables people to assess rationally their continued value, and facilitates action to change those commitments when necessary.

Finally, Part V spells out some preliminary ideas about how emotion research might advance current descriptive and normative debates in constitutional theory.

Given the wide scope of recent emotion research and its many potential implications, there are two limitations on the scope of this article. First, it does not directly address the growing body of literature on judicial behavior.<sup>16</sup> While much of the work on emotion and decision making has potential implications for how judges interpret the Constitution, judicial actors are not the focus of this piece. Rather, it primarily focuses on how citizens develop their own interpretations of constitutional meaning, because popular conceptions of constitutional law—in the form of public opinion—often act as a constraint on the Court's power.<sup>17</sup> Constitutional meaning stems from a cultural interplay between law and politics, and it is impossible to understand fully doctrinal development by focusing exclusively on the actions of federal judges. If, as many political scientists and constitutional scholars have concluded, the Supreme Court operates within constraints established by dominant electoral majorities,<sup>18</sup> the forces that govern individuals' political perceptions and behavior are a powerful and highly relevant dynamic in contemporary constitutional lawmaking.

Second, the relationship between law and emotion works in both directions. As emotion shapes the content and interpretation of legal commitments, the law also shapes emotional responses in

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16. See generally Richard A. Posner, *HOW JUDGES THINK* (2008); Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrick, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007); Andrew J. Wistrick, Chris Guthrie & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251 (2005).

17. See Thomas M. Keck, *Party Politics or Judicial Independence? The Regime Politics Literature Hits the Law Schools*, 32 L. & SOC. INQUIRY 511, 528–32 (2007) (summarizing recent legal literature supporting the link between public opinion and the Court's decision making).

18. See Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1050 (2001) (addressing the effect of the Republican party's entrenchment on the Court's decision regarding the 2000 presidential election); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957).

both legal and non-legal contexts. By defining the spheres of public and private conduct, the appropriate uses of the state's coercive power, and the areas of individual autonomy, constitutional law cultivates and manipulates emotional response. While this topic deserves further exploration, it is beyond the limited scope of this article.

### *A Note About the Definition of Emotion*

"Emotion" is a contested term, with scholars in a range of disciplines engaged in active disagreement over its definition.<sup>19</sup> They disagree not only about the dividing line between emotion and cognition, but also over the definition of different emotions.<sup>20</sup> Complicating matters, these definitions may be culturally contingent—different societies may answer the question "what is an emotion" or identify appropriate emotional responses in different ways.<sup>21</sup> Americans, for example, are more optimistic than other cultures and tend to associate positive feelings with a comparatively wider range of events.<sup>22</sup>

This article adopts the following definition, which reflects a developing consensus within the field: Emotions (1) are triggered by a particular stimulus that bears a relationship to an individual or collective goal; (2) involve a set of physiological changes (both conscious and unconscious); (3) provoke some change in cognitive activity by focusing attention, bringing particular memories into conscious awareness, or activating other thought processes; and (4) are tied to an action tendency to behave in a particular way.<sup>23</sup> For example, fear is generally triggered by a threat to the goal of survival, causes a set of physiological changes such as increased heart rate and perspiration, focuses conscious attention immediately on the threat, and creates the action tendencies to flee and seek safety.<sup>24</sup>

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19. See KEITH OATLEY ET AL., UNDERSTANDING EMOTIONS 28 (2d ed. 2006).

20. See Hazel Rose Markus & Shinobu Kitayama, *The Cultural Construction of Self and Emotion: Implications for Social Behavior*, in EMOTION AND CULTURE (Shinobu Kitayama and Hazel Rose Markus eds., 1994).

21. *Id.*

22. *Id.* at 104.

23. BRADER, *supra* note 13, at 51.

24. *See id.*

One critical element causes major concern about emotion's impact on decision-making capacity: emotions often operate as intuitions that exist outside the realm of conscious thought.<sup>25</sup> For example, people often sense danger before its source enters their full awareness, and their bodies begin preparing to respond to that danger even before they fully comprehend it.<sup>26</sup> Much of the discussion that follows focuses on the intuitive aspect of emotion and the ways in which reliance on affective intuition helps to maintain stability within a constitutional community.

## II. COMMITMENT, IMAGINATION, AND THE DOMINANT VIEW

In April 2005, Harvard constitutional scholar Laurence Tribe sent a letter to Associate Supreme Court Justice Stephen Breyer.<sup>27</sup> In the letter, Tribe announced that he was suspending work on the third edition of his acclaimed constitutional law treatise due to confusion over the status of "basic constitutional premises."<sup>28</sup> In a separate note to readers, he asserted that "the very working materials of American constitutional law may be in the process of changing"<sup>29</sup> and called for "systemic attention" to "popular conceptions of constitutional law" that shape legal development and governmental behavior.<sup>30</sup> Specifically, Tribe highlighted the interpretive challenges posed by the "extraordinary politics of feeling" that surround contemporary constitutional discourse, and the tension between "the encompassing rhetoric of searing emotion" and long-standing constitutional principles.<sup>31</sup>

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25. This subconscious element is not unique to emotion. Indeed, a long-established body of scholarship has examined the role of cognitive heuristics (or mental shortcuts) and their ability to distort decision making in predictable ways. See, e.g., Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al. eds., 1982); Cass R. Sunstein, *Moral Heuristics*, 28 BEHAV. & BRAIN SCI. 531 (2005).

26. See Robert S. Adler, *Flawed Thinking: Addressing Decision Biases in Negotiation*, 230 OHIO ST. J. ON DISP. RESOL. 683, 694–96 (2005) (discussing the benefits of heuristics, particularly in survival situations).

27. Letter from Laurence H. Tribe, Carl M. Loeb Univ. Professor, Harvard Univ., to Stephen G. Breyer, Assoc. Justice, Supreme Court of the United States (Apr. 29, 2005), in Laurence H. Tribe, *The Treatise Power*, 8 GREEN BAG 2D 291, 292–93 (2005).

28. *Id.* at 292.

29. Letter from Laurence H. Tribe, Carl M. Loeb Univ. Professor, Harvard Univ., to Interested Readers of American Constitutional Law (Apr. 29, 2005), in Laurence H. Tribe, *The Treatise Power*, 8 GREEN BAG 2D 294, 297 (2005).

30. *Id.* at 299.

31. *Id.*



Tribe's focus on the social practice of constitutionalism outside the courts and the relationship between constitutional law and emotion is well-placed. It was, after all, a series of collective emotional outbursts in the form of violent social upheavals that resulted in the establishment and maintenance of our most sacred constitutional commitments.<sup>32</sup> Constitutions are written and changed in moments of extreme popular passion: revolution, civil war, and severe economic hardship are indispensable elements of American constitutional development.<sup>33</sup>

Moreover, as any regular viewer of the nightly news or social historian can attest, constitutional interpretation is inseparable from a political culture that is bathed in emotion.<sup>34</sup> The Constitution serves as a focal point for individual and collective expressions of hope and fear, love and hate, and sympathy and disgust.<sup>35</sup> Constitutional history and doctrine contain many remnants of dreams realized, deferred, and denied, along with the expired emotions that set those alternative visions of constitutional meaning into action.<sup>36</sup>

Furthermore, like any religion, constitutional law sustains and legitimizes itself through emotional ties created by, facilitated by, and focused upon ritual, symbol, a foundational myth, and a core text.<sup>37</sup> In this light, "constitutional culture"<sup>38</sup> often transcends the legalistic and the logical, with emotion functioning as an essential predicate for the American constitutional regime and a vehicle for collective expression of social aspirations.

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32. See JED RUBENFELD, *FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* 129 (2001); see also Frederick Schauer, *The Constitution of Fear*, in *CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES* 84, 84-88 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998) (arguing that excessive fear contributed to flawed aspects of constitutional design).

33. See 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 3-8 (1998).

34. See BRADER, *supra* note 13, at 183 (discussing findings that provide "strong support to the common belief that politicians routinely use ads to appeal to emotions").

35. See DAVID I. KERTZER, *RITUAL, POLITICS, AND POWER* 64-65 (1988); see also Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 *HARV. L. REV.* 4, 36-37 (2003).

36. See Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 *HARV. L. REV.* 4, 40-42 (1983) (describing a "jurisgenerative" process where multiple constitutional norms are asserted by different interpretive communities, and the "jurispathic" role played by the Court in choosing between different interpretive visions).

37. See KERTZER, *supra* note 35, at 60-65, 133.

38. See Post, *supra* note 35, at 8 (defining constitutional culture as a "specific subset of culture that encompasses extrajudicial beliefs about the substance of the Constitution").

The Constitution also defines the broad parameters by which law and emotion intersect and recognize one another within public life. When Chief Justice John Roberts likened his role as a constitutional interpreter to an umpire calling balls and strikes at his confirmation hearing,<sup>39</sup> or when Justice Ruth Ginsberg, for the first time in her fifteen-year tenure on the Supreme Court, decided to read two “passionate and pointed” dissents aloud from the bench,<sup>40</sup> they both made statements about the relationship between emotion and constitutional lawmaking.<sup>41</sup> Disputes about prayer at graduation ceremonies or football games address the level of comfort with the emotions that are generated, released, and suppressed by particular types of public ritual.<sup>42</sup> Cases about same-sex marriage, grandparent visitation, or sodomy laws question whether the law will recognize particular types of love in human relationships.<sup>43</sup> In addition, as the Court’s recent ruling in *Gonzales v. Carhart* suggests, a woman’s ability to terminate a pregnancy in a particular way may hinge on perceptions about the lasting emotional impact of late-term abortions.<sup>44</sup>

Yet in spite of these cultural realities, the definition of constitutional commitments is still commonly seen as a process dominated by rationality, where interpretive rules and institutional constraints act to minimize emotion’s taint on constitutional meaning.<sup>45</sup> This account—dominant within the legal community and closely linked to the need for judicial supremacy—suggests that emotion should have as little to do with constitutional culture as possible.<sup>46</sup>

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39. See *Confirmation Hearing on the Nomination of John G. Roberts, Jr., To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr.).

40. Linda Greenhouse, *Oral Dissents Give Ginsberg a New Voice*, N.Y. TIMES, May 31, 2007, at A1.

41. See Lani Guinier, *The Supreme Court, 2007 Term—Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 27 (2008) (discussing the practice of “oral dissents” as a way for judges to engage an audience on an “emotional level”).

42. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 294, 307–08 (2000); *Lee v. Weisman*, 505 U.S. 577, 580, 592–93 (1992).

43. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003); *Troxel v. Granville*, 530 U.S. 57, 60 (2000); *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003).

44. 127 S. Ct. 1610, 1634 (2007).

45. See SOTIROS A. BARBER & JAMES E. FLEMING, CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS 13 (2007).

46. See Chemerinsky, *supra* note 2, at 1078–79 (discussing how judges’ views and ideologies may overshadow issues of textual interpretation, framers’ intent, and cost-benefit analysis).

This part makes three arguments. First, it argues that constitutions provide a structure for two social phenomena that are central to human existence: commitment and imagination. Second, it links emotion, commitment, and imagination by arguing that constitutional culture has long viewed emotion as destructive to both phenomena. Third, it examines how beliefs about emotion influenced core aspects of American constitutional design, including the procedures for making and altering constitutional commitments.

### A. *Commitment and Imagination in Constitutional Systems*

The primary function of written constitutions is to facilitate collective commitments that transcend time and the day-to-day battles of conventional politics.<sup>47</sup> As many theorists have noted, constitutions establish precommitments: constraints on future behavior put into effect at Time 1 to ensure that action taken at some point in the future—Time 2—will conform with the course of action preferred at Time 1.<sup>48</sup> Thus, a community makes a pre-

47. See RUBENFELD, *supra* note 32, at 93 (“Written constitutionalism is properly understood as a nation’s struggle to lay down and live out its own fundamental political commitments over time.”).

48. *Id.* at 116–17. For the past fifteen years or so, precommitment has been a budding, if not central, preoccupation for constitutional theorists. There are at least three reasons for the recent level of interest: originalism, the rise of the Rehnquist Court, and the demise of the former Soviet Union.

First, originalism—defining constitutional meaning as defined by the intent and motives of those who drafted the relevant constitutional provision—focuses on the virtues of precommitment. See *id.* at 62. Originalism revolves around the ideas that commitments are fixed at a particular point in the past and that constitutional interpreters can only locate the limits of present-day or future constraints by defining the precise understanding of a constitutional commitment at the moment it was made. See *id.* at 88, 185. As Justice Scalia, Judge Bork, and others began to provide credibility and intellectual firepower for originalism as an interpretive model in contemporary constitutional lawmaking, justifications for, and critiques of, precommitment seeped into the debate over its original meaning. See *id.* at 64–65.

Second, progressive scholars began to experience widespread frustration over the Court’s shift to the right. The result has been a spate of recent theories about the mechanics of constitutional change, relying on interdisciplinary work in history, political science, and sociology, with the partial goal of legitimizing interpretive activity that occurs outside the judiciary. See *id.* at 73. Several progressive scholars have reframed constitutional governance as a form of popular sovereignty, endorsing the ability of “the People” to stake independent claims about constitutional meaning outside of Article V. See *id.* at 70–71. This too required engagement with precommitment, but focused on determining how precommitments are negotiated and redefining the parties involved in that negotiation process.

Third, the end of the Cold War led to a new round of constitution drafting in the past fifteen years, particularly as new republics formed out of the former Soviet Union. Evgeni

commitment at Time 1 knowing that the precommitment (a) will restrict its ability to act at Time 2 and (b) may indeed preclude a course of action that the community, for good or bad reasons, *wants* to engage in at Time 2.<sup>49</sup>

Constitutional provisions, by operating as supreme law and requiring a higher threshold for adoption and amendment than ordinary statutes,<sup>50</sup> act as the primary legal device for establishing and enforcing shared legal precommitments. Constitutional precommitments can take a range of forms: processes for collective decision making, institutional behaviors and limitations that embody a particular set of values, and mechanisms for defining new precommitments or altering existing ones.<sup>51</sup>

Why would a society willingly restrict its ability to engage in a particular desired action at an unknown point in the future? Commitments, in legal and less formal incarnations, benefit society because they promote consistency. Social psychologists have long noted that a desire for consistency is a central motivator for human behavior, in part due to its ability to promote stable, predictable decision making and consequences.<sup>52</sup> This, in turn, promotes efficient decision making—individuals and institutions can make choices and take risks with reduced information-gathering costs, an enhanced ability to predict outcomes, an ability to trust and predict the actions of others, and a sense of confidence that comes from day-to-day continuity.<sup>53</sup> Consistency also allows complex systems and large numbers of people to coordinate behavior, which facilitates the success of shared endeavors and the achievement of common goals.<sup>54</sup>

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Tanchev, *Historical and Psychological Sources Shaping Constitutionalism and Constitutional Performance in the Post-Communist Societies*, in *LEGAL REFORM IN POST-COMMUNIST EUROPE* 141, 143 (Stanislaw Frankowski & Paul B. Stephen, III eds., 1995). With the terms of precommitments being hashed out by a new generation of constitutional framers, there was a new market for lessons learned from past attempts to design precommitment procedures.

49. See RUBENFELD, *supra* note 32, at 116–17.

50. JON ELSTER, *ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS* 101 (2000). There are a range of devices that constitutions use to establish this higher threshold, such as requiring supermajorities, creating delays, or imposing additional costs. *Id.*

51. See *id.* at 88–92.

52. ROBERT B. CIALDINI, *INFLUENCE: SCIENCE AND PRACTICE* 54 (4th ed. 2001).

53. See *id.* at 61–68.

54. See *id.* at 95–96.

Commitment strategies are among the best available vehicles to promote consistency;<sup>55</sup> if someone makes a commitment, it creates “personal and interpersonal pressures to behave consistently with that commitment.”<sup>56</sup> Externally, consistency is considered an attractive social trait—human beings want other people to like them and therefore want to be perceived as consistent by others.<sup>57</sup> Internally, consistency offers individuals an efficient shortcut through the time and agony it takes to make difficult decisions.<sup>58</sup>

Hence, continuity and stability are among the primary benefits associated with a written constitution. Public commitments—particularly those made in writing—harness these internal and external pressures and serve as the most effective mechanisms to ensure consistent behavior over time.<sup>59</sup> Constitutions capitalize on these social realities, using written commitments—backed by fidelity to law—to promote consistent behavior.

The consistency embedded in constitutional commitments is in perpetual tension with another activity that is central to both human existence and constitutional culture: imagination. Constitutions provide a structure for imagining and negotiating collective aspirations for the future. The text provides a set of substantive dreams for a better world,<sup>60</sup> and the process of constitutional lawmaking—both within and outside the courts—provides a structure for a cultural conversation in which citizens, as participants in a constitutional culture, envision, negotiate, and fight for a better world in the years and decades to come.<sup>61</sup> Moreover, by its very terms, the Federal Constitution remains an unfinished

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55. *Id.* at 61.

56. *Id.* at 53 (emphasis omitted).

57. *See id.* at 54 (showing that inconsistency is perceived as an “undesirable social trait” (citing A.R. Allgeier et al., *The Waffle Phenomenon: Negative Evaluations of Those Who Shift Attitudinally*, 9 J. APPLIED SOC. PSYCHOL. 170, 179 (1979)); S.E. Asch, *Forming Impressions of Personality*, 41 J. ABNORMAL & SOC. PSYCHOL. 258, 273–75 (1946)).

58. *Id.* at 55.

59. *See id.* at 68–70.

60. *See* William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 433 (1986) (describing the Constitution as “embod[ing] the aspiration to social justice, brotherhood, and human dignity that brought this nation into being” and “the lodestar for our aspirations”).

61. *See Post, supra* note 35, at 8.

document. By setting out an amendment procedure, Article V recognizes the text's imperfections and the need for continued innovation.<sup>62</sup>

Imagination about the future is, thus, essential to a constitutional system. When individuals try to amend the Constitution or interpret its meaning, the future—even from a short-term perspective—is never far from their minds. This is true even in doctrinal areas, such as substantive due process, which demand a look backward in time to examine the past for evidence of the nation's history and tradition.<sup>63</sup> Even there, the interpretive frame constructs an imagined vision of the future that provides cultural continuity through a close link with the past.

In constitutional development, commitment and imagination are both mutually dependent and in irreconcilable tension. Imagination forms visions of a lasting future that inspire constitutional commitments into being; commitments provide stimuli for constitutional imagination, because change so often results from dissatisfaction with present commitments and the dim prospects of a stagnant future. Conversely, commitments stifle imagination by creating procedural and substantive roadblocks to realizing imagined alternatives: Imagination constrains commitment by counseling against creating restrictions today that might inhibit a better tomorrow. In part, this paradoxical relationship is attributable to the different temporal perspectives embedded in each behavior—commitment looks to the past, while imagination looks to the future.

### B. *The Dominant View: Dualism and Rationality-Preferencing*

Our constitutional system reflects a dominant theory of human behavior that views emotion as destructive to the maintenance of existing constitutional commitments and to the process of imagining new ones.<sup>64</sup> This view contains two core elements.

First, it relies upon a rigid dualism that sets reason, cognition, deliberation, mind, and thought in irreconcilable opposition against emotion, affect, intuition, heart, and feeling. Second, it

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62. AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 12–13 (2005).

63. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 723 (1997).

64. See *supra* notes 1–4 and accompanying text.

subscribes to rationality-preferencing—the notion that within this dualistic framework, decisions based on reason and deliberation are better than decisions made under the influence of emotion and intuition.<sup>65</sup>

This adverse relationship between constitutional law and emotion flows directly from a view of human behavior that treats emotion as corrosive to public decision making and to the collective search for a common good.<sup>66</sup> From the perspective of commitment and imagination, emotion causes a society to make unwise commitments based on short-term desires, discard existing commitments made during a period of calmer and rational thinking, and imagine new commitments that are destructive to other constitutional values.

As a result, constitutional commitments are often designed as safeguards against emotion's potential to distort decision making by constitutional actors.<sup>67</sup> As George Marcus and his co-authors describe it, critics have derided emotion's influence on decision making in four different ways. First, emotion *displaces* reason through overstimulation, which makes careful deliberative consideration of rational alternatives impossible.<sup>68</sup> Second, emotion *distracts* by drawing individuals' attention to irrelevant considerations and distorting their ability to assess risk and relative benefits.<sup>69</sup> Third, emotion leads to *intransigence* by creating an intensity of belief that is immune to new information or persuasion.<sup>70</sup> Finally, emotion facilitates *self-absorption*, making it impossible to consider larger consequences or public goals.<sup>71</sup>

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65. See *supra* notes 3–5 and accompanying text.

66. See ROBERT C. SOLOMON, A PASSION FOR JUSTICE: EMOTIONS AND THE ORIGINS OF THE SOCIAL CONTRACT 55 (1990) (“In many versions of [social contract] theory, justice becomes a matter of reason whose purpose is to counter and control the unruly and usually selfish dictates of our natural passions.”).

67. See STEPHEN HOLMES, PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY 272 (1995), PAUL W. KAHN, THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP 8 (1999).

68. GEORGE E. MARCUS ET AL., AFFECTIVE INTELLIGENCE AND POLITICAL JUDGMENT 18–19 (2000).

69. *Id.* at 19.

70. *Id.* at 19–20.

71. *Id.* at 20–21. For a somewhat different laundry list of the ways in which emotion potentially undermines cognition and sound judgment, see ELSTER, *supra* note 50, at 87; HALL, *supra* note 12, at 13.

Taken as a whole, the dominant view treats emotion in public life as a threat to stability and a vehicle for injustice, intolerance, violence, and political instability.<sup>72</sup> This view of human behavior influenced the development of constitutional institutions and procedures at the time of the nation's founding, and found widespread reinforcement from theorists, judges, and legal academics throughout the two centuries that followed.

### 1. Dualism and Rationality-Preferencing at the Founding

The dominant view's rigid dualism was prominent in the minds of those drafting and marketing the new American Constitution.<sup>73</sup> It drew on a long and distinguished intellectual tradition within Western political and philosophical development<sup>74</sup> that separated "reason from passion, thinking from feeling, [and] cognition from emotion."<sup>75</sup> In *The Federalist Papers*, Publius envisioned "passions" as diametrically opposed to reason.<sup>76</sup> He pathologized the "sudden breese of passion"<sup>77</sup> as "angry,"<sup>78</sup> "malignant,"<sup>79</sup> "transient,"<sup>80</sup> "irregular," and subject to the "artful misrepresentation of interested men."<sup>81</sup> Passion threatened to "drown" . . . the mild voice of reason,<sup>82</sup> resulting in constitutional governance dominated by "[a]mbition, avarice, personal animosity, [and] party opposition."<sup>83</sup>

Within this dualistic framework, the framers weighed in solidly on the reason/deliberation side of the battle,<sup>84</sup> in line with a long-

72. See Hall, *supra* note 12, at 24–25.

73. See RUBENFELD, *supra* note 32, at 116 n.26 ("The reason/passion trope is a strong theme in the *Federalist Papers*.").

74. See HOLMES, *supra* note 67, at 45; THE REPUBLIC OF PLATO 121 (Allan Bloom trans., Basic Books 2d ed. 1991); Jeremy A. Blumenthal, *Does Mood Influence Moral Judgment? An Empirical Test with Legal and Policy Implications*, 29 L. & PSYCHOL. REV. 1, 1–2 & n.4 (2005); Martha C. Nussbaum, *The Supreme Court, 2006 Term—Foreword: Constitutions and Capabilities: "Perception" Against Lofty Formalism*, 121 HARV. L. REV. 4, 32 n.78 (2007).

75. LEDOUX, *supra* note 11, at 24.

76. THE FEDERALIST NO. 49, at 343 (James Madison) (Jacob E. Cooke ed., 1961).

77. THE FEDERALIST NO. 71, at 482 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

78. THE FEDERALIST NO. 1, at 5 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

79. *Id.*

80. THE FEDERALIST NO. 71, *supra* note 77, at 482.

81. THE FEDERALIST NO. 63, at 425 (James Madison) (Jacob E. Cooke ed., 1961).

82. THE FEDERALIST NO. 42, at 283 (James Madison) (Jacob E. Cooke ed., 1961).

83. THE FEDERALIST NO. 1, at 5 (Alexander Hamilton) (Jacob B. Cooke ed., 1961).

84. See HOLMES, *supra* note 67, at 269; George E. Marcus, *The Psychology of Emotion*



held perception that “passions are a negative force in human behavior.”<sup>85</sup> In part, this reflected Enlightenment beliefs that reason was critical to human progress<sup>86</sup> and that emotion was incompatible with liberal democracies because it serves “as the basis for intemperateness, ethnocentrism, swift and intractable prejudices, and thoughtlessness.”<sup>87</sup>

Throughout *The Federalist Papers*, Publius described reason as superior to emotion, deliberation as superior to intuition, and both emotion and intuition as inconsistent with the common “rule of law” values: consistency, predictability, and stability.<sup>88</sup> In *Federalist No. 49*, James Madison set forth his theory that reason is essential to the constitutional order about as clearly as one could imagine: “it is the reason, alone, of the public, that ought to control and regulate the government. The passions ought to be controlled and regulated by the government.”<sup>89</sup> Publius saw passion as intimately connected to factionalism and initiating the irrational desire to form groups that were forever locked in constant battle with other groups.<sup>90</sup> As Madison noted, “In all very numerous assemblies, of whatever characters composed, passion never fails to wrest the scepter from reason. Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob.”<sup>91</sup>

As Paul Kahn put it, the *Federalist* mission was “to bring science to popular government.”<sup>92</sup> Reflection and deliberation were deemed essential to good public decision making,<sup>93</sup> and rea-

*and Politics*, in *OXFORD HANDBOOK OF POLITICAL PSYCHOLOGY* 182, 185 (David O. Sears et al. eds., 2003).

85. Loewenstein & Lerner, *supra* note 6, at 619.

86. See Suzanna Sherry, *The Sleep of Reason*, 84 *GEO. L.J.* 453, 466 (1996).

87. Marcus, *Emotions and Politics*, *supra* note 6, at 198.

88. See RICHARD K. MATTHEWS, *IF MEN WERE ANGELS: JAMES MADISON AND THE HEARTLESS EMPIRE OF REASON* 81 (1995) (noting that Madison makes no positive reference to “passion” in the *Federalist Papers*); Neil S. Siegel, *A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 *MICH. L. REV.* 1951, 2015 (2005) (identifying rule-of-law values).

89. *THE FEDERALIST NO. 49*, *supra* note 76, at 343.

90. See *HOLMES*, *supra* note 67, at 268.

91. *THE FEDERALIST NO. 55*, at 340 (James Madison) (Jacob E. Cooke ed., 1961).

92. PAUL W. KAHN, *LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY* 12 (1992); see JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 152–53 (1996).

93. *THE FEDERALIST NO. 71*, *supra* note 77, at 431 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

son enabled social choices to align with the public good.<sup>94</sup> In Hannah Arendt's words, the founders saw "government in the image of individual reason" and "the rule of government over the governed according to the age-old model of the rule of reason over the passions."<sup>95</sup> As Alexander Hamilton noted in Federalist No. 15, government is necessary because "the passions of men will not conform to the dictates of reason and justice without constraint."<sup>96</sup> Passions were seen as erratic, creating a "turbulent and changing" populace unable to "judge or determine right."<sup>97</sup>

To a large extent, the concern over the corrosive impact of emotion on decision making reflected the immediate challenges of managing a volatile post-revolutionary environment, where shared emotional bonds formed in the heat of battle against a common British enemy were disintegrating.<sup>98</sup> Moreover, the framers' concerns about emotion reflected the tumult that surrounded post-founding American politics.<sup>99</sup> Legislative turnover was high, major ideological schisms existed about fundamental issues of economic and foreign policy, and a vibrant press stoked public emotion and agitation.<sup>100</sup> Political violence in eighteenth-century America was far more commonplace than it is today, and public participation in political life was marked by "mobbing," strong rhetoric, and other acts that involved highly visible emotional displays.<sup>101</sup>

Publius's rhetoric around emotion was not particularly nuanced and grouped a wide range of very strong and different emotions under the umbrella of "passions."<sup>102</sup> The subtlety with which people describe different emotions today did not appear in

94. See KAHN, *supra* note 92, at 15. *But see* MARCUS, *supra* note 13, at 27–28 (offering evidence of a more ambivalent attitude towards reason in The Federalist Papers).

95. HANNAH ARENDT, ON REVOLUTION 91 (1963).

96. THE FEDERALIST NO. 15, at 96 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

97. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 299 (Max Farrand ed., 1966) [hereinafter 1 RECORDS].

98. THE FEDERALIST NO. 49, *supra* note 76, at 341 (ed.,) (1961).

99. See Jan Lewis, "Those Scenes for Which Alone My Heart Was Made": Affection and Politics in the Age of Jefferson and Hamilton, in AN EMOTIONAL HISTORY OF THE UNITED STATES 52, 54 (Peter N. Stearns & Jan Lewis eds., 1998).

100. See *id.*

101. See LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 156 (2004).

102. See SUSAN JAMES, PASSION AND ACTION: THE EMOTIONS IN SEVENTEENTH-CENTURY PHILOSOPHY 4–5 (1997).

his writings; he treated happiness and sadness, empathy and disgust, and anger and elation as one and the same.<sup>103</sup>

Despite this broad-brush perspective, the framers recognized some useful purposes for emotion in creating a constitutional regime. Specifically, they saw emotion as important for establishing the new Constitution's legitimacy and for developing a sense of national identity.<sup>104</sup> As historian Jan Lewis noted, "[T]he founders of the new national government knew that one of their greatest challenges was to stimulate affection for the new national government."<sup>105</sup> Madison derided those who felt that "the people of America, knit together as they are by so many chords of affection, can no longer live together as members of the same family."<sup>106</sup>

But even emotions that might prove helpful to the nation-building project—bonds that create loyalty and cohesion within a heterogeneous group—were treated with suspicion. Madison believed that those loyalties would operate at a much smaller level within a comparatively large democracy, creating factions that would encourage division rather than unity, and would ultimately undermine the nation-building agenda.<sup>107</sup> He viewed the emotional unity and enthusiasm surrounding the Revolution as temporary and thought that the "passions most unfriendly to order and concord" would soon reappear once the immediacy of the Revolution had vanished into memory.<sup>108</sup>

## 2. The Dominant View in Constitutional Culture

Despite the unique historical circumstances, the framers' theory of human behavior and decision making has continued to resonate throughout American constitutional history and into the modern era. In particular, constitutional commitments are seen as a safeguard against emotion's negative impact on public life. Abraham Lincoln's famed 1838 Lyceum speech captured the dominant view's legacy in its starkest form: "Passion has helped us;

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103. *See id.* at 5.

104. HALL, *supra* note 12, at 31; MARCUS, *supra* note 13, at 24–25.

105. Lewis, *supra* note 99, at 57.

106. THE FEDERALIST NO. 14, at 88 (James Madison) (Jacob E. Cooke ed., 1961).

107. *See* THE FEDERALIST NO. 10 (James Madison) (Jacob E. Cooke ed., 1961).

108. *See* THE FEDERALIST NO. 49, *supra* note 76, at 341.

but can do so no more. It will in future be our enemy. Reason, cold, calculating, unimpassioned reason, must furnish all the materials for our future support and defence.”<sup>109</sup> Unsurprisingly, he deemed reason synonymous with “general intelligence, . . . morality, and . . . a reverence for the constitution.”<sup>110</sup>

Lincoln’s perspective aligned with standard views of citizenship that position rational judgment as the sole means for obtaining substantive and procedural legitimacy, just outcomes, and social progress.<sup>111</sup> Under this model, citizens must have the opportunity to consider—in a calm, sober state—the implications and consequences of different options and decisions.<sup>112</sup> Emotion and intuition threaten democratic progress, which can only occur through deliberative or republican processes that advance the rule of reason.<sup>113</sup>

In turn, emotion threatens the maintenance of constitutional order because it can potentially lead individuals to ignore prior commitments or imagine new commitments that are irrational or unwise. As a result, popular involvement in defining constitutional meaning should not be trusted, particularly in situations where elements critical to reason—knowledge and time to obtain, consider, and evaluate relevant information—are absent.

The legacy of rationality-preferencing bleeds into many aspects of contemporary constitutional law and politics. As any observer of a first-year constitutional law class will notice, legal elites are systematically trained to discount and ignore emotion, moral intuition, and imagination when trying to define, interpret, and advocate on behalf of constitutional commitments. Comments that reflect feelings are actively discouraged (or secretly feared) by most professors. This discouragement stems from a concern that

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109. Abraham Lincoln, Address Before the Young Men’s Lyceum of Springfield, Illinois (Jan. 27, 1838), in 1 THE COLLECTED WORKS OF ABRAHAM LINCOLN 108, 115 (Roy P. Basler ed., 1953).

110. *See id.*

111. *See* James H. Kuklinski et al., *Thinking About Political Tolerance, More or Less with More or Less Information*, in RECONSIDERING THE DEMOCRATIC PUBLIC 225, 227 (George E. Marcus & Russell L. Hanson eds., 1993); George E. Marcus et al., *Dynamic Models of Emotional Response: The Multiple Roles of Affect in Politics*, 5 RES. IN MICROPOLITICS 33, 34 (1996).

112. *But see* Marcus et al., *supra* note 111, at 34–35 (explaining how humans do not always process all information before making a decision, as the rational-judgment theory would suggest).

113. Kuklinski et al., *supra* note 111, at 227.

the classroom will reflect pathological and seemingly uncontrollable behaviors often associated with emotion.<sup>114</sup> Instead, constitutional law becomes interchangeable with “thinking like a lawyer,” perpetuated by a Socratic method pedagogy that structures inquiries to ensure that feelings are kept under tight control and on limited display. This perpetuates what psychologist Carol Gilligan calls a dissociative state—a condition under which individuals are not permitted to know what they know.<sup>115</sup>

Beyond the classroom, the notion that emotion is destructive to the process of constitutional commitment making, interpretation, and inquiry finds reinforcement throughout contemporary constitutional culture.<sup>116</sup> In particular, this notion operates as the exclusive behavioral model for constitutional interpretation by judges,<sup>117</sup> with “emotional” thrown around as an epithet at judges who are perceived as advancing a personal moral agenda.<sup>118</sup> As Richard Posner notes, “The law itself is conventionally regarded as a bastion of ‘reason’ conceived of as the antithesis of emotion, as operating to rein in the emotionality of the behavior that gives rise to legal disputes.”<sup>119</sup> Consider, for example, the *Casey* joint opinion’s description of the forces seeking to undermine *Roe v.*

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114. For an interesting example of an academic community wrestling with the role of emotion in constitutional discourse, see Posting of Orin Kerr to The Volokh Conspiracy, [http://www.volokh.com/archives/archive\\_2005\\_04\\_10-2005\\_04\\_16.shtml#1113585884](http://www.volokh.com/archives/archive_2005_04_10-2005_04_16.shtml#1113585884) (Apr. 15, 2005, 13:24 EST).

115. CAROL GILLIGAN, *THE BIRTH OF PLEASURE: A NEW MAP OF LOVE* 23–24, 228 (2003).

116. See Erin Ryan, *The Discourse Beneath: Emotional Epistemology in Legal Deliberation and Negotiation*, 10 HARV. NEGOT. L. REV. 231, 234 (2005).

117. See Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655, 665–66 (1989); see also Jeffrey Rosen, *Sentimental Journey: The Emotional Jurisprudence of Harry Blackmun*, THE NEW REPUBLIC, May 2, 1994, at 13 (addressing how Justice Blackmun’s reliance on emotion when deciding cases rendered him ineffective as a Justice). For alternative perspectives on the relationship between the judicial role and emotion, see *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944) (arguing that “[h]eart and mind . . . cannot be altogether parted in law more than in life”); William J. Brennan, Jr., *Reason, Passion, and “The Progress of Law”*, 10 CARDOZO L. REV. 3, 3 (1988) (claiming that the “interplay of . . . reason and passion[ ] does not taint the judicial process, but is in fact central to its vitality”). For a historical perspective on this theory of judicial independence, see Bruce A. Green & Rebecca Rophie, *Regulating Discourtesy on the Bench: A Study in the Evolution of Judicial Independence* (unpublished manuscript, on file with author).

118. See *Romer v. Evans*, 517 U.S. 620, 639 (1996) (Scalia, J., dissenting) (describing majority opinion as “long on emotive utterance and . . . short on relevant legal citation”); Jeffrey Rosen, *Supreme Leader: The Arrogance of Justice Anthony Kennedy*, THE NEW REPUBLIC, June 18, 2007, at 16, 19.

119. Richard A. Posner, *Emotion Versus Emotionalism in Law*, in THE PASSIONS OF LAW 309, 309 (Susan A. Bandes ed., 1999).

*Wade*: “Some of those efforts may be mere unprincipled emotional reactions; others may proceed from principles worthy of profound respect.”<sup>120</sup> Or, the final words of the Eleventh Circuit panel decision denying Terry Schiavo’s parents’ motion for a temporary restraining order directing her husband to bring her to a hospital for medical treatment: “While the position of our dissenting colleague has emotional appeal, we as judges must decide this case on the law.”<sup>121</sup> Or, Justice Anthony Kennedy’s recent portrayal of law as an effort to “bring rationality to an existence that can be irrational and chaotic.”<sup>122</sup> As Justice Harry Blackmun stated in his majority opinion in *Roe*, the Court’s job “is to resolve the issue by constitutional measurement, free of emotion.”<sup>123</sup>

For the most part, constitutional theory has operated to reinforce the notion of constitutional commitments as barriers against the corrosive effects of emotion. This has happened primarily through reliance upon two popular analogies to explain and justify constitutional commitments. In the first analogy, a commitment operates as “Peter sober” speaking to “Peter drunk”—the voice of past reason guiding a confused individual through a turbulent, intoxicated present.<sup>124</sup> In the second analogy, drawn from *The Odyssey*, Ulysses confronts the Sirens, whose beautiful song lures sailors to their deaths.<sup>125</sup> Unwilling to miss the opportunity to hear their singing, he instructs his crew to plug their ears and tie him to the mast of the boat before they meet the Sirens.<sup>126</sup> The crew is further instructed to lash him more tightly to the mast if he protests.<sup>127</sup> The plan is successfully implemented—Ulysses is able to enjoy the show and survive the trip—successfully stifling the uncontrollable urges of future pas-

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120. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 867 (1992).

121. *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1229 (11th Cir. 2005) (per curiam).

122. *See Rosen*, *supra* note 118, at 16.

123. *Roe v. Wade*. 410 U.S. 113, 116 (1973); *see also* *State v. Post*, 20 N.J.L. 368, 369 (1845) (declaring arguments that the New Jersey Constitution forbids slavery as “addressed to the feelings rather than to the legal intelligence of the court”).

124. For a history of the analogy, see Samuel Issacharoff, *The Enabling Role of Democratic Constitutionalism: Fixed Rules and Some Implications for Contested Presidential Elections*, 81 TEX. L. REV. 1985, 1988 & n.13 (2003).

125. *THE ODYSSEY OF HOMER* 173–74 (T.E. Lawrence trans., Oxford Univ. Press 1991) (1932).

126. *Id.* at 173.

127. *Id.*

sion.<sup>128</sup> Both analogies reflect a theory of human behavior that establishes a rigid separation between reason and emotion, with calm, deliberative reason offered as a clearly superior alternative to the immediacy and destructive effects of emotion.<sup>129</sup>

Often, this perspective is closely tied to the need for judicial supremacy—the notion that the Court should serve as the sole and final arbiter of constitutional meaning. As Richard Parker recognized, constitutional theory has a history of pathologizing popular constitutional engagement as “emotional” instead of “reasonable,” “impulsive” rather than “deliberate,” “self-centered” instead of “public-spirited,” “abusive” rather than “respectful,” and “intoxicated” as opposed to “sober.”<sup>130</sup> Popular emotional sentiments are viewed as destructive to the constitutional endeavor<sup>131</sup> and perceived as “irrational response[s] [that do] not evidence a process of moral reasoning worthy of respect.”<sup>132</sup>

Finally, psychological dynamics underlying interest-group politics feed the rationality-preferencing norm as well. Members of a group tend to see their own group’s perspective and decision-making process as the product of rational thought. By contrast, a given group will more likely see the decision making of other groups as governed by emotion and feeling.<sup>133</sup> The result is a constitutional culture where groups with a stake in the outcome of an interpretive debate lay claim to the exalted status of rationality using accusations about emotion to deride other perspectives and diminish their opponents’ intellectual stature or relative social status.<sup>134</sup>

128. JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* (1984).

129. For a critique of the Ulysses analogy, see JEREMY WALDRON, *LAW AND DISAGREEMENT* 268 (1999).

130. PARKER, *supra* note 8, at 57–58.

131. See SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG* 19 (2006) (outlining the framers’ view that “the general public should be educated to feel only ‘veneration’ for their Constitution rather than be encouraged to use their critical faculties” to interpret its meaning).

132. Larry D. Kramer, *Undercover Anti-Populism*, 73 *FORDHAM L. REV.* 1343, 1354 (2005).

133. See Jared B. Kenworthy & Norman Miller, *Attributional Biases About the Origins of Attitudes: Externality, Emotionality, and Rationality*, 82 *J. PERSONALITY & SOC. PSYCHOL.* 693, 702 (2002).

134. See *id.* at 693 (quoting opposing sides of *Bush v. Gore* that suggest “strategic, group-serving use” of allegations about whether a court’s decision is grounded in “sound reasoning”); see also Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social*

### C. *Emotion Management in Constitutional Design*

Constitutional law, like many other forms of law, functions as an elaborate system of emotion management.<sup>135</sup> Through its separation of powers provisions, the Constitution channels emotional expression into particular legislative, judicial, and administrative fora. Through its directives on institutional structure, it establishes decision-making rules and customary practices that validate, reject, or transform emotional expression in particular ways and delineate the actors whose emotional expressions are recognized within particular contexts.<sup>136</sup> And by providing mechanisms for the resolution of social conflict, the Constitution restrains the strong emotions triggered by uncertainty or unexplained phenomena.<sup>137</sup>

In an effort to manage the adverse effects of emotion, the dominant view influenced core features of constitutional design. Most prominently, it informed the design of Article V, which sets out the formal mechanics for establishing or altering constitutional commitments.<sup>138</sup>

Article V serves as the connective tissue between imagination and commitment in three different ways: procedural, institutional, and substantive. From a procedural perspective, it regulates the balance between commitment and imagination within the realm of formal amendment, establishing the precise terms under which constitutional commitments can be made, altered, and broken. From an institutional perspective, it constrains imagination through procedural hurdles in the amendment process and channels imagination into other arenas, transferring the locus of con-

*Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814, 823 (2001).

135. See GOLEMAN, *supra* note 9, at 5 (“[T]he first laws and proclamations of ethics . . . can be read as attempts to harness, subdue, and domesticate emotional life.”); MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 12 (2004); Peggy A. Thoits, *The Sociology of Emotions*, 15 ANN. REV. OF SOC. 317, 336 (1989) (“[E]motion norms are produced by and function to sustain dominant institutional arrangements.”).

136. See Francesca Polletta, *The Laws of Passion*, 35 L. & SOC’Y REV. 467, 473–76 (2001) (reviewing THE PASSIONS OF LAW, *supra* note 119) (discussing how courts handle litigants’ emotional expressions).

137. See GILBERT, *supra* note 10, at 187–89 (stating that unexplained events have a heightened emotional impact).

138. Whether Article V provides the exclusive method for constitutional amendment is a matter of significant debate. See Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1760–61 (2007) (arguing that civil rights statutes and advances have achieved the functional equivalent of constitutional amendments).



stitutional innovation toward the courts, state constitutions, and other non-Article V mechanisms for change. And from a substantive perspective, it requires consensus among a wide range of political actors at both the state and federal level. This impacts the imagination process itself, altering visions for change<sup>139</sup> and manipulating the participants and levels of abstraction at which conversations about America's constitutional future take place.<sup>140</sup>

In regulating the balance between commitment and imagination, the framers designed Article V as a means of emotion management and control, with emotion seen as destructive to the establishment and maintenance of sound constitutional commitments.<sup>141</sup> In Federalist No. 49, Madison responded to Thomas Jefferson's proposal for a more relaxed amendment standard for the Virginia State Constitution. Madison noted that subjecting constitutional questions to frequent public debate raised "[t]he danger of disturbing the public tranquility" and "interesting . . . public passions."<sup>142</sup> He also pointed out that passions threatened the "true merits of the question," which should only be represented by reason.<sup>143</sup>

Article V relies upon a range of procedural devices to minimize the influence of emotion in the commitment-making process. Notably, Article V makes the Constitution extremely difficult to amend, particularly when compared with amendment provisions in other constitutions.<sup>144</sup> The process of garnering significant

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139. See William E. Forbath, *The Politics of Constitutional Design: Obduracy and Amendability—A Comment on Ferejohn and Sager*, 81 TEX. L. REV. 1965, 1974–80 (2003) (attributing the Constitution's failure to recognize social welfare rights to Article V constraints).

140. See John Ferejohn & Lawrence Sager, *Commitment and Constitutionalism*, 81 TEX. L. REV. 1929, 1957–59 (2003).

141. This is not to say that checks against passion were the only forces underlying Article V's design. The framers were clearly concerned about the challenges presented by the unanimity requirement in the Articles of Confederation. See James Madison, *Speech During Debate in Virginia Ratifying Convention (June 6, 1788)*, reprinted in 4 THE FOUNDER'S CONSTITUTION 580, 582 (Philip B. Kurland & Ralph Lerner eds., 1987). Federalism concerns also motivated the framers to provide an alternative method of constitutional amendment that was independent of Congress. See *Records of the Federal Convention*, reprinted in 4 THE FOUNDER'S CONSTITUTION, *supra*, 576, 576–78.

142. THE FEDERALIST NO. 49, *supra* note 76, at 340 (James Madison) (Jacob E. Cooke ed., 1961).

143. *Id.* at 342–43.

144. See Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT, 237, 260–61 (Sanford Levinson ed., 1995).

support at both the federal and state levels imposes significant transaction costs and time delays, which allow ample time for sober second thoughts.<sup>145</sup> Further, the central role of elected representatives in the amendment proposal and ratification processes, rather than direct referenda schemes that appear in other national and state constitutions, serves as yet another mechanism to dilute popular passion.<sup>146</sup>

Emotion management significantly influenced the formation of other areas of constitutional design as well. For example, Article I's bicameralism and presentment requirements act as checks on emotion's potentially dangerous impact on political behavior by establishing multiple fora for deliberation and slowing the legislative process to allow time for sober reflection.<sup>147</sup> Indeed, Madison envisioned the Senate as an essential "defense to the people against their own temporary errors and delusions . . . stimulated by some irregular passion."<sup>148</sup> The framers placed age limits on public office to ensure, at least in part, a level of emotional maturity among the political elite.<sup>149</sup> This comported with a vision of public service and republican government that "does not require an unqualified complaisance to every sudden breeze of passion, or to every transient impulse which the people may receive from the arts of men."<sup>150</sup> In the modern era, the removal of constitutional obstacles to the development of the administrative state, like the demise of the non-delegation doctrine, reflects a judgment about the desirability of rational judgment in the development of public policy.

### III. COMMITMENT

While the dominant view continues to hold sway over constitutional law and theory, other disciplines have begun to revisit its core assumptions. In recent years, developments in the social and natural sciences have questioned the dualistic relationship between reason and emotion and begun to recharacterize emotion

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145. ELSTER, *supra* note 50, at 101, 103.

146. See Ackerman, *supra* note 138, at 1775–76.

147. See ELSTER, *supra* note 50, at 130–31.

148. THE FEDERALIST NO. 63, *supra* note 81, at 425.

149. See STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 30 (2005).

150. THE FEDERALIST NO. 71, *supra* note 77, at 42.

as a vital and valuable component of sound decision making component.<sup>151</sup> These developments, in turn, have implications for the way constitutional theory conceives of the relationship between emotion and commitment.

Constitutional governance facilitates commitment over time and with it, the substantial benefits associated with individual and collective consistency.<sup>152</sup> Under the dominant view, emotions undermine these constitutional commitments by displacing reason. They “flood consciousness,” leading individuals to abandon previously held commitments based on impulse, whimsy, and without appropriate thought and consideration.<sup>153</sup> During the Constitutional Convention, Hamilton referenced this concern explicitly, describing “the popular passions . . . [that] spread like wild fire, and become irresistible.”<sup>154</sup> In a similar vein, Madison expressed concern about the threat to democracy presented by the “turbulency . . . of unruly passions.”<sup>155</sup>

There is no doubt that, under certain circumstances, affective forces can lead people astray and distort consciousness in ways that can be destructive to their short- and long-term interests.<sup>156</sup> These forces can alter individuals’ perspective on the future,<sup>157</sup> warp their perception of risk,<sup>158</sup> facilitate prejudice,<sup>159</sup> manipulate attitudes based on mood,<sup>160</sup> ignore information,<sup>161</sup> distort processes of analytic and analogical reasoning,<sup>162</sup> contribute to

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151. LEDOUX, *supra* note 11, at 19–20.

152. *See supra* notes 47–63 and accompanying text.

153. *See* LEDOUX, *supra* note 11, at 19–20 (discussing how emotions work to motivate behavior).

154. 1 RECORDS, *supra* note 97, at 289.

155. *Id.* at 430–31.

156. *See* Loewenstein & Lerner, *supra* note 6, at 627–28; George Loewenstein, *Out of Control: Visceral Influences on Behavior*, 65 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 272, 272 (1996).

157. *See* Daniel T. Gilbert et al., *The Future Is Now: Temporal Correction in Affective Forecasting*, 88 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 430, 430–31 (2002).

158. *See* Paul Slovic, *Trust, Emotion, Sex, Politics, and Science: Surveying the Risk-Assessment Battlefield*, 19 RISK ANALYSIS 689, 689 (1999).

159. *See* Susan T. Fiske, *What We Know About Bias and Intergroup Conflict, the Problem of the Century*, 11 CURRENT DIRECTIONS IN PSYCHOL. SCI. 123, 123 (2002) (reviewing research connecting fear and anxiety to automatic prejudice against particular groups).

160. *See* Blumenthal, *supra* note 74, 25–27.

161. *See* Eric A. Posner, *Law and the Emotions*, 89 GEO. L. J. 1977, 2011 (2001).

162. *See* Norbert Schwarz & Herbert Bless, *Happy and Mindless, But Sad and Smart? The Impact of Affective States on Analytic Reasoning*, in EMOTION AND SOCIAL JUDGMENTS

the prioritization of short-term benefit over long-term gain,<sup>163</sup> and create bias in certain decision-making contexts.<sup>164</sup>

Yet these critiques do not tell the whole story. This part uses recent developments in the social and natural sciences to argue that emotion—derided by the dominant view for its potential to destabilize commitments—also serves as a vital stabilizing force, enabling constitutional commitments to survive and thrive over time and across generations.

Specifically, emotions (1) help turn abstract commitments into individual *habits* and monitor people's adherence to those commitments through *enthusiasm* and *anxiety*, (2) operate as a *stabilizing force* for individual behavior and political preferences within a large and heterogeneous constitutional culture, and (3) are integral to *interpretation*—the process by which a society determines the precise meaning and terms of preexisting constitutional commitments.

#### A. *Habit, Enthusiasm, and Anxiety*

Habit provides the essential bridge between constitutional commitment and emotion, as effective commitments often embed themselves in habitual behavior. For example, if a professor wants to make a commitment that she will be on time for her 9:00 a.m. class, her chances of success will increase dramatically if she establishes a habitual morning routine that allows her to predict reliably the precise time she must leave her home to make it to class.

Constitutional systems work in a similar way. If one goal of a constitutional system is to maintain consistency over time, habitual behavior and customary practices are the best available mechanisms to sustain constitutional institutions.<sup>165</sup> For example, if

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55, 56 (Joseph P. Forgas ed., 1991); Neta C. Crawford, *The Passion of World Politics: Propositions on Emotion and Emotional Relationships*, 24 INT'L SECURITY 116, 141–42 (2000).

163. See Colin Camerer et al., *Neuroeconomics: How Neuroscience Can Inform Economics*, 43 J. ECON. LITERATURE 9, 40–41 (2005).

164. This bias is created particularly when emotions are strongly held. See Martha C. Nussbaum, "Secret Sewers of Vice": *Disgust, Bodies, and the Law*, in THE PASSIONS OF LAW, *supra* note 119, at 19, 35–38; Rose McDermott, *The Feeling of Rationality: The Meaning of Neuroscientific Advances for Political Science*, 2 PERSP. ON POL. 691, 700–01 (2004).

165. See TOM R. TYLER, WHY PEOPLE OBEY THE LAW 102, 161, 163–64 (1990); Richard

widespread citizen participation in elections is essential to the continued survival of our constitutional system, voting should become habitual behavior. Similarly, if citizens who disagree with a given decision are called upon to comply with it nonetheless,<sup>166</sup> their willingness to do so is based, in no small part, on habits of compliance with the rule of law that legitimate the decision. In the end, individual and collective habits—including compliance with the rule of law—produce the consistency and predictability that are among the primary benefits of a written constitution.

Habit is also essential to getting around the thorny problem of constitutional consent. Because those who participated in drafting and ratifying the Constitution are long dead, the current incarnation of the American polity must reckon with a government “of the people” where none of “the people” ever formally consented to their current form of government.<sup>167</sup> Instead, their consent, as John Locke recognized long ago, is often tacit.<sup>168</sup> The practice of constitutional habits, rather than a conscious act of consent, provides contemporary democratic legitimacy for America’s constitutional order.

According to the dominant view, emotion undermines the commitment-facilitating function of constitutions by causing individuals to discard existing commitments in favor of immediate short-term considerations, like addicts who “fall off the wagon.”<sup>169</sup> Moreover, the unpredictable, subconscious, and intense nature of emotion facilitates inconsistent behavior.<sup>170</sup> In this light, emotion becomes a real and substantial threat to rule-of-law values and stability, which constitutional commitments and habits are designed to promote. Yet habit—the linchpin of consistency and commitment—requires emotion to help establish and maintain habitual behavior.

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H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795–96 (2005).

166. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 867 (1992) (explaining how the Constitution calls on people to accept a “common mandate” under the Constitution).

167. See RUBENFELD, *supra* note 32, at 81. For an early articulation of this problem, see David Hume, *Of the Original Contract*, in 1 ESSAYS, MORAL, POLITICAL, AND LITERARY 443, 447 (T.H. Green & T.H. Grose eds., 1875).

168. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT 365–66 (Peter Laslett ed., 1967).

169. See *supra* note 153 and accompanying text.

170. See *supra* notes 157–64 and accompanying text.

Most significantly, emotion-processing regions of the brain play a significant role in facilitating learned habitual behavior and the accompanying consistency and stability.<sup>171</sup> A recent neuroimaging study suggests a strong connection between emotional regions of the brain and habitual, addictive behavior, like smoking.<sup>172</sup> Researchers studying patients with damage to the insula—a region of the brain thought to trigger conscious bodily responses to anticipated emotional events (e.g., initiating the conscious urge to smoke by anticipating the pleasure of a cigarette)—discovered a strong relationship between the localized nature of the damage and the ability to quit smoking.<sup>173</sup> As one of the researchers noted, “[T]he fact that insular damage breaks down a learned habit such as smoking, demonstrates a powerful link between habit and emotion or feeling.”<sup>174</sup> This is not to claim that nicotine addiction is individually or socially beneficial. But, as a fairly extreme form of commitment, it underscores the connection between emotion and habit and the ways in which people’s emotional infrastructure facilitates the sort of consistency and stability that enable commitments to thrive.

The intersection between habit and emotion also helps individuals monitor their adherence to prior commitments. Political scientist George Marcus underscores the critical role of two emotional subsystems—one dominated by enthusiasm and the other by anxiety and fear—that govern individual political behavior.<sup>175</sup> As he puts it, “Affective attachments and affective control systems anchor enduring patterns of behavior” by rewarding behavior that is consistent with previously established goals and by monitoring the environment for departures from the norm.<sup>176</sup>

The first system, dominated by enthusiasm, monitors individuals’ progress toward particular goals and triggers positive emotional responses (i.e., enthusiasm) when progress is made toward those goals.<sup>177</sup> This, in turn, assists in the creation of habitual

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171. MARCUS, *supra* note 13, at 82–83.

172. Nasir H. Naqvi et al., *Damage to the Insula Disrupts Addiction to Cigarette Smoking*, 315 SCI. 531 (2007).

173. *Id.* at 533.

174. Carl Marziali, *Smokers Quit After Brain Region Damage*, USC NEWS, <http://www.usc.edu/uscnews/stories/13312.html> (quoting Hanna Damasio).

175. MARCUS ET AL., *supra* note 68, at 65.

176. Marcus, *Emotions and Politics*, *supra* note 6, at 223–24.

177. MARCUS, *supra* note 13, at 81.

behavior. Through trial and error, emotions provide signals about which actions work best to achieve an objective and create automatic dispositions to behave in ways that help achieve individual and collective goals.<sup>178</sup>

Political advertising has long recognized this dynamic, using enthusiasm as an anchoring force for consistency and commitment. For example, individuals who watch campaign advertisements containing enthusiasm cues will more likely have their prior views about a candidate reinforced.<sup>179</sup> Enthusiasm “reinforce[s] existing preferences and discourage[s] change”<sup>180</sup> and, in turn, functions as a stabilizing force in public opinion.<sup>181</sup>

The second system, dominated by anxiety, triggers emotional responses when something departs from the norm and helps individuals monitor their external environments.<sup>182</sup> This surveillance system is tied to threat and serves as an alert mechanism to focus attention to forces that are unusual or destabilizing.<sup>183</sup> This enables individuals to immediately and efficiently channel their resources toward threats to stability and consistency. Hence, through anxiety and fear, people can detect and focus on “normative deviations” from the status quo that represent potential threats to their previously held commitments.<sup>184</sup> They can then take appropriate action to maintain their commitments and habits.

### B. *Emotions as a Stabilizing Force*

Commitments facilitate consistency and predictability. In the dualistic battle between reason and emotion, reason has always been seen as having consistency on its side and, with it, a mode of decision making that advances rule-of-law values.<sup>185</sup> A growing body of research, however, suggests that emotion is a critical

178. *Id.* at 81–82.

179. BRADER, *supra* note 13, at 114–18.

180. *Id.* at 118.

181. *Id.* at 119.

182. Elizabeth Theiss-Morse et al., *Passion and Reason in Political Life: The Organization of Affect and Cognition and Political Tolerance*, in RECONSIDERING THE DEMOCRATIC PUBLIC 248, 254, 266 (George E. Marcus & Russell C. Hanson eds., 1993).

183. George E. Marcus et al., *Linking Neuroscience to Political Intolerance and Political Judgment*, 17 POL. & LIFE SCI. 165, 168–69 (1998).

184. *Id.*

185. *See supra* notes 88–91 and accompanying text.

force in stabilizing decisions and preferences over time and may play a much larger role in establishing consistency within a constitutional regime than previously believed.<sup>186</sup>

First and foremost, emotions enforce behavioral norms in an environment where constant monitoring of individual behavior is neither realistic nor desirable. When external threats of punishment or reward are absent, emotions like embarrassment, pride, and vanity ensure individual and collective behavioral conformance with established legal and cultural norms.<sup>187</sup> Shame and guilt impose psychological costs on individual departures from collective commitments, whether or not someone else enforces the commitment.<sup>188</sup>

Moreover, affective forces help stabilize people's evaluations of the world around them. The systems of social relationship—like families or nations—that enable stable, transgenerational commitments to survive are held together by emotional bonds based in love and pride.<sup>189</sup> These social relationships, particularly families, are critical to the development of civic awareness and political engagement.<sup>190</sup>

Indeed, much of Americans' political behavior is grounded in emotions and habits<sup>191</sup> that help citizens form and maintain stable partisan affiliations,<sup>192</sup> shape our attitudes toward candidates,<sup>193</sup> dictate attitudes toward civil liberties,<sup>194</sup> and motivate our desire to defend the status quo.<sup>195</sup> For example, in a recent study, strongly partisan citizens who had an emotional stake in the outcome of the 2004 presidential election were confronted

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186. See, e.g., Theiss-Morse et al., *supra* note 182, at 266.

187. See Susan Shott, *Emotion and Social Life: A Symbolic Interactionist Analysis*, 84 AM. J. SOC. 1317, 1323–24 (1979).

188. FRANK, *supra* note 15, at 53.

189. See HAIDT, *supra* note 10, at 48–49.

190. Hugh McIntosh et al., *The Influence of Family Political Discussion on Youth Civic Development: Which Parent Qualities Matter?*, 40 POL. SCI. & POL. 495, 495 (2007).

191. Kinder, *supra* note 6, at 279; MARCUS, *supra* note 13, at 84.

192. See John T. Jost et al., *Political Conservatism as Motivated Social Cognition*, 129 PSYCHOL. BULL. 339, 340 (2003).

193. Robert P. Abelson et al., *Affective and Semantic Components in Political Person Perception*, 42 J. PERSONALITY & SOC. PSYCHOL. 619, 619 (1982).

194. GEORGE E. MARCUS ET AL., WITH MALICE TOWARD SOME: HOW PEOPLE MAKE CIVIL LIBERTIES JUDGMENTS (1995).

195. See John T. Jost & Orsolya Hunyady, *Antecedents and Consequences of System-Justifying Ideologies*, 14 CURRENT DIRECTIONS IN PSYCHOL. SCI. 260, 261–62 (2005).



with information about their preferred candidate that would lead to an emotionally negative conclusion about the candidate.<sup>196</sup> Rather than adopting the negative conclusion, most study participants adopted an alternative conclusion that minimized the impact of the emotionally threatening information and favored their preferred candidate.<sup>197</sup> During this reasoning process, researchers performed brain scans on the participants and observed increased activity in brain regions involved in emotion processing.<sup>198</sup> They concluded that neural information processing occurs differently when individuals have a “strong emotional stake” in the outcome of the election and that regions of the brain involved in “implicit [emotion] regulation” help maintain partisan attitudes in the face of potentially unfavorable information.<sup>199</sup>

Emotions also stabilize preferences within a heterogeneous group. In one recent set of studies by Michael Tuan Pham, individuals were split into two groups and asked to evaluate a range of stimuli.<sup>200</sup> One group was asked to pay attention to their feelings about the stimuli and to disregard any reason-based assessments.<sup>201</sup> The other group was asked to make their evaluations purely on reason-based assessments.<sup>202</sup> The studies concluded that judgments made by the feelings group showed greater consistency across individuals than judgments made by the reason group.<sup>203</sup>

In addition, affective forces play a role in creating consistent and stable preferences within individuals. One recent study defined stable preferences through transitivity, meaning that for a set of objects—A, B, and C—if A is preferred over B and B is preferred over C, then A will be preferred over C.<sup>204</sup> Participants

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196. Drew Westen et al., *Neural Bases of Motivated Reasoning: An fMRI Study of Emotional Constraints on Partisan Political Judgment in the 2004 U.S. Presidential Election*, 18 J. COGNITIVE NEUROSCI. 1947, 1948 (2006).

197. *Id.* at 1955.

198. *Id.*

199. *Id.*

200. Michel Tuan Pham et al., *Affect Monitoring and the Primacy of Feelings in Judgment*, 28 J. CONSUMER RES. 167, 171, 176, 178, 182 (2001).

201. *Id.* at 171.

202. *Id.*

203. *Id.* at 184.

204. Leonard Lee et al., *In Search of Homo Economicus: Preference Consistency, Emotions, and Cognition* 9 (2006), available at <http://ssrn.com/abstract=925978> (click “Download” hyperlink; then click “SSRN to open” hyperlink).

were asked to engage in a set of preference identification tasks under two different sets of conditions.<sup>205</sup> One group was placed under a set of conditions that emphasized emotional processing in preference identification;<sup>206</sup> the other group operated under conditions that allowed for greater cognitive input.<sup>207</sup> The studies confirmed a higher level of transitivity among the affect-based group, concluding that “emotional processes can also contribute to greater preference stability and consistency *within* individuals.”<sup>208</sup>

Moreover, emotion is not always the unpredictable, unruly force that the dominant view calls to mind, regardless of its visceral impact, often automatic nature, and potentially subconscious roots. Instead, internal and external forces stabilize affective expression and constrain emotional response, rendering emotions far more predictable and stable than the dominant view would allow.

Emotions are held in check, over time, by internal systems of regulation that disfavor emotional extremes.<sup>209</sup> Hence, people over-predict the strength and duration of an emotional response to an event, due in part to their failure to recognize their internal ability to regulate their emotions in ways similar to body temperature.<sup>210</sup> Conscious behavioral and cognitive actions—distraction, venting, suppression, exercise, and cognitive reframing—also help stabilize the type and strength of an emotional response within particular parameters.<sup>211</sup>

Externally, culture plays a major role in constructing—and therefore constraining—emotional response.<sup>212</sup> From the world,

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205. See *id.* at 13, 17.

206. *Id.* at 13.

207. *Id.* at 17.

208. *Id.* at 25.

209. See Daniel T. Gilbert et al., *Immune Neglect: A Source of Durability Bias in Affective Forecasting*, 75 PERSONALITY & SOC. PSYCHOL. 617, 618 (1998) (describing how pessimism acts as a defense mechanism curtailing happiness when a perceived negative event turns out not to be very bad).

210. *Id.* at 617.

211. See Randy J. Larsen & Zrjesdana Prizmic, *Affect Regulation*, in HANDBOOK OF SELF-REGULATION: RESEARCH, THEORY, AND APPLICATIONS 40, 42–49 (Roy F. Baumeister & Kathleen D. Vohs eds., 2004). See generally James J. Gross, *The Emerging Field of Emotion Regulation: An Integrative Review*, 2 REV. GEN. PSYCHOL. 271 (1998).

212. Batja Mesquita, *Emotions as Dynamic Cultural Phenomena*, in HANDBOOK OF AFFECTIVE SCIENCES, *supra* note 6, at 871, 871.

people learn emotional responses to different stimuli, physical symptoms associated with a given emotional response, and to interpret others' emotions through a culturally defined lens.<sup>213</sup> They learn "proper" and "improper" emotional behaviors—and to interpret the propriety of different emotions—through emotional rules or scripts that create paradigmatic responses to particular stimuli.<sup>214</sup> These scripts are often transmitted and reinforced through popular culture and archetypal narratives. For example, *Romeo and Juliet*—a story that is retold, in one form or another, throughout American popular culture—tells people the way romantic love is supposed to feel.<sup>215</sup>

Not surprisingly, emotional responses to different stimuli vary across cultures.<sup>216</sup> Non-western cultures, for instance, care more about maintaining relationships and engaging with people than their American counterparts.<sup>217</sup> Americans are also more likely to feel anger in response to injustice than the Japanese.<sup>218</sup> Other studies have documented culturally specific manifestations of emotional behavior, including facial and vocal expression.<sup>219</sup>

Emotional scripts maintain their relevance even in the face of evidence that the scripts do not accurately describe emotional reality. For example, we express sadness at funerals even if we are downright hostile toward the decedent; we express joy at weddings even if we have doubts about the merits of the union; we express pride in our country by standing during the national anthem even when our collective actions provoke shame; we express disgust at certain sexual practices even when we engage in them.

While internal and external forces operate to stabilize emotions, conscious reasoning is far from perfect as a model for stability. Indeed, it can potentially destabilize perception and judgment. When individuals are asked to explain the reasons behind their attitudes, they are more likely to be dissatisfied with their

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213. Cheshire Calhoun, *Making up Emotional People: The Case of Romantic Love*, in *THE PASSIONS OF LAW*, *supra* note 119, at 217, 220.

214. *Id.* at 220; ARLIE RUSSELL HOCHSCHILD, *THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELING* 56, 58, 59, 74 (1983).

215. Calhoun, *supra* note 213, at 221.

216. Mesquita, *supra* note 212, at 871.

217. *See id.* at 876.

218. *Id.* at 875.

219. NICO H. FRIJDA, *THE EMOTIONS* 62, 68 (1986).

choice,<sup>220</sup> change their attitudes,<sup>221</sup> and display lower consistency between the attitude and subsequent behavior.<sup>222</sup> These dynamics are particularly relevant under conditions of limited knowledge about the attitude object.<sup>223</sup> Indeed, when the choice under consideration is particularly complex, conscious deliberative consideration can actually lead to objectively less optimal outcomes when compared with choices made with minimal deliberation.<sup>224</sup>

### C. *Emotions, Attitudes, and Interpretation*

The underlying meaning of constitutional commitments is often ambiguous. More than other legal commitment devices—statutes, regulations, bank notes, or commercial contracts—the Constitution’s vague language and age, as well as the absence of consensus about appropriate interpretive methodology, leaves open a wide range of plausible interpretations.

Given a text that is subject to multiple interpretations, how do individuals construct the precise meaning of constitutional commitments? How do individuals determine, for example, whether the word “liberty” in the Fourteenth Amendment’s Due Process Clause encompasses a woman’s decision to terminate a pregnancy?

The dominant view has long treated interpretation as a process dominated by reason. Under this view, rational inference, precedent, and logic provide the ideal model for constructing constitutional meaning.<sup>225</sup> This, in turn, facilitates the need for ex-

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220. Timothy D. Wilson et al., *Introspecting About Reasons Can Reduce Post-Choice Satisfaction*, 19 PERSONALITY & SOC. PSYCHOL. BULL. 331, 331 (1993).

221. Timothy D. Wilson et al., *Introspection, Attitude, Change, and Attitude-Behavior Consistency: The Disruptive Effects of Explaining Why We Feel the Way We Do*, in 22 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY, 287, 288–89 (Leonard Berkowitz, ed., 1989).

222. Timothy D. Wilson et al., *Effects of Analyzing Reasons on Attitude-Behavior Consistency*, 47 J. PERSONALITY & SOC. PSYCHOL. 5, 13 (1984).

223. See Timothy D. Wilson et al., *The Disruptive Effects of Explaining Attitudes: The Moderating Effect of Knowledge About the Attitude Object*, 25 J. EXPERIMENTAL SOC. PSYCHOL. 379, 396, 398 (1989).

224. See Ap Dijksterhuis et al., *On Making the Right Choice: The Deliberation-Without-Attention Effect*, 311 SCI. 1005, 1005, 1007 (2006); Timothy D. Wilson & Jonathan W. Schooler, *Thinking Too Much: Introspection Can Reduce the Quality of Preferences and Decisions*, 60 J. PERSONALITY & SOC. PSYCHOL. 181, 191 (1991).

225. See *supra* note 65 and accompanying text.

pert judgment in determining what the Constitution means. And for expertise in rational judgment, we turn to judges.

Regardless of whether emotion is seen as a constructive or destructive force, emotion is an inevitable, and often controlling, dynamic in the way that individuals interpret the Constitution. Rather than following a rational process of logical inference, their interpretive faculties are guided by emotion and intuition. Thus, to the extent that (1) constitutional meaning is constructed by a mix of judicial and non-judicial actors, or (2) judicial decision making mirrors the way lay people make decisions about constitutional meaning, emotion is an inevitable element in the way society determines the content and meaning of constitutional commitments.

### 1. Emotions and Constitutional Attitudes

In considering how individuals perceive constitutional commitments, there is one overriding reality: most individuals confront constitutional commitments with extremely limited information about the constitutional text,<sup>226</sup> political institutions like the Supreme Court,<sup>227</sup> or the issues themselves.<sup>228</sup> Moreover, in an environment where attention to politics is in short supply,<sup>229</sup> constitutionally significant issues like abortion, same-sex marriage, and flag burning are fairly low on the public's list of priorities.<sup>230</sup>

As a result, members of the public often have little incentive to seek out additional information about the issues that obsessively occupy constitutional scholars. Moreover, the emotionally charged nature of many issues may cause the public to avoid engaging in

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226. See MICHAEL X. DELLI CARPINI & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS 70–71 & tbl. 2.2 (1996); Michael C. Dorf, *Whose Constitution Is It Anyway? What Americans Don't Know About Our Constitution—and Why It Matters*, FINDLAW, May 21, 2002, <http://writ.news.findlaw.com/dorf/20020529.html>.

227. Doni Gewirtzman, *Glory Days: Popular Constitutionalism, Nostalgia, and the True Nature of Constitutional Culture*, 93 GEO. L.J. 897, 919–20 (2005).

228. See Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1308 tbl.1 (2004).

229. See Gewirtzman, *supra* note 227, at 917 (providing data suggesting a decline in political interest over the past 30 years).

230. See Frederic Schauer, *The Supreme Court, 2005 Term—Foreword: The Court's Agenda—and the Nation's*, 120 HARV. L. REV. 4, 24 (2006).

deliberation or debate about these issues out of a widespread distaste for public conflict and concern over violating social norms.<sup>231</sup>

Yet, even in a conflict-averse environment of limited interest, information, and engagement, individuals develop attitudes toward particular people, events, and political issues.<sup>232</sup> Attitudes are “the positive or negative judgment of an attitude object (i.e., the entity about which one bears an attitude).”<sup>233</sup> Attitudinal responses are divided into three different categories: affective, cognitive, and behavioral.<sup>234</sup> The affective component consists of the emotions and feelings triggered by the attitude object, the cognitive component corresponds to the “beliefs” elicited, and the behavioral component includes the actions or predispositions to act toward the attitude object.<sup>235</sup>

The notion that attitudes have affective and cognitive components finds reinforcement in dual-process theory.<sup>236</sup> The dual-process theory refers to models of human psychology that posit the existence of two simultaneous, and often interdependent, operating systems that help people define their relationship to the world around them and assist their brains in processing information.<sup>237</sup>

231. See Carolyn L. Funk, *Process Performance: Public Reaction to Legislative Policy Debate*, in *WHAT IS IT ABOUT GOVERNMENT THAT AMERICANS DISLIKE?* 193, 195, 198, 200–01 (John R. Hibbing & Elizabeth Theiss-Morse eds., 2001); JOHN R. HIBBING & ELIZABETH THEISS-MORSE, *STEALTH DEMOCRACY: AMERICANS BELIEFS ABOUT HOW GOVERNMENT SHOULD WORK* 134–35 (2002).

232. *But see* John Zaller & Stanley Feldman, *A Simple Theory of the Survey Responses: Answering Questions Versus Revealing Preferences*, 36 *AM. J. POL. SCI.* 579, 579 (1992) (stating that citizens do not possess specific attitudes, but “a mix of only partially consistent ideas and considerations”).

233. SUSAN T. FISKE, *SOCIAL BEINGS: CORE MOTIVES IN SOCIAL PSYCHOLOGY* 216 (2004).

234. Alice H. Eagly & Shelly Chaiken, *Attitude Structure and Function*, in 1 *THE HANDBOOK OF SOCIAL PSYCHOLOGY*, 269, 271 (Daniel T. Gilbert et al., eds. 4th ed. 1998); ALICE H. EAGLY & SHELLY CHAIKEN, *THE PSYCHOLOGY OF ATTITUDES* 14 (1993).

235. FISKE, *supra* note 233, at 216.

236. See Timothy D. Wilson et al., *A Model of Dual Attitudes*, 107 *PSYCHOL. REV.* 101, 102 (2000).

237. See Steven J. Breckler & Elizabeth C. Wiggins, *Affect Versus Evaluation in the Structure of Attitudes*, 25 *J. EXPERIMENTAL PSYCHOL.* 253, 269 (1989) (concluding that affect and evaluation form distinct components of individual attitudes); Sunstein, *supra* note 25, at 533. See generally *DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY* (Shelly Chaiken & Yaakov Trope eds., 1999).

The first system, referred to as the rational, cognitive, or cool system, operates in the realm of beliefs—a set of true-false inferences that involve associations between an object and another concept.<sup>238</sup> For example, upon confronting a chocolate sundae, individuals associate “sundae” with the concept of “has calories.”<sup>239</sup> This system operates primarily in the realm of conscious thought and is seen as “emotionally neutral, contemplative, . . . slow, episodic, and strategic.”<sup>240</sup>

The second system, referred to as associative emotional, experiential, or hot, operates in the realm of feelings—a set of messages that define whether individuals want to approach or avoid a particular object.<sup>241</sup> It is primarily intuitive, often unconscious, and focused on gut reactions.<sup>242</sup> This system operates to help evaluate both the direction of attitudes—the “how do I feel about it question,” or as social psychologists put it, valence—and the level of strength or intensity associated with a given attitude.<sup>243</sup>

While the brain relies on these two parallel systems to process information, the two systems do not necessarily operate on the same timeline. The brain is constructed in ways that give emotional reactions an advantage over cognitive processing, a probable effect of the emotional system’s evolutionary function of enabling quick and efficient fight-or-flight decision making.<sup>244</sup> As Joseph LeDoux notes, information transmitted through neural pathways that control intuitive response arrives faster than information processed through cognitive pathways.<sup>245</sup> This intuitive reaction, in turn, affects the way people receive information through the slower cognitive system.<sup>246</sup> As a result, people often

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238. Lee et al., *supra* note 204, at 4.

239. See Roger Giner-Sorolla, *Affect in Attitude*, in *DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY*, *supra* note 237, at 441, 443.

240. Janet Metcalfe & Walter Mischel, *A Hot/Cool-System of Delay of Gratification: Dynamics of Willpower*, 106 *PSYCHOL. REV.* 3, 3 (1999).

241. Lee et al., *supra* note 204, at 4.

242. See Seymour Epstein et al., *Individual Differences in Intuitive-Experiential and Analytical-Rational Thinking Styles*, 71 *J. PERSONALITY & SOC. PSYCHOL.* 390, 391 (1996).

243. See Michel Tuan Pham, *The Logic of Feeling*, 14 *J. CONSUMER PSYCHOL.* 360, 362 (2004).

244. Antoine Bechara et al., *Deciding Advantageously Before Knowing the Advantageous Strategy*, 275 *SCI.* 1293, 1294 (1997).

245. See LEDOUX, *supra* note 11, at 163.

246. BRADER, *supra* note 13, at 56; Joseph E. LeDoux & Elizabeth A. Phelps, *Emotional Networks in the Brain*, in *HANDBOOK OF EMOTIONS* 159, 161 (Michael Lewis et al. eds., 3d ed. 2008).

react before they have time to think, and their thoughts are colored by their affective reactions to particular stimuli, including political issues and leaders.<sup>247</sup>

Not surprisingly, “affective processes predominate” in the formation of individual attitudes, particularly when compared with cognition.<sup>248</sup> For example, the affective reactions people have to political candidates or particular social policies more strongly predict how they ultimately evaluate those candidates and policies than their cognitive reactions.<sup>249</sup> In a comprehensive survey of the literature, Jack Glaser and Peter Salovey conclude that “[a]ffective reactions play a major, if not the dominant role in candidate selection.”<sup>250</sup>

Feelings function as an important source of information in evaluating an attitude object. As a result, citizens will often consult their emotional reactions toward a particular candidate when assessing the candidate’s overall desirability as a potential leader. In a landmark 1982 study, the results of which have been consistently upheld in the years since, Robert Abelson and his colleagues concluded that the emotions voters have toward particular candidates, like happiness or anger, better predict actual voting behavior than opinions about the candidates’ honesty or competence.<sup>251</sup> For these reasons, psychologist and political consultant Drew Westen attributes much of the Democratic Party’s pre-Obama political difficulties to a systemic “undervaluation of emotion,” and urges candidates to adopt a renewed strategic focus on “clear, emotionally compelling appeals.”<sup>252</sup>

247. See Milton Lodge & Charles S. Taber, *The Automaticity of Affect for Political Leaders, Groups, and Issues: An Experimental Test of the Hot Cognition Hypothesis*, 26 POL. PSYCHOL. 455, 455 (2005).

248. FISKE, *supra* note 233, at 225; see also Linda A. Jackson et al., *Cognition, Affect, and Behavior in the Prediction of Group Attitudes*, 22 PERSONALITY & SOC. PSYCHOL. BULL. 306, 313–14 (1996); Howard Lavine et al., *On the Primacy of Affect in the Determination of Attitudes and Behavior: The Moderating Role of Affective-Cognitive Ambivalence*, 34 J. OF EXPERIMENTAL SOC. PSYCHOL. 398, 398 (1998) (finding that affect exerted a stronger influence on political attitudes in situations where the affective and cognitive components of attitude conflict).

249. Eagly & Chaiken, *supra* note 234, at 278; see Kinder, *supra* note 6, at 307.

250. Jack Glaser & Peter Salovey, *Affect in Electoral Politics*, 2 PERSONALITY & SOC. PSYCHOL. REV. 156, 159 (1998).

251. Abelson et al., *supra* note 193, at 626; see WESTEN, *supra* note 13, at 118–19 (stating that the results of the Abelson study have held up in the twenty-five years since).

252. WESTEN, *supra* note 13, at 43–44.



Emotion's influence is particularly strong in situations where individuals have limited information upon which to form beliefs<sup>253</sup> or allocate limited attention to the choice at hand.<sup>254</sup> This makes the emotions triggered by a given object more like to shape individual attitudes toward that object. In other words, while people may not know or have enough information to determine what they think about a given issue, almost everyone has a feeling about it.<sup>255</sup>

But emotion's interpretive influence may not be limited to the ignorant or apathetic. In a recent study, political scientist Ted Brader challenged the conventional wisdom that only less sophisticated citizens are driven by emotion. Brader conducted an experiment that exposed citizens with varying levels of political knowledge to political advertisements designed to trigger enthusiasm or fear in the viewer.<sup>256</sup> He concluded, on balance, that politically sophisticated citizens who saw politics as relevant were *more* responsive to, and influenced by, emotional cues.<sup>257</sup> Hence, even politically knowledgeable citizens who show relatively high interest in politics are subject to emotion's influence over their attitudes.

As with attitudes toward political candidates, emotion plays a critical role in attitude development for a range of constitutionally salient issues.<sup>258</sup> In a 1998 study, Geoffrey Haddock and Mark Zanna sought to explore the underlying structure of attitudes to-

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253. See Norbert Schwarz & Gerald L. Clore, *Feelings and Phenomenal Experiences*, in *SOCIAL PSYCHOLOGY: HANDBOOK OF BASIC PRINCIPLES* (Arie W. Kruglanski & E. Tory Higgins eds., 2007); Wendy M. Rahn, *Affect as Information: The Role of Public Mood in Political Reasoning*, in *ELEMENTS OF REASON: COGNITION, CHOICE, AND THE BOUNDS OF RATIONALITY* 130, 130-31, 150 (Arthur Lupia et al., eds., 2000) (discussing study showing that "public mood" has a greater impact on opinions among individuals with low political information); Kari Edwards, *The Interplay of Affect and Cognition in Attitude Formation and Change*, 59 *J. PERSONALITY & SOC. PSYCHOL.* 202, 202 (1990) ("[A]ffective cues are particularly potent determinants of attitude change when the ability or motivation to process issue-relevant information is low."); see also Eric J. Johnson & Amos Tversky, *Affect, Generalization, and the Perception of Risk*, 45 *J. PERSONALITY & SOC. PSYCHOL.* 20, 20, 30 (1983).

254. Baba Shiv & Alexander Fedorikhin, *Heart and Mind in Conflict: The Interplay of Affect and Cognition in Consumer Decision Making*, 26 *J. CONSUMER RES.* 278, 288 (1999) (presenting findings showing that when information processing resources are limited, consumer choice is more likely influenced by affective reactions than cognitions).

255. See Kinder, *supra* note 6, at 295.

256. BRADER, *supra* note 13, at 99.

257. *Id.*

258. See Alice H. Eagly et al., *Cognitive and Affective Bases of Attitudes Toward Social Groups and Social Policies*, 30 *J. EXPERIMENTAL SOC. PSYCHOL.* 113, 133 (1994) (offering a "general endorsement of the position that affect can underlie attitudes").

ward the death penalty, with specific attention to the roles that affect and cognition play in predicting attitudes.<sup>259</sup> They concluded that emotional responses were “predictive of attitudes,” and that affect plays a critical role in attitude formation around the death penalty.<sup>260</sup> This conclusion echoes other research suggesting that emotional reactions were better predictors of individual attitudes about sexual morality than rational assessments about the harmfulness of the conduct.<sup>261</sup> Moreover, emotional responses play a significant role in predicting attitudes toward abortion,<sup>262</sup> affirmative action,<sup>263</sup> different social groups,<sup>264</sup> the Clinton impeachment,<sup>265</sup> the outcome of *Bush v. Gore*,<sup>266</sup> and the torture at Abu Ghraib prison.<sup>267</sup>

Hence, even under conditions of what Bruce Ackerman calls “normal politics”—periods of widespread detachment and disengagement<sup>268</sup>—there are still emotions and feelings that actively steer the course of constitutional culture.<sup>269</sup>

## 2. Emotions and Moral Judgment

As constitutional scholar Paul Brest once noted, the “most significant issues of public morality are, or once were, or eventually will be, *constitutional issues*.”<sup>270</sup> Indeed, in a society where limited government and equality remain core elements of constitu-

259. Geoffrey Haddock & Mark P. Zanna, *Assessing the Impact of Affective and Cognitive Information in Predicting Attitudes Toward Capital Punishment*, 22 L. & HUMAN BEHAV. 325, 326 (1998).

260. *Id.* at 337.

261. Jonathan Haidt & Matthew A. Hersh, *Sexual Morality: The Cultures and Emotions of Conservatives & Liberals*, 31 J. APPLIED SOC. PSYCHOL. 191, 214–15 (2001).

262. Haddock & Zanna, *supra* note 259, at 328.

263. *Id.*

264. Victoria M. Esses et al., *Values, Stereotypes, and Emotions as Determinants of Intergroup Attitudes*, in AFFECT, COGNITION, AND STEREOTYPING: INTERACTIVE PROCESSES IN GROUP PERCEPTION 137, 141 (Diane M. Mackie & David L. Hamilton eds., 1993); see also Jamie Chamberlin, *What's Behind Prejudice?*, 34 MONITOR ON PSYCHOL. 34, 34 (summarizing research on emotion and prejudice).

265. WESTEN, *supra* note 13, at 103, 107–08.

266. *Id.* at 103–04, 109–10.

267. *Id.* at 103, 110–11.

268. See 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 230–31 (1991).

269. Kinder, *supra* note 6, at 281.

270. Paul Brest, *Constitutional Citizenship*, 34 CLEV. ST. L. REV. 175, 178 (1986). *But see* RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 141 (1999) (arguing that moral philosophy is irrelevant to constitutional law).

tional and cultural identity<sup>271</sup> where religion remains a widespread presence in social life and public discourse, and where the constitutional text frames the relevant law at a high level of abstraction,<sup>272</sup> a moral element is likely to lurk, explicitly or latently, behind virtually every major constitutional dispute.<sup>273</sup> It is nearly impossible to discuss the issues at the heart of contemporary constitutional discourse—like abortion, homosexuality, the right to die, or affirmative action—without implicating moral judgment.<sup>274</sup>

Traditionally, emotion has been seen as destructive to these sorts of moral evaluations and decisions.<sup>275</sup> Those critical of emotion's role in moral decision making see emotion as partisan—it causes people to “play favorites”—and, therefore, detrimental to the impartial state from which ideal moral judgments should spring.<sup>276</sup> Others see emotion as arbitrary, arising from factors external to the situation that can flood consciousness and distort judgment.<sup>277</sup> Finally, some fear emotions automaticity—the intuitive characteristics that lie beyond the realm of voluntary control and defy the deliberate exercise of free will and conscious moral reasoning.<sup>278</sup>

For many years, academic psychologists echoed and reinforced these concerns in their study of moral judgment. Traditional models of moral development and reasoning focused entirely on cognition and conscious processes and dismissed the potential for emotion to contribute positively to the moral domain.<sup>279</sup> This school of thought draws its origins from Plato and Immanuel

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271. See Donald R. Kinder, *Opinion and Action in the Realm of Politics*, in 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 778, 809–11 (Daniel T. Gilbert et al. eds., 4th ed. 1998).

272. Brest, *supra* note 270, at 178–79.

273. See *id.*; see also RONALD DWORKIN, JUSTICE IN ROBES 56–57 (2006) (arguing constitutional interpretation “require[s] a very considerable ‘excursion’ into political morality”). For a more extensive descriptive and normative elaboration of this view, see generally RONALD DWORKIN, FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996).

274. See KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 6–8 (1984).

275. David Pizarro, *Nothing More than Feelings? The Role of Emotions in Moral Judgment*, 30 J. THEORY SOC. BEHAV. 355, 355 (2000).

276. *Id.* at 356.

277. *Id.* at 357.

278. *Id.* at 357–58.

279. See *id.* at 356.

Kant,<sup>280</sup> but found its most recent and influential incarnation from Lawrence Kohlberg, a leader in the “cognitive revolution” that overtook psychology in the 1960s.<sup>281</sup>

This rationalist perspective views moral judgment as primarily cognitive in nature. Decisions about morality or ethics involve conscious thinking, can be evaluated from a true-false perspective, and move toward a set of answers that are universal and known.<sup>282</sup> People develop moral competence over time and in stages of cognitive development beginning in childhood.<sup>283</sup> It occurs as individuals cultivate a particular set of aptitudes that assist with moral reasoning<sup>284</sup>—like putting one’s self in another person’s shoes”—or by creating environmental circumstances that facilitate moral development.<sup>285</sup> At their highest stage of moral development, individuals can make morally sound decisions that replicate rule-of-law values through invoking “self-chosen ethical principles appealing to logical comprehensiveness, universality, and consistency.”<sup>286</sup>

Today, emotion’s role in moral judgment is undergoing a dramatic rehabilitation. Emotion is increasingly seen as an essential and unavoidable component of moral assessment. More importantly, its presence can, and often does, constructively facilitate the resolution of issues with a moral component.<sup>287</sup> The notion that emotion is indispensable to moral judgment finds support in at least two areas of research: (1) social psychology research on the integration of affective and intuitive forces in moral judgment and (2) neuroscience research isolating portions of the brain associated with emotion processing that are active during moral judgment tasks. First, Kohlberg’s rationalist perspective on moral reasoning has come under significant fire from Virginia psychologist Jonathan Haidt, who offers an alternative perspective on

280. *Id.*

281. Richard A. Shweder & Jonathan Haidt, *The Future of Moral Psychology: Truth, Intuition, and the Pluralist Way*, 4 *PSYCHOL. SCI.* 360, 360 (1993).

282. Haidt, *supra* note 134, at 818.

283. *Id.* at 816.

284. *Id.*

285. *See id.*

286. Brest, *supra* note 270, at 176 (quoting LAWRENCE KOHLBERG, *THE PHILOSOPHY OF MORAL DEVELOPMENT: MORAL STAGES AND THE IDEA OF JUSTICE* 19 (1981)).

287. *See* Brennan, *supra* note 117, at 3 (exposing this view in the context of constitutional interpretation).

moral judgment: social intuitionism.<sup>288</sup> According to Haidt, moral judgments are made at a sub-conscious level and take the form of gut reactions rather than conscious, deliberative reasoning.<sup>289</sup> These intuitions occur “quickly, effortlessly, and automatically”<sup>290</sup> and contain a normative judgment about whether the conduct or object under evaluation is good or bad.<sup>291</sup> To support his theory, Haidt conducted a set of experiments where he presented participants with different scenarios involving sexual morality.<sup>292</sup> The studies concluded that participants’ emotional reactions to the scenarios better predicted their moral attitudes than did a more conscious, cognitive assessment about whether the conduct was actually harmful to anyone.<sup>293</sup>

Conscious, deliberative reasoning plays a role in this model primarily, though not exclusively, to provide a post-hoc rationalization of an intuitive judgment: the emotional dog wagging its rational tail.<sup>294</sup> While Haidt recognizes the potential for sheer logic or private reflection to overcome intuitive judgment, he argues that this rarely happens in practice.<sup>295</sup> Instead, individuals are far more receptive to social persuasion—group moral norms that emerge from friends and others in social interactions where other people exert a moral judgment but do not provide any reasoned persuasion or articulated rationale.<sup>296</sup>

There is also evidence of a relationship between certain emotional capacities, like an ability to discriminate between different feelings or regulate emotions, and the resolution of moral dilemmas. In one study, individuals were presented with the “Asian disease problem,” a decision-making scenario involving a choice between a certain outcome or an outcome that involves risk.<sup>297</sup>

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288. See Haidt, *supra* note 134, at 814.

289. See *id.* at 819–20. For an argument that moral intuitions have an evolutionary basis, see Paul H. Robinson et al., *The Origins of Shared Intuitions of Justice*, 60 VAND. L. REV. 1633, 1639–54 (2007).

290. Haidt, *supra* note 136, at 818.

291. *Id.* at 819–20.

292. Haidt & Hersh, *supra* note 261, at 193.

293. *Id.* at 214; see also Jonathan Haidt et al., *Affect, Culture and Morality, or Is It Wrong To Eat Your Dog?*, 65 J. PERSONALITY & SOC. PSYCHOL. 613, 626 (1993) (concluding that the role of affect in moral judgment may be variable across cultures).

294. Haidt, *supra* note 134, at 822–23.

295. Jonathan Haidt, *The Emotional Dog Does Learn New Tricks: A Reply to Pizarro and Bloom*, 110 PSYCHOL. REV. 197, 197 (2003).

296. Haidt, *supra* note 134, at 828–29.

297. See Pablo Fernandez-Berrocá & Natalio Extremera, *About Emotional Intelligence*

The study concluded that individuals with a higher self-reported ability to regulate emotions were more likely to select the risk-seeking option.<sup>298</sup> A similar study showed a relationship between the ability to identify different emotions or moods and the choices made when presented with a moral dilemma involving the decision to divorce.<sup>299</sup> Both studies suggest that moral decision making is sensitive to emotional dynamics and that different emotional capacities influence moral outcomes.<sup>300</sup>

Second, there is increasing neurobiological evidence that “emotion is a significant driving force in moral judgment.”<sup>301</sup> Neuroscientists have become fairly adept at identifying the regions of the brain involved in certain types of decision making.<sup>302</sup> They have found significant evidence of increased activity in brain regions associated with emotion when individuals are confronted with certain types of moral judgments.<sup>303</sup>

In a recent neurobiology study using fMRI data, Joshua Greene and his colleagues measured brain activity in individuals presented with moral and non-moral dilemmas.<sup>304</sup> They concluded that differences in a person’s level of emotional engagement impacted moral judgment.<sup>305</sup> To support their findings, the experiments concluded that there was a relationship between the choices made and neural activity located in emotional centers of the brain.<sup>306</sup>

Moreover, in another study, patients with damage to the ventromedial prefrontal cortex (“VMPC”), a brain region necessary to generate emotions, more likely adopted a utilitarian approach to moral judgment.<sup>307</sup> The authors of the study attributed this shift

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*and Moral Decisions*, 28 BEHAV. & BRAIN SCI. 548, 548 (2005).

298. *Id.*

299. *Id.*

300. *Id.* at 548–49; *see also* Blumenthal, *supra* note 74, at 7–8 (concluding that people superficially process information when they are in a good mood).

301. Joshua Greene & Jonathan Haidt, *How (and Where) Does Moral Judgment Work?*, 6 TRENDS COGNITIVE SCI. 517, 522 (2002).

302. Robinson et al., *supra* note 289, at 1660.

303. *Id.*

304. *See* Joshua D. Greene et al., *An fMRI Investigation of Emotional Engagement in Moral Judgment*, 293 SCI. 2105, 2105 (2001).

305. *Id.* at 2107.

306. *Id.*

307. Michael Koenigs et al., *Damage to the Prefrontal Cortex Increases Utilitarian Moral Judgments*, 446 NATURE 908, 908, 910 (2007).

in perspective to the diminished role of “social emotions,” like compassion, shame, and guilt, in patients with VMPC damage.<sup>308</sup> Both studies provide support for a neurobiological connection between emotion and moral judgment.<sup>309</sup>

#### D. *Dualism and the Link Between Emotion and Reason*

The dominant view rigidly separates emotion and reason and places the two forces in tension with one another.<sup>310</sup> Indeed, one of reason’s primary benefits is its ability to allow individuals to discard emotional forces from the decision-making calculus altogether. This dualism informs the American cultural model for judicial behavior, which seeks to minimize emotion’s influence and delegitimizes its role in constitutional interpretation.<sup>311</sup>

To the extent that society views reason as a desirable element in the interpretive process, evidence increasingly shows that emotion is essential to the successful exercise of reason. This evidence calls into question the dominant view’s dualistic model, which separates reason from emotion and views emotion as a threat to the exercise of our rational faculties.

From the vantage point of neuroscience, reason and emotion can and do coexist, minimizing concerns over emotion’s ability to displace reason. As neuroscientists began to delve deeper into the relationship between brain activity and affective-cognitive response,<sup>312</sup> they revealed a human decision-making process in which emotion and reason are deeply interrelated, with “certain aspects of the process of emotion and feeling” considered “indispensable for rationality.”<sup>313</sup>

Antonio Damasio’s studies of brain-injured patients have been extremely influential in this area. Damasio’s work focused on in-

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308. *Id.*

309. Robinson et al., *supra* note 289, at 1659–60.

310. See Sheila T. Murphy & R.B. Zajonc, *Affect, Cognition, and Awareness: Affective Priming with Optimal and Suboptimal Stimulus Exposures*, 64 J. PERSONALITY & SOC. PSYCHOL. 723, 736 (1993).

311. See *supra* notes 64–72 and accompanying text.

312. DAMASIO, *supra* note 11, at xiv; see Jeremy A. Blumenthal, *Emotional Paternalism*, 35 FL. ST. U. L. REV. 1, 18 (2007).

313. DAMASIO, *supra* note 11, at xiii. The precise extent of the interrelationship and causal relationship between the two spheres is a matter of great dispute and active inquiry. See Blumenthal, *supra* note 311, at 18–24.

dividuals with injuries to portions of their brain that process emotion.<sup>314</sup> Predictably, these patients experienced a lack of affect and emotional reaction.<sup>315</sup> The patients' reasoning and logical abilities remained perfectly intact, and they performed normally on intelligence tests.<sup>316</sup> Nonetheless, the patients experienced severe impairments in their ability to make basic decisions, categorize, or engage in long-term planning.<sup>317</sup>

Individuals rely on subjective affective responses to prioritize among, or direct their attention to, particular attributes of competing stimuli,<sup>318</sup> provide valuable information,<sup>319</sup> and integrate that information into attitude formation, judgment, and decision making.<sup>320</sup> Indeed, an individual's feelings deeply impact the process by which that person will assess risk,<sup>321</sup> determine causality,<sup>322</sup> and assign value to outcomes,<sup>323</sup> all components of traditional rational analysis. Reason, in turn, often operates to control emotional reaction. Efforts to reframe a problem, intellectualize an emotionally volatile situation, or reappraise emotionally disturbing phenomena are all cognition-driven efforts to alter, minimize, or regulate emotional response.<sup>324</sup> All of this suggests that "emotion is part of rationality itself, and that the two are intimately intertwined and interconnected processes."<sup>325</sup>

314. DAMASIO, *supra* note 11, at 32–34.

315. *Id.* at 34.

316. *See id.* at 32–37.

317. *See id.* at 36–37.

318. *See* Maroney, *supra* note 7, at 1404–05.

319. *See* Norbert Schwarz & Gerald L. Clore, *Mood, Misattribution, and Judgments of Well-Being: Informative and Directive Functions of Affective States*, 45 J. PERSONALITY & SOC. PSYCHOL. 513, 520 (1983) (showing that individuals use "momentary moods to make judgments about their general happiness and life satisfaction").

320. Schwarz & Clore, *supra* note 253, at 434; *see* Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U.L. REV. 1049, 1063 (2006).

321. Jennifer S. Lerner & Dacher Keltner, *Fear, Anger, and Risk*, 81 J. PERSONALITY & SOC. PSYCHOL. 146, 147 (2001); Slovic, *supra* note 158, at 694.

322. *See* Pham et al., *supra* note 200, at 168.

323. Christopher K. Hsee & Yuval Rottenstreich, *Music, Pandas, and Muggers: On the Affective Psychology of Value*, 133 J. EXPERIMENTAL PSYCHOL. 23, 27 (2004); Samuel M. McClure et al., *Separate Neural Systems Value Immediate and Delayed Monetary Rewards*, 306 SCI. 503, 506 (2004) (suggesting that bias in favor of immediately available rewards is connected to activity in portions of the brain that process emotions).

324. *See* Gross, *supra* note 211, at 284–85.

325. McDermott, *supra* note 164, at 693; *see also* Loewenstein & Lerner, *supra* note 6, at 634 ("If expected emotions captured everything that people care about, then the absence of immediate emotional influences would not degrade decisions as much as it does.").



### E. *Emotion and Constitutional Commitment*

To sum up thus far, constitutional governance facilitates commitment over time, and with it, the substantial benefits associated with individual and collective consistency. Emotion, derided by the framers for its potential to destabilize, operates instead as a vital stabilizing force that enables prior commitments to survive and thrive. In particular, emotion facilitates habitual behavior, helps monitor adherence to commitments through enthusiasm and anxiety, and stabilizes individual behavior and political preferences within a large and heterogeneous constitutional culture. Further, emotion is a critical influence on the interpretation of existing constitutional commitments, as well as the exercise of reason and rationality.

## IV. IMAGINATION

As with commitment, emotion is indispensable to imagination.<sup>326</sup> In particular, emotion (1) identifies which commitments to revisit through the processes of attention, appraisal, and assessment; (2) facilitates a change in attitude towards prior commitments as a result of anxiety; and (3) enables social movements to initiate a process of commitment revision and renewal through action tendencies associated with particular emotions.

### A. *Attention, Appraisal, and Assessment*

Imagination encourages individuals to revisit and reconsider prior commitments in light of other commitments, changed circumstances, or new information. Despite its potential to distract, emotion enables individuals to focus on which commitments to revisit through three processes that are critical to human functioning: attention, appraisal, and assessment.<sup>327</sup>

First, emotion grabs and focuses attention.<sup>328</sup> In a political and social environment with multiple stimuli, it is impossible to focus on everything at once. Emotion helps focus cognitive faculties on

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326. For an early articulation of the connection between emotion and imagination, see DAVID HUME, *A TREATISE OF HUMAN NATURE* 220 (David Fate Norton & Mary J. Norton eds., 2000).

327. See Maroney, *supra* note 7, at 1404–06.

328. *Id.* at 1404.

areas of personal importance and public concern<sup>329</sup> and sends a warning signal to revisit prior choices.<sup>330</sup> As emotion theorist Ronald de Sousa points out, “No logic determines *salience*: what to notice, what to attend to, what to inquire about.”<sup>331</sup> It is an emotional reaction—often intuitive and lurking beneath consciousness<sup>332</sup>—that operates as a tractor beam for cognitive efforts and helps to “facilitate efficient judgment and decision making.”<sup>333</sup>

Moreover, emotion assists decision making by focusing attention on a limited range of potentially available alternatives. Damasio argues that the human brain attaches a “somatic marker” to certain potential outcomes, which often takes the form of a gut reaction to a particular choice.<sup>334</sup> These markers are often emotional in nature and assist individuals in making efficient choices by sending emotional signals that quickly constrain the range of available alternatives.<sup>335</sup> This, in turn, allows individuals to focus cognitive faculties on the limited range of options most closely related to the individuals’ overall goal(s).<sup>336</sup>

Emotion also focuses people’s attention on particular aspects of stimuli that initiate behavioral evolution and change. Empathy, for example, focuses people’s attention on the possibility of distress and can facilitate cooperative and helping behavior.<sup>337</sup> Enthusiasm increases attention to political campaigns and sets in motion the desire to get actively involved in the democratic process.<sup>338</sup>

329. Marc D. Lewis, *Bridging Emotion Theory and Neurobiology Through Dynamic Systems Modeling*, 28 BEHAV. & BRAIN SCI. 169, 171 (2005); George F. Loewenstein et al., *Risk as Feelings*, 127 PSYCH. BULL. 267, 268 (2001).

330. See D. Don Welch, *Ruling with the Heart: Emotion-Based Public Policy*, 6 S. CAL. INTERDISC. L.J. 55, 67 (1997).

331. RONALD DE SOUSA, THE RATIONALITY OF EMOTION 191 (1987).

332. LEDOUX, *supra* note 11, at 9 (discussing physiological triggers for fear that precede cognitive awareness); Jon Elster, *Rationality and the Emotions*, 106 ECON. J. 1386, 1393 (1996).

333. Melissa L. Finucane et al., *Judgment and Decision Making: The Dance of Affect and Reason*, in EMERGING PERSPECTIVES ON JUDGMENT AND DECISION RESEARCH 327, 347 (Sandra L. Schneider & James Shanteau eds., 2003).

334. DAMASIO, *supra* note 11, at 173.

335. *Id.*

336. See *id.* But see Wilson & Schooler, *supra* note 224, at 191 (arguing that thinking may actually draw attention to irrelevant information).

337. Pizarro, *supra* note 275, at 360.

338. BRADER, *supra* note 13, at 126; MARCUS, *supra* note 13, at 89–91; Nicholas A. Valentino et al., *Is a Worried Citizen a Good Citizen? Emotions, Political Information Seeking, and Learning via the Internet*, 29 POL. PSYCHOL. 247, 265–66 (2008).

Second, emotion is also critical to appraisal—the process by which meaning is assigned to an event based upon the event’s relationship to an individual’s overall goals and well-being.<sup>339</sup> When individuals decide to change an existing commitment, they must first appraise how other existing commitments, and how any potential new commitments, align with their personal and collective goals. Emotions convey information about the things an individual values;<sup>340</sup> sadness and anger, for example, are usually connected to something one cares about. As a result, the presence and strength of different emotions enable individuals to gauge the effectiveness of existing commitments and prioritize among competing commitments and values, a necessary task in virtually every constitutional conflict. People often look to their feelings to find out what they care about most and to provide information about whether a proposed commitment will satisfy or fail to satisfy a particular goal.<sup>341</sup>

Third, imagination demands that individuals assess the emotional outcomes produced by potential changes. Here too, emotion drives the process by which individuals envision and evaluate the future. Most importantly, people make choices based on how they think they will feel once a given decision is made. In the words of psychologist Daniel Gilbert, the brain allows individuals to “pre-feel events.”<sup>342</sup> People simulate future events in their imaginations and evaluate their emotional reactions to imagined futures. This process allows individuals to predict their future emotions with greater accuracy and to make choices to maximize future satisfaction.<sup>343</sup>

This “affective forecasting” process is, to some degree, flawed.<sup>344</sup> People unconsciously supply and omit relevant information in systematic and predictable ways that distort their predictive powers. In other words, they rely too much on their feel-

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339. Maroney, *supra* note 7, at 1405.

340. Gerald L. Clore et al., *Affective Causes and Consequences of Social Information Processing*, in 1 HANDBOOK OF SOCIAL COGNITION 323, 384–85 (Robert S. Wyer, Jr. & Thomas K. Srull eds., 2d ed. 1994); MARTHA C. NUSSBAUM, *UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS* 30 (2001).

341. Schwarz & Clore, *supra* note 253, at 437.

342. GILBERT, *supra* note 10, at 120.

343. *Id.*

344. Samuel R. Bagenstos & Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 VAND. L. REV. 745, 769–71 (2007); Jeremy A. Blumenthal, *Law and the Emotions: The Problem of Affective Forecasting*, 80 IND. L.J. 155, 162–63 (2005).

ings about the present in assessing their future feelings and fail to fully account for their emotional adaptability to changed circumstances.<sup>345</sup>

Despite these predictive errors, emotion, from a purely descriptive perspective, helps quantify the expected utility associated with particular options for change. When people imagine the future, they do not simply contemplate rational, bottom-line outcomes. Instead, they engage in a complex, predictive process that focuses on how their emotional state will change in response to different outcomes. Then, they make choices based upon that predictive assessment.

### B. *Anxiety and Attitude Change*

Emotion offers the potential for intransigence and self-involvement. Emotional states sometimes make it difficult for individuals to listen to alternative perspectives and obtain the benefits associated with reasoned deliberation and introspection.<sup>346</sup> As a result, people may not recognize situations where commitments might prove destructive to their long-term self-interest, or adapt to changing circumstances.<sup>347</sup> Significant empirical evidence supports the proposition that strongly held attitudes are difficult to change and often go hand-in-hand with strong emotions.<sup>348</sup>

From this vantage point, emotion may also facilitate attitudes within constitutional culture, like intolerance, that are seemingly immune to reasoned argument and destructive to the survival of heterogeneous democratic societies.<sup>349</sup> In particular, intolerance stems from perceptions that a particular group represents a

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345. GILBERT, *supra* note 10, at 224–28.

346. See Michael Ignatieff, *Getting Iraq Wrong: What the War Has Taught Me About Political Judgment*, N.Y. TIMES MAG., Aug. 5, 2007, 26, 29.

347. See *id.*

348. See Richard E. Petty et al., *Emotional Factors in Attitudes and Persuasion*, in HANDBOOK OF AFFECTIVE SCIENCES, at *supra* note 6, at 752, 754; Allan P.O. Williams, et al., MANAGING CHANGE SUCCESSFULLY: USING THEORY AND EXPERIENCE TO IMPLEMENT CHANGE 307 (2002).

349. Elizabeth A. Phelps et al., *Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation*, 12 J. COGNITIVE NEUROSCI. 729, 734 (2000) (finding that amygdala responses to black and white faces in white subjects reflect cultural evaluations of social groups influenced by individual experience).

threat to an individual or that individual's group.<sup>350</sup> These threat perceptions are often driven by emotions like anger and fear that can cause individuals to overestimate the actual threat or remain stubborn in the face of information about the actual nature of the threat.<sup>351</sup>

Yet this is only part of the story. While emotion may facilitate intransigence,<sup>352</sup> intolerance,<sup>353</sup> and self-involvement,<sup>354</sup> it is also critical to the process of attitude change. Emotion enables individuals to break from the limitations presented by consistency and habit when circumstances warrant. For example, political scientists commonly accept that most voters operate according to habitual patterns and without much information about a given candidate's policy positions.<sup>355</sup> Absent a reason to break from routine, voter behavior is best predicted by a set of partisan affiliations that form early in life, along with an assessment of the likeability of the candidate.<sup>356</sup> Thus, for the most part, reasoned, well-informed, independent assessments of a candidate's policy positions simply do not take place.

However, as political scientist George Marcus has shown, anxiety is critical in causing individuals to depart from prior habits and facilitating conscious deliberation.<sup>357</sup> Absent anxiety, individual political behavior is dominated by prior commitment and habit.<sup>358</sup> But when voters operate under conditions of anxiety, something strange happens—they become more attentive to the actual positions taken by candidates, actively seek out new information, and show a willingness to act based on the new information they obtain.<sup>359</sup> In short, they behave as rational actors and are willing to reassess the wisdom of prior commitments and habits, but only under conditions triggered by an emotional re-

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350. See Fiske, *supra* note 159, at 125, 127.

351. MARCUS ET AL., *supra* note 194, at 105–09; *id.* at 124.

352. See Ignatieff, *supra* note 346, at 29.

353. MARCUS ET AL., *supra* note 194, at 222.

354. See Leaf Van Boven & George Loewenstein, *Social Projection of Transient Drive States*, 29 PERSONALITY & SOC. PSYCHOL. BULL. 1159, 1165–67 (2003) (showing that individual predictions of how others will react to emotional situations reflect participant predictions of how they themselves would react).

355. MARCUS, *supra* note 13, at 102–03.

356. *Id.*

357. *Id.* at 103.

358. *Id.* at 102–03.

359. *Id.* at 103–04.

sponse.<sup>360</sup> Hence, fear and anxiety help “to pry open the door to attitude change and unexpected choices.”<sup>361</sup>

Certain emotions also enable impartiality, a critical contextual tool to breaking habitual patterns. As political theorist Sharon Krause points out, impartiality involves perspective taking—the ability to see the world through someone else’s eyes.<sup>362</sup> This sort of imagination requires emotion: the empathy needed to adopt another’s perspective and the emotional sensitivity required to understand the pain of discrimination or the pleasure of integration within a community.<sup>363</sup>

### C. *Emotion and Constitutional Innovation*

Changes to a constitutional system, both within and outside the constraints of Article V, require the intersection of imagination and the necessary energy and resources for sustained political action. The passage of the Nineteenth Amendment,<sup>364</sup> the Supreme Court’s decision to overrule *Plessy v. Ferguson*,<sup>365</sup> and the path of the Court’s abortion jurisprudence since *Roe v. Wade*<sup>366</sup>—to name just a few critical moments of constitutional change— all aligned with the rise of social and political movements. Emotion fuels these social movements and is necessary to sustain individual and collective desire for public action.<sup>367</sup> Absent the presence

360. *See id.*

361. BRADER, *supra* note 13, at 143.

362. Sharon R. Krause, Assoc. Prof., Brown University, Public Deliberation and the Feeling of Impartiality 14 (Aug. 31–Sept. 3, 2006).

363. *See id.* at 14–17; *see also* NUSSBAUM, *supra* note 340, at 444–45 (arguing that empathy and compassion are necessary for judges and jurors to fully assess the facts before them); Deborah A. Small & Jennifer S. Lerner, *Emotional Policy: Personal Sadness and Anger Shape Judgments About a Welfare Case*, 29 POL. PSYCHOL. 149, 164 (2008) (explaining how defense attorneys instruct juries to view the case from the defendant’s perspective to “achieve a more lenient sentence”).

364. *See* Reva B. Siegel, *The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 968–69, 1034 (2002).

365. *See* William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2072–89 (2002).

366. *See* Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323, 1397–1400 (2006).

367. *See* Leonie Huddy & Anna H. Gunthorsdottir, *The Persuasive Effects of Emotive Visual Imagery: Superficial Manipulation or the Product of Passionate Reason?*, 21 POL. PSYCHOL. 745, 766–67 (2000) (concluding that “[k]nowledgeable, involved participants reacted more strongly to arousing visual imagery and were much more likely to feel positive about an organization, agree with its goals, objectives, and arguments, and take action on its behalf . . .”).

of emotion, constitutional communities will fall victim to “apathy, immobility, and ultimately, disintegration.”<sup>368</sup>

Emotions are associated with particular action tendencies.<sup>369</sup> Fear, for example, creates a tendency to engage in “fight or flight” behavior;<sup>370</sup> love initiates behaviors that nurture.<sup>371</sup> These action tendencies associated with particular emotions motivate individuals to become involved in public life,<sup>372</sup> to instigate moral action,<sup>373</sup> to engage in acts of altruism,<sup>374</sup> and most importantly, to change the status quo.<sup>375</sup> For example, compassion, triggered by people’s perception of suffering, changes the way they see their relationships with other people and enables altruistic behavior.<sup>376</sup> Shame, guilt, and pride motivate or deter social action,<sup>377</sup> and emotional benefits associated with collective identity help form the glue that holds social movements together.<sup>378</sup>

In particular, one emotion—hope—is absolutely critical to imagination and action within a constitutional system. As Professors Kathryn Abrams and Hila Keren point out, hope is deeply connected to an ongoing sense of the law’s potential and possibility.<sup>379</sup> It provides individuals and social movements with the persistence, resourcefulness, and courage necessary to bring about

368. HALL, *supra* note 12, at 4.

369. Lewis, *supra* note 329, at 181; *see* Mesquita, *supra* note 211, at 876–78 (discussing the “action readiness” aspect of emotion).

370. *See* MARCUS, *supra* note 13, at 70–71.

371. *See* Margaret S. Clark & Ian Brissette, *Two Types of Relationship Closeness and Their Influence on People’s Emotional Lives*, in HANDBOOK OF AFFECTIVE SCIENCES, *supra* note 6, at 824, 831–32.

372. *See* Bruce E. Kaufman, *Emotional Arousal as a Source of Bounded Rationality*, 38 J. ECON. BEHAV. & ORG. 135, 136 (1999) (“[E]motions are a central part of the psychological process of motivation (i.e., the process that activates and guides human behavior toward particular ends) as they heighten the saliency of certain desires, wants, and outcomes and thus energize people to pursue them.”).

373. Welch, *supra* note 330, at 67–68.

374. KRISTEN RENWICK MONROE, *THE HEART OF ALTRUISM* 234 (1996) (concluding that “[a]ltruistic behavior does not arise from the dominance of reason over the baser passions”); *see* MARCUS, *supra* note 13, at 21.

375. *See* Welch, *supra* note 330, at 69.

376. Dacher Keltner et al., *Emotional Intuitions and Moral Play*, 19 SOC. JUST. RES. 208, 210 (2006).

377. *See* PASSIONATE POLITICS, *supra* note 14, at 18–20.

378. *Id.* at 21–22; James M. Jasper, *The Emotions of Protest: Affective and Reactive Emotions in and Around Social Movements*, 13 SOC. FORUM 397, 415 (1998).

379. Kathryn R. Abrams & Hila Keren, *Law in the Cultivation of Hope*, 97 CAL. L. REV. (forthcoming Mar. 2009) (manuscript at 5, on file with author).

the transformation of long-held commitments.<sup>380</sup> Conversely, in the absence of hope, imagination becomes impossible. Not surprisingly, then, dictatorial and oppressive legal regimes often employ significant resources to eliminate hope within a population as a means for maintaining power.

The link between emotion and action also plays a critical role in shifting strategy and tactics within constitutional culture. For example, the social mobilization and activism that followed the Supreme Court's decision in *Bowers v. Hardwick*<sup>381</sup>—and led to its overruling sixteen years later<sup>382</sup>—can be explained, in part, as a shift from an emotional discourse within the gay community that centered around shame to one focused on pride.<sup>383</sup>

#### D. *Emotion and Imagination*

Just as emotions enable commitment to take hold, they also enable individuals to look at their commitments with new and more discerning eyes. Through attention, appraisal, and assessment; anxiety; and action tendencies, emotions steer the imaginative process and fuel the action necessary to revise prior commitments and imagine new ones.

### V. EMOTION AND CONSTITUTIONAL CULTURE

For too long, the dominant view has impaired our ability to test core assumptions about human behavior that informed America's constitutional design. The result has been a disconnect between a theoretical framework that views emotion as destructive to constitutional governance and the actual social practice of constitutionalism, where emotion advances core constitutional objectives of consistency and innovation. Now, in light of recent developments in affective science and political psychology, we are in a position to draw some conclusions about the actual role emotion plays within constitutional culture, and to tighten the link between theory and practice.

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380. *Id.*

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

382. Deborah Gould, *Rock the Boat, Don't Rock the Boat, Baby: Ambivalence and the Emergence of Militant AIDS Activism*, in *PASSIONATE POLITICS*, *supra* note 14, at 135–36.

383. *See Lawrence v. Texas*, 539 U.S. 558, 578 (2003).



First, emotion is an unavoidable force in constitutional law-making—it is simply too central to commitment making, interpretation, moral judgment, and attitude change to be systematically dismissed or ignored. If the subject matter of recent *Harvard Law Review* forewords are any indication, the central descriptive inquiry in contemporary constitutional theory is the relationship between “popular conceptions of constitutional law” and the Court.<sup>384</sup> Emotion is a vital part of this developing story, particularly in an environment where low levels of political knowledge and interest inhibit meaningful cognitive input. Indeed, emotional responses may more accurately predict popular interpretive preferences than indicia of public support for reason-based arguments.

Second, contrary to the dominant view, emotion can play a positive role in constitutional culture. This is not to say that emotion’s impact is *always* positive.<sup>385</sup> Indeed, constitutional systems can and do serve to minimize emotion’s capacity to distort decision making in ways that undermine constitutional values. But emotional influences aren’t *entirely* negative, and emotion enables behavior that allows constitutional commitments to develop, thrive, and evolve. As a result, theorists should question their tendency to discount automatically emotional perspectives within constitutional debate. Among other things, emotions contain important information about larger value commitments and serve as a mechanism for preserving those value commitments in a dynamic and changing environment.

Third, emotion performs a valuable stabilizing function within constitutional culture. Its connection to habitual behavior allows written commitments to manifest themselves in social practices, and its relationship to partisanship helps to create stable political alignments that allow for a measure of predictability within a large and diverse political system. Emotion is also critical to the maintenance of communal structures—like families—that are instrumental in reinforcing commitments across generations.

Fourth, emotion enables constitutional innovation and change. It helps spur social movement action, facilitate individuals’ abili-

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384. See Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 32–35 (2005); Post, *supra* note 35, at 4–6, 8–9; Schauer, *supra* note 230, at 5–8.

385. See *supra* notes 68–71 and accompanying text.

ty to prioritize among competing concerns, provide important information as they assess alternative options, and—through anxiety—allows them to break from existing habits.

Fifth, developments in affective science have the potential to advance ongoing descriptive and normative inquiries in constitutional theory. This article's goal is fairly modest: to demonstrate the centrality of emotion to core behaviors within constitutional systems and to argue that emotion brings positive elements to constitutional culture.

But the impact of these realizations is potentially much larger. In a number of areas, a revised conception of emotion may alter the way people think about constitutional law and theory.

#### A. *Popular Constitutionalism and Judicial Supremacy*

Over the past several years, constitutional scholars have once again questioned whether constitutional interpretation is the exclusive province of the judiciary and the extent to which interpretation by ordinary citizens, or their elected representatives, is desirable.<sup>386</sup> In this debate over interpretive supremacy, a professionally trained judiciary has always had predictability and stability on its side, particularly when contrasted with an emotional public.<sup>387</sup> The overriding concern is that citizens' reliance on emotion can lead to interpretive choices that are either erratic or discount long-term constitutional values to satisfy short-term desires.

On one level, this characterization is correct. Citizens are likely to place great reliance upon emotion and intuition in their efforts to figure out what the Constitution means. And because they may not have a lot of information about the Constitution to work with, they will likely rely on emotion and intuition to compensate.

But citizens' reliance on emotion may actually enhance their interpretive capacity. Emotion will help stabilize interpretation over time by integrating preferences into habit and by providing a mechanism for implanting those values across generations. More-

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386. See, e.g., KRAMER, *supra* note 101; MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

387. See Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 NW. U. L. REV. 145, 152–53 (1999).

over, it is only under certain emotional contexts that citizens' more rational faculties take hold and cause them to revisit past commitments and assumptions.

In addition, the emotional attachment to the Constitution as a symbol, like the Bible, will temper more extreme interpretations of constitutional meaning. While many Americans remain ill-informed about the Constitution's specific content, they have an emotional bond with the document that sustains its legitimacy and lasting integrity. These symbolic emotional ties may help explain why, for example, so many Americans oppose same-sex marriage but are reluctant to support a formal amendment that would elevate their policy preferences into a national precommitment.<sup>388</sup>

As a result, if the primary concern behind the capacity of ordinary citizens to make constitutional judgments is their susceptibility to the erratic and immediate pull of emotional forces, that danger may be far less extreme than the dominant view suggests. Indeed, if emotion helps stabilize popular interpretive preferences, members of the public may have a far greater capacity for interpretive consistency than previously believed.

## B. *The Court and Public Opinion*

Along with potentially enhancing interpretive capacity, emotion may also operate as a limitation on the Court's influence over the public. Constitutional scholars have long been skeptical of the Court's ability to initiate meaningful social change.<sup>389</sup> Some of the research on the sources of attitudes and the causes of attitude change helps explain why.

Most notably, the basis for a particular attitude impacts an individual's capacity for attitude change. Affect-based attitudes—attitudes formed when affective reaction precedes conscious thought—are more susceptible to persuasive efforts that appeal

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388. See Patrick J. Egan, Nathaniel Persily & Kevin Wallsten, *Gay Rights, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY* 234, 255 (Nathaniel Persily, Jack Citrin & Patrick J. Egan eds., 2008) (summarizing public opinion data to conclude that "support for a constitutional amendment [banning same-sex marriage] is consistently lower than opposition to legalization of same-sex marriage.").

389. See generally GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 1991).

to emotion rather than cognitive capacities.<sup>390</sup> Further, affect-based attitudes are held with greater confidence than attitudes based in cognition.<sup>391</sup>

This suggests that the very nature of legal reasoning may inhibit the Court's ability to engage public opinion in ways that matter. If large swaths of the public engage in constitutional discourse from an emotional perspective, the Court's reason-based interpretive methodology is unlikely to impact popular attitudes about constitutional law.<sup>392</sup> This presents a critical challenge to those who see the Court as educating the public,<sup>393</sup> as well as to those who envision the Court as engaged in active dialogue and negotiation with the American people.<sup>394</sup>

It also suggests that there may be benefits to greater emotional transparency in judicial opinions. If the public speaks a language that responds to emotional content more strongly than analytical reasoning, the presence of emotional appeals in judicial decisions may enhance public support for the Court's actions.

### C. *Constitutional Amendment*

Another area for inquiry is the continued normative effort to define the optimal level of constitutional tension between commitment and imagination. Article V has taken its share of lumps from constitutional scholars for the difficulty it places on formally amending the Constitution through its supermajority requirements at both the proposal and ratification stages.<sup>395</sup> At present,

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390. Edwards, *supra* note 253, at 211; FISKE *supra* note 233, at 225–31.

391. Edwards, *supra* note 253, at 212; *see also* Haddock & Zanna, *supra* note 259, at 337 (individuals whose attitudes were “affect-consistent” on other topics relied more on their emotional reactions to the topic in forming their attitudes).

392. *See* Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. REV. 961, 1030 (1992) (arguing that “if the Court is to communicate effectively with the people, it must somehow bring its interpretation of the Constitution to the level of the people”).

393. *See* Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952) (describing members of the Court as “teachers in a vital national seminar”).

394. *See* Post, *supra* note 35, at 104 (describing the Court's decision in *Lawrence v. Texas* as an “opening bid in a conversation that the Court expects to hold with the American public”).

395. *See, e.g.*, Stephen M. Griffin, *The Nominee Is . . . Article V*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES, *supra* note 32, at 51, 51–53; LEVINSON, *supra* note 131, at 159–66.

Article V sets a threshold for amendment that is significantly higher than virtually any other constitution currently in existence.<sup>396</sup>

If the intent behind the high threshold is to minimize the destructive impact of emotion on constitutional lawmaking—as the framers' theory of human behavior suggests—the underlying concerns behind their intent seem increasingly misguided. In a world where reason and emotion coexist in decision making, where emotion operates as a stabilizing force in constitutional culture, and where emotion carries with it important information about moral intuition and public values, there may be good reason to allow ordinary people greater access to the mechanisms for formal constitutional change. If emotion can stabilize attitudes towards constitutionally salient issues, a more permissive amendment process may be less unpredictable, unruly, and unreliable than the framers believed.

#### D. *Institutional Design*

Constitutional theorists have been actively searching for a set of conditions that would best facilitate sound public decision making. These solutions have typically centered around mechanistic, deliberative structures, like Bruce Ackerman's proposal to set aside a "Deliberation Day" to enable higher-quality public participation in political life.<sup>397</sup> Emotion research has the potential to impact these solutions, suggesting that greater attention should be paid to the optimal emotional context for public decision making or the cultivation of particular emotions when making decisions, rather than a continued focus on increased deliberation and the cultivation of cognitive reasoning processes.

For example, intolerance is tied to perceptions that members of a given group present a threat. When individuals hold strong intolerant attitudes—attitudes deemed particularly dangerous to the future of heterogeneous democratic societies—those attitudes are more likely to shift under persuasive methods that provide emotional reassurance against the threat, rather than under the cognitive acquisition of facts suggesting that the target of the in-

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396. LEVINSON, *supra* note 131, at 160.

397. See BRUCE ACKERMAN & JAMES S. FISHKIN, *DELIBERATION DAY* 3–4 (2004).

tolerant attitude does not present a realistic threat.<sup>398</sup> If citizens view intolerance as damaging to constitutional systems, it may be wise to focus reform efforts on developing democratic institutions that provide this emotional reassurance rather than deliberative processes that implicitly denigrate emotion and idealize reasoned argument and logical inference.

## VI. CONCLUSION

Constitutional theory is behind. While theorists in economics, psychology, and biology use new realizations about human behavior to challenge long-held theoretical assumptions,<sup>399</sup> constitutional theory has remained largely stagnant in its efforts to match theory to developing understandings of human behavior. The dominant view's continued prevalence within constitutional theory has obscured America's ability to see how emotion advances constitutional objectives, and America has failed to design institutions that could exploit emotion's positive effects and advance those objectives even further.

Despite American's current failure, we can do better. The central task for the next generation of constitutional theorists is to make constitutional theory relevant by aligning it with what we know about human and institutional behavior. This requires developing new areas of expertise, collaborating across disciplines, and letting go of broad generalizations about human behavior that have defined the course of constitutional theory for several generations of scholars. Theory—on either a descriptive or normative plane—must stay tied to practice to maintain its relevance. As affective science begins to revolutionize the way we think about human behavior, it is incumbent upon constitutional theory to realign and respond.

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398. See Kuklinski et al., *supra* note 111, at 233–45; MARCUS ET AL., *supra* note 68, at 3.

399. See DAMASIO, *supra* note 11, at xi–xii; ELSTER, *supra* note 50, at 1–2; Loewenstein, *supra* note 156, at 272, 276.

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