TRIBUTE TO
PROFESSOR MELVYN R.
DURCHSLAG

EXPLORING THE AFFECTIVE
CONSTITUTION

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I'm delighted to have this opportunity to pay tribute to the work and career of Mel Durchslag. You have a wonderful tradition for celebrating faculty retirements, but it creates a paradoxical situation for the speaker: I'm here to honor a man that I've only recently had the pleasure of meeting, and to celebrate his career before a group of people who have known and valued him for decades. This is no small order. But I think the least presumptuous way to offer this kind of tribute is to talk a bit about Mel as he is reflected in his scholarly work—the Mel who leaps out of the pages of law reviews. Those of you on the faculty can supplement this, in your own minds, with your own knowledge of Mel as a colleague and human being. Then I'd like to pay a more indirect tribute, by talking about some work that

† Herma Hill Kay Distinguished Professor of Law, UC-Berkeley School of Law. I want to thank Gary Simson and, of course, Mel Durchslag, for giving me the occasion to develop these ideas, and the faculty of Case Western Reserve University School of Law for their hospitality and their thought-provoking questions. I would also like to thank Reva Siegel, Pam Karlan, Priscilla Smith, and participants in the Stanford Roundtable on Reproductive Rights for prompting me to think through the affective implications of Gonzalez v. Carhart. Finally, I am grateful to Hila Keren, Jack Jackson, and Robert Tsai for generative conversations on the topic of this Article. This Article was originally developed as a lecture to honor the retirement of Professor Melvyn R. Durchslag in April 2008.
combines a recent interest of mine, in the role of emotion in law, with a longstanding interest of Mel’s, in the Constitution.

One of the most interesting parts of preparing this lecture has been having the opportunity to spend some time with Mel’s work. When I first started reviewing his body of articles, I was amazed to find that one person had written in so many different doctrinal areas. I have a high threshold to this kind of variety because I’ve had a somewhat peripatetic scholarly life myself, but this was really something—Eleventh Amendment immunity, constitutional welfare rights, federalism and the Commerce Clause, individual rights, voting rights, even local government law, and taxation. And all of it both tightly and imaginatively argued: to take one example, I’ve taught Shaw v. Reno—a case in which Mel and I both have an interest and which I’ll be discussing later—for years in my voting rights class, but it never occurred to me to compare it with Batson v. Kentucky. It did, however, occur to Mel, and, as a result, I learned a new way of thinking about the harm the Court sought to identify in Shaw. So Mel sets a high bar for legal argumentation, one I only hope I can meet in my comments today. What I’d like to do is to pursue Mel’s interest in constitutional law, through the lens provided by recent work on “law and the emotions.” Exploring the “affective Constitution” seems like an appropriate way to honor someone who’s been described to me, by many of his colleagues, as being the “heart” of this institution.

I. LAW AND THE EMOTIONS: A HISTORICAL OVERVIEW

It may be useful to begin with an overview of legal scholarship relating to the emotions. Hila Keren and I have described legal scholars’ investigation of the role of emotion in the law as proceeding in three phases. In the first phase of this scholarship, theorists argued about whether there could be or should be a role for emotion in law. This body of scholarship confronted the assumption that the law is a domain of rationality, whose decision-makers strive for objectivity in all that they do. Scholars interested in the emotions either challenged

4 Abrams & Keren, supra note 3 (manuscript at Part I).
5 Id. (manuscript at Part I.A).
6 See, e.g., Angela P. Harris & Marjorie M. Shultz, "A(nother) Critique of Pure Reason": Toward Civic Virtue in Legal Education, 45 STAN. L. REV. 1773 (1993); Lynne N.
these assumptions outright, or explained how the operation of emotion in law could be reconciled with them.\(^7\) As this challenge began to gain credibility—a task that is still ongoing with respect to the legal mainstream—law and emotions scholars turned to a second focus of inquiry: they began to investigate the specific emotions they saw as being involved in particular areas of law. In this work, legal scholars drew on research from other disciplines to ask, for example, how we should understand disgust, remorse, or vengeance, and they began to trace the operation of these emotions in certain legal areas, such as the criminal law.\(^8\)

More recently, some legal scholars interested in the emotions have initiated a third kind of inquiry: they have begun to consider the normative consequences of recognizing the interrelation of emotions and the law.\(^9\) They’ve begun to ask what we should do with this knowledge we’ve gained about the emotions in relation to law: can it help us understand how the law works, or (more importantly) how it might work better? This might mean using our understanding of the emotions to improve the operation of legal doctrine. Or, in a more ambitious vein, it might mean reforming or restructuring the law in order to produce particular emotional effects by ameliorating specific negative emotions, for example, or fostering positive ones. This is not, I should add, quite as radical as it may sound. Martha Minow has written about how criminal tribunals or truth commissions might be used to mitigate vengeance or cultivate reconciliation in the wake of mass violence.\(^10\) Cass Sunstein has explored how law might be used to respond to fear.\(^11\)

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Martha L. Minow & Elizabeth V. Spelman, *Passion for Justice*, 10 Cardozo L. Rev. 37 (1988);

\(^7\) See sources cited supra note 6.


II. THE ROLE OF THE EMOTIONS IN CONSTITUTIONAL LAW

You can see these different strands of inquiry at issue in the constitutional arena, and I want to touch briefly on each in my comments. First, I will explore the ways that emotion might be implicated in the field of constitutional law. Then I will identify some of the emotions that have played a particularly prominent role in recent constitutional analysis; and finally I will suggest how fuller understanding of these emotions might enhance constitutional decision-making. In conclusion, I will consider why it may be useful to think in this unaccustomed way about constitutional law. I want to add that while I may make some claims that seem strong, these ideas are actually quite provisional. Although I've thought a fair amount about the emotions in law, I'm just beginning to think about how becoming more alert to their role might affect the field of constitutional law in particular. So emboldened by Mel's own example of moving energetically into new areas, I will lay out these ideas, not in hopes of making conclusive pronouncements, but with the goal of starting a broader conversation about these questions.

A. Emotion in Constitutional Decision-Making

1. As an Attribute of the Decisionmaker

Let's start with the first level of inquiry: does affect, and should affect, play a role in constitutional decision-making? It's fair to say that there's been a rather schizoid history in this area. On the one hand, there are many factors that would seem to make emotion anathema in the crucial area of constitutional decision-making. Constitutional law is an area in which decision-makers (paradigmatically, judges) are oriented to a specific text, and situated within a specific history—all of which might seem to make emotion extraneous and therefore inappropriate influence. Constitutional law is also high stakes stuff: in this context—as compared to the average lawsuit—courts are interpreting the highest law of the land, and decisions at the appellate and Supreme Court levels will resolve cases throughout the federal system. When you add to this the counter-majoritarian difficulty—the prospect that judicial interpretation of this document may invalidate the work of the democratically-elected legislature\(^\textsuperscript{12}\)—there seems to be a particularly

\(^{12}\text{This difficulty received its paradigmatic articulation in Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (1962). It has spawned literally shelves of commentary and efforts at resolution by constitutional scholars.}
acute need for the paradigmatic judicial virtues of objectivity (in the sense of distance or dispassion) and rationality, which also seems to militate against emotion. There’s finally a matter of history here: it is possible to argue, as Doni Gerwirtzman has done in an excellent recent article, that the Framers of the Constitution were extremely wary of emotion, and that we can understand many of the constitutional structures that endure to this day as vehicles for subjecting the dangerously hot or volatile emotions to the cooler influence of reason.

But while legal scholars may see the constitutional field as ill-suited to the exploration of the emotions, some leading jurists have seen matters differently. Justice Brennan, in a fascinating lecture, described the way that his decision in *Goldberg v. Kelly* was informed not just by his reason, but by his passions. He observed that the plaintiffs’ brief had generated an empathic response in him by describing the plaintiffs’ lives and predicament in palpable, human terms. This lecture generated a lot of controversy, and prompted some legal scholars, most famously Owen Fiss, to jump in and try to save Justice Brennan from himself, suggesting that he had misconstrued the grounds of his own decision. But this revelation created an illuminating crack in the facade of the Court’s rationality. Additional light was shed on this affective dimension of adjudication by Justice Blackmun, exclaiming about the plight of Joshua DeSheney and alluding to the emotional as well as the political stakes of the Court’s abortion decisions, and even by Justice Scalia, 


16 *Id.* at 21.


18 DeSheney v. Winnebago County Dep’t of Social Servs., 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting) (“Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by respondents who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing except . . . ‘dutifully recorded these incidents in [their] files.’”’ (citation omitted) (brackets in original)).

demonstrating passion as well as rationality in his jousting with judicial colleagues.\textsuperscript{20}

The role of emotion in constitutional decisionmaking has also been underscored by a recent body of scholarship that describes constitutional interpretation or lawmaking as extending beyond the work of courts. Scholars including Bruce Ackerman,\textsuperscript{21} Larry Kramer,\textsuperscript{22} Reva Siegel,\textsuperscript{23} and Robert Post\textsuperscript{24} have sought to describe constitutional lawmaking as encompassing a complex conversation between the courts, the elected branches, and the people. In this form of exchange, emotion is no longer suspect; in Ackerman’s work, for example, the heightened emotional valence of the public response helps to signal to the Court that an exceptional turn in politics germane to constitutional interpretation is occurring. As the scope of constitutional meaning-making expands to include legislators and the public, the demand for dispassion in constitutional decisionmaking eases, and emotion finds a more legitimate, and a more central role.\textsuperscript{25}

2. As a Dimension of Persuasion

The above analysis, however, describes only one way that emotion may become germane to constitutional lawmaking—as an attribute of the decisionmaker. It may also be implicated as a part of the persuasion that occurs in the realm of constitutional argumentation. We’ve already seen, in Justice Brennan’s discussion of \textit{Goldberg v. Kelly}, an example in which advocates cultivated the emotion of empathy in order to encourage a particular kind of resolution. But persuasion can run two ways: the Court can also mobilize emotion in the effort to persuade its readers—be they the legal community or the broader public. Sometimes emotion can be a potent vehicle for

\textsuperscript{21} ACKERMAN, FOUNDATIONS, supra note 12.
\textsuperscript{23} Reva B. Siegel, Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA, 94 CAL. L. REV. 1323 (2006).
\textsuperscript{24} Robert C. Post & Reva B. Siegel, Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power, 78 IND. L.J. 1 (2003).
\textsuperscript{25} After offering this hypothesis in my original lecture, I was fascinated to see it developed at great length, and in a slightly different direction, by Doni Gewirtzman. See Gewirtzman, supra note 13. Gewirtzman goes farther than I do here, in arguing that the salutary role of the emotions, in fostering commitment and imagination—two key components of constitutionalism—militate in favor of allowing a larger role for popular constitutionalism, perhaps even questioning the primacy of judicial decisionmaking in the constitutional area. \textit{Id.} Because I believe that affective understandings can be deployed to advantage by judges as well as lay citizens, I do not necessarily see the role of the emotions as reshaping claims of comparative institutional advantage in the constitutional area.
introducing a new constitutional understanding, or highlighting the need for it.

In *Shaw v. Reno*, for example, the Court sought to extend its restrictive affirmative action jurisprudence to majority-minority electoral districts created under the Voting Rights Act. The voting rights area had been one of the few in which race-conscious remedies had enjoyed comparatively wide support—partly because of the long history of frank and violent denial of the African-American vote, and partly because of the explicitly race-conscious character of the Voting Rights Act (the preclearance provision, Section 5, that was at issue in *Shaw*, in particular). *Shaw* held for the first time that the imposition of a race-conscious remedy in the voting rights area can create a claim of constitutional violation. Because it may have suspected that the public was not entirely prepared for this transition, the Court renders the opinion in particularly florid, metaphorical language, which, it seems to me, is designed to incite indignation in readers—

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26 509 U.S. 630 (1993). *Shaw* concerned the efforts of the state of North Carolina to create a congressional districting arrangement that met the preclearance requirements of section 5 of the Voting Rights Act. *Id.* at 634. Directed by the Voting Rights division of the Justice Department to create an additional district that gave African-Americans the opportunity to elect the candidates of their choice, *id.* at 635, North Carolina rejected the most obvious suggestion about where to place this district, because it would have created problems for one or more incumbents. Instead it situated the district in an area that did not have a geographically compact population of African-Americans. Consequently, state officials were obliged to draw an irregularly shaped district, which drew into its ambit a series of black neighborhoods located in a long, narrow strip along highway I-85. *Id.* at 635–36. As one legislator said, "if you drove down the interstate with both car doors open, you’d kill most of the people in the district." *Id.* at 636 (quoting Joan Biskupic, *N.C. Case to Pose Test of Racial Redistricting—White Voters Challenge Black-Majority Map*, WASH. POST, Apr. 20, 1993, at A4) (brackets in original). White voters in the district challenged its creation under the Equal Protection Clause, arguing that the evident efforts to classify voters according to race violated their equal protection right to participate in a color-blind electoral process. *Id.* at 637. The Court held that such a claim might state a violation under the Equal Protection Clause, *id.* at 658, although it did not definitively articulate the elements necessary to establish such a claim.

27 See 42 U.S.C. §§ 1973–1973aa6. Section 5, § 1973c, prohibits a covered jurisdiction from implementing changes in a “standard, practice, or procedure with respect to voting” without seeking and receiving authorization from the Voting Rights Division of the Department of Justice or a District Court for the District of Columbia. *Id.* § 1973c(a). The race consciousness of this provision inheres importantly in the fact that those jurisdictions that are “covered” under Section 5 are states and counties within states that have a particularly egregious history of discrimination against African Americans or other racial and language minorities protected by the Act in the area of voting. The formula originally used to determine which jurisdictions would be covered targets jurisdictions that used poll taxes or similar exclusionary practices, and in which less than half of the minority population was registered to vote. See 42 U.S.C. § 1973c.

28 See *Shaw*, 509 U.S. at 639–52.

29 Indignation has been explored at some length by Martha Nussbaum, who describes it as anger at a perceived wrong that has been done to you, or another. See Nussbaum, *supra* note 9, at 19. Indignation has a contagious quality that is not characteristic of all emotions: if your friend feels indignant at a wrong someone else has done her, you are likely to feel indignant as well; whereas if she feels love for a third party, you are not likely to share that emotion.
black and white—who might not intuitively grasp the harm of such a district. It begins by analogizing the challenged district to the "'uncouth twenty-eight-sided figure'" that disenfranchised the blacks of Tuskegee, Alabama in Gomillion v. Lightfoot, noting that "[i]t is unsettling how closely [this district] resembles the most egregious racial gerrymanders of the past." Thus, the aroused sentiment that readers had been prepared to direct toward the opponents of African-American enfranchisement is swiftly displaced onto the state actors who have sought to respond to this scourge. The opinion continues by referring to the effort to comprehend a majority of Blacks within a particular electoral district as "political apartheid"—the contemporary term perhaps most strongly associated with a sense of indignation at undeserved political exclusion or subordination. And it describes the assumption behind the challenged district as a flawed, potentially insulting suggestion that one could find political commonality among a group of people who "have little in common with one another but the color of their skin." The case uses particularly blunt affective appeals—from heavy-handed metaphorical language to freighted historical analogies—to re-script the indignation of the American public and to shift it from cases like Gomillion to cases like Shaw, from the harm of racial disadvantage in voting to the harm of race-based electoral classification.

Nussbaum likes indignation as a basis for legal action because it can be connected with the giving of reasons: indeed, Aristotle's Rhetoric explained how a speaker can engender indignation in an audience by giving them reasons to believe that a wrong had been done. Id. at 26. But there is also a potentially unreliable quality to indignation, which some philosophers describe as connected with the love of money or honors or possessions. Because we may want these things, or even feel entitled to them, we feel indignation when they are denied us. When our desire for honor or material goods is excessive, our indignation may be excessive or unwarranted as well.

30 Shaw, 509 U.S. at 640 (quoting Gomillion v. Lightfoot, 364 U.S. 339, 340 (1960)).
32 Id. at 641.
33 Id. at 647.
34 Id.
35 By framing the substantive right at issue as an abstract claim to be deprived of the "right to participate in a 'color-blind' electoral political process," id. at 641–42, the Court confers a final gift on prospective claimants: it permits them to feel indignant about race-conscious electoral arrangements without having to raise arguments about their own group-based electoral disadvantage. Not only does this make the case easier to prove doctrinally—even as it makes the claimants' standing, as Mel has observed, a bit peculiar—but it also permits prospective claimants to experience indignation on behalf of the population as a whole, without feeling that they are focusing on their own parochial advantage.
3. As an Object of Constitutional Adjudication

Emotion might also be understood in a final way: as an object of constitutional adjudication.

a. As a Goal of Constitutional Structure

At the most general level, the Constitution may be understood as creating institutional structures that serve to manage or channel (or generally “cool”) emotion. The Framers may have worried about the role of unconstrained emotions in constitutional governance, but their answer was neither to ignore them nor to suppress them. The Framers saw the domain of politics and government as being fraught with emotion, but they also viewed the institutional arrangements created by the Constitution as being vehicles for managing it, or rendering it productive. Take, for example, those minorities and majorities “actuated by some common impulse of passion” in *Federalist No. 10*, or the perpetually overreaching ambitions of the constitutional officeholders in *Federalist No. 51*. The Framers believed that emotion was best controlled or properly directed when it was answered by a distinct or competing emotion, and they used the Constitution to structure this kind of engagement between emotions—factions competing for popular support across an extended sphere, ambition counteracting ambition in the system of checks and balances.

b. As a Backdrop to Constitutional Interpretation

Emotion is also the object of constitutional adjudication in the sense that it can provide the backdrop for, or the subtext of, the controversies that courts and other constitutional decisionmakers are required to resolve. Although emotions may not be explicitly implicated in the doctrinal issues before the court, they are very much present in the minds of judges or justices as they work toward a

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36 In this sense, the Framers made discussion of and inquiry into emotion a legitimate topic for constitutional analysis from the earliest days of constitutional history, and our habitual reluctance to think about constitutional matters in this way is a departure from their salutary example.

37 See, e.g., *The Federalist No. 10*, at 43 (James Madison) (Buccaneer Books 1992) (stating that suppressing faction—an important seat of emotion in the Federalist Papers—would be a cure “worse than the disease”).

38 *Id.*

39 *The Federalist No. 51*, at 262–63 (James Madison) (Buccaneer Books 1992) (“Ambition must be made to counteract ambition, . . . the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other; that the private interest of every individual, may be a sentinel over the public rights.”).
resolution. The fear that possessed the nation after 9/11 is very much the subtext of the detention cases that followed—much as the fury and indignation that fueled massive resistance to school desegregation formed the backdrop to Cooper v. Aaron\(^4\) and the anger that led to Mr. Cohen's famous jacket concerning the Vietnam draft set the stage for Cohen v. California.\(^4\)

c. As an Explicit Focus of Constitutional Interpretation

Finally, and perhaps more importantly, emotion may become an object or focus of constitutional adjudication because specific norms embodied in the Constitution—norms articulated in the document, or in the adjudication that gives it meaning—have crucial affective dimensions. This may mean that the Court looks to that affective dimension to explain the wrong that the Constitution aims to prevent (or the value it aims to vindicate), or it may use the presence or absence of that affective state to decide when a violation has occurred. The Court's discussion of the damage to the "hearts and minds" of Black children, perpetrated by segregated primary and secondary schools, may be an example of this kind of use of emotion, as is the Court's recognition that the First Amendment protects emotive as well as cognitive dimensions of speech in Cohen v. California.\(^4\) The Eighth Amendment's text proscribing the use of "cruel and unusual punishment"\(^4\) invites recourse to affective states, as emotions provide a visceral clue to what we find to be "cruel." Similarly, Rochin v. California's focus on "conduct that shocks the conscience"\(^4\) instructs decisionmakers to consult their outrage or indignation. More recently, women's fear, guilt, and regret have become the subject of explicit deliberation as the Court has weighed restrictions on the right to reproductive choice.\(^4\)

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42. See Brown v. Bd. of Educ., 347 U.S. 3483, 494 (1954) ("To separate [Black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.").
43. Cohen, 403 U.S. at 26 ("[W]ords are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.").
44. U.S. CONST., amend. VIII.
B. The Emotions of Constitutional Law: Two Examples

There is, at least in theory, no limit to the range of emotions that could become salient in constitutional law. Which emotions claim the attention of the courts at any given time depends, in the first instance, on what constitutional provisions are being adjudicated. As we saw above, shame or humiliation might be an index of subordination in the context of equal protection litigation, while vengeance and mercy might be at issue in the context of the death penalty. Different emotions may also form the backdrop for the Court’s decision-making, either because they comprise the political backdrop for certain decisions, or because the tenor of the Court’s decision-making over a period of time is marked by the influence of a particular emotion. Lynne Henderson has described, for example, the increasing salience of empathy in the jurisprudence of the Warren Court, and its eclipse in the years of the Burger Court.47 For purposes of this discussion, I will focus on two emotions that have become important in the Supreme Court jurisprudence of the last several years: fear, which has been a prominent backdrop to a number of cases on detention and national security, and regret, which has become an explicit focus of constitutional analysis in cases involving abortion. I will first describe the way these emotions have been implicated in two recent Supreme Court cases, *Hamdi v. Rumsfeld*48 and *Gonzales v. Carhart*.49 I will then explore some of the things we have learned about these emotions from cross-disciplinary analysis, and ask how understanding more about these emotions might aid adjudication.

1. Fear

The first emotion I will consider is fear. Fear is one of the most familiar, and most thoroughly analyzed, of emotions.50 It has a

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47 See Henderson, supra note 6.
50 This rich literature analyzes fear both as a more intuitive manifestation of affect and as a more cognitively inflected process of risk perception and assessment. See, e.g., J.H. BAMBER, THE FEARS OF ADOLESCENTS (1979); JOSEPH LE DOUX, THE EMOTIONAL BRAIN: THE MYSTERIOUS UNDERPINNINGS OF EMOTIONAL LIFE (1996); SUNSTEIN, supra note 11; JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1999); George Loewenstein & Jane Mather, Dynamic Processes in Risk Perception, 3 J. RISK & UNCERTAINTY 155 (1990); Robert Zajonc, On the Primacy of Affect, 39
recognizable visceral component that is well described, for example, in the work of legal scholar William Miller: increased pulse, trembling, sweating, in extreme cases incontinence, an adrenaline charged “fight or flight” response that can, for example, lead soldiers to drop their weapons and run headlong from the site of battle. But it also has its less bodily, less instinctive, more cognitive moments: it has been described by Cass Sunstein as a judgment made by an individual, or a group, that we are danger. This judgment may prompt an instinctive reaction, or in many collective contexts (including legal contexts) it may prompt discussion and reflection about how and through what instrumentalities we should respond to that danger.

Fear has been the spoken or unspoken backdrop in a range of pivotal periods of constitutional decisionmaking. A fear of the impact of the faction on “aggregate interests,” such as security in one’s private property, may have infused the structural choices of the Framers, such as the decision in favor of an “extended sphere” for the new Union. Fear for the future of the Union defined the subtext of cases such as Dred Scott v. Sandford. The fear that gripped the nation following the attack on Pearl Harbor prompted the exaggerated deference of the Court’s decision in Korematsu v. United States. Fear has been invoked at other moments because of its rhetorical power—to unify or to focus attention on an insufficiently acknowledged threat. In the Supreme Court’s struggle over reproductive choice, both pro-choice and pro-life Justices have mobilized fear to rally readers to their particular viewpoint: Justice Scalia raising the spectre of a politicized judicial process, with throngs marching on the mall outside the Supreme Court, and Justice Blackmun invoking the “chill wind” that threatens to blow through women’s reproductive futures. Yet in few periods have


51 See William Ian Miller, Fear, Weak Legs, and Running Away: A Soldier’s Story, in THE PASSIONS OF LAW, supra note 3, at 241.

52 See SUNSTEIN, supra note 11, at 3.

53 See THE FEDERALIST No. 10, at 54 (James Madison) (Buccaneer Books 1992). A line of analysis extending back to CHARLES AUSTIN BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913), finds the Framers to be motivated by the desire to protect existing property relations.

54 60 U.S. (19 How.) 393 (1857), implicitly overruled by U.S. CONST. amend. XIV, as recognized in Slaughter-House Cases, 83 U.S. 36 (1873).

55 323 U.S. 214 (1944).


constititutional decisionmakers wrestled as palpably with a fear shared with the entire citizenry as in the constitutional cases on the rights of detainees following 9/11.

One way that the Executive Branch has responded to this fear was to begin a practice of indefinite detention of those suspected of perpetrating, or collaborating with the perpetrators of, terrorist attacks. *Hamdi v. Rumsfeld* was one case that challenged this practice, and a brief examination will illustrate the role that fear has played in this kind of case. The *Hamdi* case asked when the government is authorized to hold detainees, and whether and through what kind of recourse detainees may challenge this practice, under the Due Process Clause or other constitutional provisions. If that was the specific legal question raised by the case, the broader question before the Court—and the question with affective dimensions—was how the institutional arrangements that comprise our governmental system, should respond to the fear aroused by these attacks. The Court delivered what has come to be its customary array of four very different opinions. The majority (a plurality of Justices O’Connor, Kennedy, and Breyer joined on the determinative issue by Justices Souter and Ginsburg) held that the detainee, Hamdi, was entitled to some version of due process, under the doctrine of *Mathews v. Eldridge*, to determine whether he was being wrongfully held as an “enemy combatant.”

How did these opinions address the emotion of fear? The four opinions envision different responses, reflected in different institutional arrangements. For three of the four, our form of government neither rejects fear nor accepts it at face value. Instead, governmental arrangements subject fear—in this case embodied in the practice of indefinite detention—to a series of institutional checks. These checks permit governmental actors to assess fear’s relation to the extant threat, and to make sure that it doesn’t

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59 Id. at 509 (“At this difficult time in our nation’s history, we are called upon to consider the legality of the Government’s detention of a United States citizen on United States soil as an ‘enemy combatant’ and to address the process that is constitutionally owed to one who seeks to challenge his classification as such.”).
61 Hamdi, 542 U.S. at 529–35.
62 For discussions of the institutional checks that constrain executive power in the detention of “enemy combatants,” see id. at 521, 533 (discussing requirements of congressional authorization and due process, respectively, in plurality opinion); id. at 554 (Scalia, J., dissenting) (discussing the role of the Suspension Clause in the context of war in a dissenting opinion joined by Justice Stevens); id. at 542 (Souter, J., concurring in part and dissenting in part) (discussing requirement of, and reasons for, explicit legislative authorization of detention of enemy combatants in an opinion joined by Justice Ginsburg).
overwhelm other interests or values that might not have the same immediacy to decisionmakers in the moment, such as empathy with, or concern for, the civil rights—indeed the humanity—of those detained. One vehicle for performing this institutional assessment is the system of checks and balances. Indeed, eight out of nine Justices emphasize the agreement of more than one branch as a factor that serves to justify the indefinite detention of enemy combatants. While the plurality reserves the question whether such agreement is required, it emphasizes that the detention was authorized by Congressional enactment of the AUMF. Justices Ginsburg and Souter contend that an Executive’s decision to detain must in the first instance be authorized by Congress; Justices Scalia and Stevens argue that the Executive must charge or release detainees unless Congress suspends the writ of habeas corpus. Each of these opinions also allows for judicial review as to whether these requirements have been met.

Only Justice Thomas contends that the Executive has a distinctive institutional competence to address national security fears, and, consequently, that other branches, including the Court, should defer. Five Justices also require a second kind of check on fear: they require an alleged enemy combatant to be able to challenge that status by recourse to a hearing—a guarantee of due process—even under such exigent circumstances.

This brings the Court into the ultimate determination of whether national security fears should prevail in a

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63. See id. at 532 (plurality opinion) ("It is during our most challenging and uncertain moments that our nation’s commitment to Due Process is most severely tested; and it is at those times that we must preserve our commitment at home to those values for which we fight abroad.")

64. The plurality appears to reserve the question whether the executive could detain without congressional authorization, basing its opinion instead on the governments “alternative” position: that Congress had in fact authorized the detention in this case under the AUMF. Id. at 516–17. Ginsburg and Souter, on the other hand, explicitly require congressional authorization, based on their interpretation of the Non-Detention Act, 18 U.S.C. § 4001(a), which bars imprisonment or detention of a citizen “except pursuant to an Act of Congress.” Id. at 542 (Souter, J., concurring in part and dissenting in part) (quoting 18 U.S.C. § 4001(a)) (“The prohibition within § 4001(a) has to be read broadly to accord the statute a long reach and to impose a burden of justification on the Government.”). Ginsburg and Souter observe, however, that they view this act as consistent with the broader scheme of separation of powers embodied in the Constitution. See id. at 545.

65. Id. at 554–79 (Scalia, J., dissenting).

66. See id. at 524 (plurality opinion) (reserving the question of specifically what process is due but defining a minimum that is applicable in this context, and holding that it is not met by the Government’s proposed approach); id. at 573, 576 (Scalia, J., dissenting) (stating that the Court may determine whether Congress has suspended the writ of habeas corpus, but may not itself suspend writ); id. at 545 (Souter, J., concurring in part and dissenting in part) (finding it to be the Court’s responsibility to identify a clear statement of congressional authorization for the holding of enemy combatants with the specificity required by Section 4001, and determining that none of the Government’s arguments in favor of such a clear authorization is satisfactory).

67. Id. at 579–99 (Thomas, J., dissenting).

68. See id. at 524–39 (plurality opinion) (discussing due process).
particular case. Justice Thomas, in contrast, contends that whatever evidence the Executive uses to ground the detention in the first place is sufficient, and there is no need for due process or for further involvement by the courts.\textsuperscript{69}

The majority strategy might be viewed as a particular implementation of the logic of \textit{Federalist 51}: fear is subjected to a regime in which it can be answered, and moderated by the emotions and goals animating plural institutions. As Justices Ginsburg and Souter point out, the Executive Branch, which is constituted so as to be focused on national security fears, should not be solely responsible for striking the balance between security and liberty: finding that balance requires, as well, the participation of the Legislative Branch, which responds to a range of popular sentiments, or the Judicial Branch, which has an institutional connection to process and the protection of liberty.\textsuperscript{70} Our constitutional order responds to fear—in the style of the Framers—by creating a structure that arrays passion against passion.\textsuperscript{71}

This structural arrangement underscores a second interesting feature of the \textit{Hamdi} decision in relation to fear. Both by requiring congressional authorization of the indefinite detention of enemy combatants, and by equipping those detained with process through which they can contest their enemy combatant status, the Court assimilates the new, fear-inducing situation to familiar doctrines that govern more quotidian circumstances. \textit{Hamdi}'s due process rights are framed within the doctrine of \textit{Mathews v. Eldridge}—the administrative law balancing test that is used, for example, for

\textsuperscript{69} See \textit{id.} at 595–99 (Thomas, J., dissenting).

\textsuperscript{70} Justices Ginsburg and Souter note:

The defining character of American constitutional government is its constant tension between security and liberty, serving both by partial helpings of each. In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security. For reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation’s entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory; the responsibility for security will naturally amplify the claim that security legitimately raises. A reasonable balance is more likely to be reached on the judgment of a different branch . . . . Hence the need for an assessment by Congress before citizens are subject to lockup . . . .

\textit{id.} at 545 (Souter, J., concurring in part and dissenting in part).

\textsuperscript{71} Justices Souter and Ginsburg specifically cite the goal articulated in \textit{Federalist 51}: “the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights.” \textit{id.} (quoting \textit{THE FEDERALIST NO. 51}, at 349 (James Madison) (J. Cooke ed., 1961)).
deprivations of government benefits. This conspicuous recourse to normal science in the due process area contrasts starkly with Justice Thomas's approach, which suggests that fear-inducing national security developments should be handled by recourse to a more exceptional constitutional arrangement: broad deference to the decisions of a unitary executive.

2. Regret

A second emotion that has become salient in recent constitutional adjudication is regret. Chris Guthrie describes regret as "a painful feeling we experience upon determining that we could have obtained a better outcome if we had decided or behaved differently." In contrast to fear, regret has not been a familiar affective dimension of constitutional adjudication. Although there may be many explanations for this divergence, two seem particularly plausible. First, as regards the emotions of litigants or of the citizenry more generally, a focus on regret seems ill-suited to a liberal democracy, which venerates the ostensibly unencumbered choices of its citizens. If citizens have been afforded the opportunity to make their choices, their second thoughts—a reflection of their broader responsibility for those choices—are their own business, not matters of public concern. Second, as regards the courts' own functioning, regret is dangerously redolent of both subjectivity and fallibility—it is premised on an awareness of having had an opportunity to decide otherwise, and having made a flawed or suboptimal choice. For legal actors whose legitimacy has historically resided in their claims to "follow the law"—whether it be the language of the Constitution or a doctrinally-entrenched theory of interpretation—acknowledging regret is a vertiginous admission of incompletely-constrained discretion. Yet notwithstanding these weighty considerations, regret has come to play a surprisingly prominent role in a hotly contested area of constitutional law: the right to reproductive choice.

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72 Id. at 529 (plurality opinion) (citing Mathews v. Eldridge, 424 U.S. 319 (1976)).
73 It also contrasts with proposals such as that made by Bruce Ackerman to shift to a different, newly-improvised system of checks and balances for addressing the threats to national security—and in particular the fear of future dangers—arising from 9/11. See Bruce Ackerman, The Emergency Constitution, 113 YALE L.J. 1029 (2004).
74 Chris Guthrie, Carhart, Constitutional Rights, and the Psychology of Regret, 81 S. CAL. L. REV. 877, 882 (2008). Guthrie's succinct definition draws on a number of works on regret by philosophers, psychologists, and psychotherapists. See id. at 882–83 n.25 (identifying several sources for Guthrie's concept of regret).
75 While judges or justices may sometimes argue, in dissent, that the court has made a decision it will come to regret, such claims are most often only vehicles for arguing that the decision itself constituted an unjustified departure from a constitutionally clear path, rather than occasions for acknowledging the extent of discretion.
The rhetoric of regret, in the context of abortion, began to emerge as the advocacy strategy of pro-life organizations shifted to “woman-centered” arguments for restricting reproductive choice. This transition began with efforts such as “Operation Outcry,” which solicited narratives of women who experienced regret, guilt, and suicidal ideation following abortions. The strategy fueled a range of legislative initiatives, from informed consent requirements to South Dakota’s recent ballot initiative, which proposed the broadest ban on abortion in the country. It received a surprising endorsement from the Supreme Court in Gonzales v. Carhart, a case which considered the constitutionality of a federal ban on intact dilation and extraction abortions. Noting that “[r]espect for human life finds an ultimate expression in the bond of love the mother has for her child[,]” the majority opinion states:

While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.

This focus on retrospective regret became one of several bases for the majority’s decision, including concerns about whether women are being fully informed about the procedure, and uncertainty within the medical community about whether intact dilation and extraction is in fact safer for women who must abort in the second trimester. The opinion triggered a scathing dissent from Justice Ginsburg, who

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78 In 2008, anti-abortion activists in South Dakota introduced via ballot initiative a ban on abortions with limited exceptions for life, health, rape, and incest. The measure banned all abortions except for those: (1) in which the pregnancy results from rape or incest, provided the abortion occurs prior to the end of the twentieth week of gestation (as measured from the first day of the woman’s last menstrual period (“Imp”)) and the physician reports the rape or incest to law enforcement, identifying the woman and the perpetrator if possible; (2) where the abortion “is necessary to avert the death of the pregnant woman”; or (3) where the abortion “is necessary because there is a serious risk of a substantial and irreversible impairment of the functioning of a major bodily organ or system of the pregnant woman should the pregnancy be continued.” Initiative Petition §§ 2-7 (Nov. 4, 2008), available at http://www.sdsos.gov/elections/voterregistration/electvoterpdfs/2008/2008regulateperformanceofabortions.pdf.


80 Id. at 159.

81 Id. (citations omitted).
called concerns about regret "an antiabortion shibboleth for which it concededly has no reliable evidence."\textsuperscript{82} She observed that if the Court is concerned with women's regret about their choices, the answer is to "require doctors to inform women, accurately and adequately, of the different procedures and their attendant risks,"\textsuperscript{83} not to "deprive[] women of the right to make an autonomous choice, even at the expense of their safety."\textsuperscript{84}

Future trajectory of this line of analysis is uncertain: the South Dakota legislation that was based explicitly on similar conclusions regarding retrospective regret was voted down last November by a 55 percent to 45 percent margin.\textsuperscript{85} Yet this reasoning has become part of constitutional doctrine\textsuperscript{86} and provides a ready vehicle for courts to question the reproductive choices of women in a potentially broad array of contexts.\textsuperscript{87}

\textbf{C. Learning from the Analysis of Constitutional Emotions}

In the previous section, I identified two emotions that have come to play a significant role in the Supreme Court's recent jurisprudence. But the study of law and the emotions, as we have seen, does more than identify the operation of emotions in various contexts of law. It also uses research and analysis regarding the emotions, drawn from a variety of disciplinary fields, to provide fuller understandings of those emotions—which animates them and how they operate in particular contexts. These understandings can then be used to interrogate, inform, or revise legal responses. In this section, I want to look briefly at what we have learned about the two emotions in question from research in a number of fields, and ask what it suggests about the way these emotions have been treated by the courts.

\textsuperscript{82} Id. at 183 (Ginsburg, J., dissenting).
\textsuperscript{83} Id. at 184.
\textsuperscript{84} Id.
\textsuperscript{87} One context in which it might be used to significant effect is the context of informed consent. See Memorandum from James Bopp, Jr. & Richard E. Coleson Regarding Pro-Life Strategy Issues 9 (Aug. 7, 2007), available at http://www.montanacc.org/directors_pages/PDFs/10March08/BoppMemo-re-ProlifeStrategy1.pdf (advocating, inter alia, "[a] statute requiring the woman to view ultrasound images of her unborn baby").
1. Public Fear and the Constraints of Process

Fear, as I note above, has been studied in many ways by scholars in fields from philosophy to neuroscience. Much of this research, however, relates to fear as an individual phenomenon, and a response to immediate physical danger. Here I'd like to focus instead on two bodies of work that look at fear as a force in politics or policymaking, which may have group as well as individual dynamics. First, fear has been the subject of a major recent focus by psychologists, economic theorists, and legal scholars interested in the field of risk assessment. These scholars conceive emotions such as fear as prompting departures from rationality: flawed ‘heuristics’ or cognitive shortcuts that impede accurate thinking about risk. Cass Sunstein has described some of these distinctive cognitive errors in his recent book, Laws of Fear: Beyond the Precautionary Principle. Fear, Sunstein observes, is associated with “probability neglect”—we are particularly fearful of events with catastrophic consequences, even if these events have a vanishingly low probability of occurring—as well as with an “availability heuristic”—we tend to be more afraid of developments that recent events or exposures have made cognitively available to us, whether or not they are likely to occur. Sunstein also observes that fear has collective dimensions. It is one of the emotions that is subject to contagion, producing “cascades” of affect in which people who are proximate amplify each other’s anxiety. Sunstein argues that these patterns point to the wisdom of allocating certain kinds of risk assessment calculations to experts who are professionally socialized to resist the kinds of heuristics that affect broad segments of the public.

A second body of work that focuses on more collective dimensions of fear comes from the field of political theory. A recent, exemplary
work that draws on this literature, and applies it specifically to the context of the United States after 9/11, is Corey Robin’s *Fear: The History of a Political Idea.* Using examples from McCarthyism through the Rwandan genocide, Robin argues that fear does not simply emerge in individuals, it follows well-hewn paths of culturally-instilled belief and mythology and can be elaborately orchestrated by public officials. Robin identifies two patterns that are salient in the ebb and flow of U.S. political history: the tendency of the public, and its governmental leaders, to embrace fear as a source of energy and revitalization in politics; and the tendency of U.S. officials to depoliticize the source of fear by presenting groups or nations against whom the American public is (to be) arrayed as motivated by flawed psychology, rather than judgments of political difference. Robin notes that while the public terror following 9/11 was widely understood to represent something entirely new on the American political scene, it actually followed both of these patterns. Devastated as they were by the human costs of the attacks, Americans seized on the possibility they presented for a kind of political rebirth, marked by new unity and a restoration of national purpose that had been absent since the demise of the Cold War. Moreover, officials presented the al-Qa’ida threat as emanating from a psychological or cultural rejection of modernity, rather than a political rejection of U.S. geopolitics and political values.

How might this cross-disciplinary analysis of fear help us think about the issue framed by *Hamdi*? It may suggest, in the first instance, the wisdom of the majority’s reluctance to take the fear reflected in a policy of indefinite detention at face value. The events of 9/11 were almost ideally tailored to provoke the flawed heuristics highlighted by Cass Sunstein: the catastrophic losses at the Twin Towers, and at the Pentagon, and the availability of this source of national terror—through its temporal immediacy and its constant replay in the media, scholarship, and varied forms of cultural

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95 *ROBIN, supra* note 94.

96 *Id.* at 227–48, 142–55 (showing how cultivation of fear requires work by elites and public officials, and how terror can function as the moral foundation for liberal democracy).

97 *Id.* at 142–55 (illustrating how liberal democracies can view terror as a source of regeneration, and how they can view those who perpetrate terror as animated by psychological anxieties about modernity).

98 *Id.* at 155–60 (discussing how 9/11 followed both of these patterns).

99 *Id.*

100 *Id.*
expression—both point to distortions in the fear of another terrorist attack, as do the collective fear “cascades” that followed the event. They also bear the marks of governmental and media orchestration discussed by Robin: government actors—particularly those of the Executive Branch—often characterized the War on Terror as a war against psychological extremists and cultural opponents of modernity. As Robin describes this governmental mindset, one can’t negotiate with such people, so the better path is simply to kill them—or, one might add, to detain them indefinitely. In this context, the checking function made possible by the institutional participation of the Legislative Branch (in authorizing detention) and the Judicial Branch (in providing hearings to detainees) makes a vital contribution. Robin reminds us that it is no panacea: he describes, for example, the way that fear, under McCarthyism, flourished under—and even deployed to advantage the arrangements produced by—the separation of powers. But the opportunity to challenge the manifestations of fear through institutions structured to be animated by other concerns—courts, for example, may perceive the values of proceduralism and the rights of those accused as more “immediate”—provides an antidote well worth preserving.

2. Scripting Regret

A different kind of conclusion emerges from the analysis of regret in relation to Carhart. One of the most striking things about the invocation of regret in Carhart is that the Court relies neither on evidence, nor on analysis. It may be, as Terry Maroney has suggested, that the Court views affective response as a matter of common sense: something that everyone intuitively understands (although, as Maroney points out, some understand differently from others). However, far from simply being a matter of common sense, regret has been and is being carefully investigated, in a variety of disciplines.

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101 Sunstein points to the extreme anxiety provoked by the anthrax attacks that followed 9/11, which claimed very few lives and are generally thought to have been unrelated. See SUNSTEIN, supra note 11, at 84–85.
102 ROBIN, supra note 94, at 6.
103 See id. at 199.
Much of this research calls into question the Court’s treatment of regret in *Carhart*.

To begin with the obvious, the Court marshals no empirical support for its contention that women who abort their fetuses may experience regret, leading to depression and loss of self-esteem. In fact, many empirical studies of post-abortion response reach a starkly different conclusion. They suggest that the predominant emotion women feel, both immediately after abortions and over the longer-term, is relief, and that few of those who do feel grief or conflict over their choice actually regret it.\(^\text{106}\) Investigations of regret by psychologists, behavioral economists, and other social scientists also suggest regret is far less likely to be a problem for women after abortion than the Court suggests. Drawing on this literature in a recent article, Chris Guthrie argues that people tend to avoid regret, overestimate regret, dampen regret, and learn from regret.\(^\text{107}\) These adaptive patterns mean that people tend to experience regret less often than one might anticipate, and that when they do they are capable of muting its force or extracting positive experience from it.\(^\text{108}\) These features, as Guthrie concludes, make regret unlikely to have a negative force in women’s lives following an abortion.

Moreover, regret, like other emotions, emerges in a particular social, political, and cultural context: we receive strong social and cultural cues about the emotions we should feel and the objects that should provoke them.\(^\text{109}\) This context renders the Court’s treatment of regret additionally problematic. Regret emerges in relation to an event, usually a choice, which the subject believes should have been made differently.\(^\text{110}\) In this case, however, the choice has unusual cultural salience: it is a choice by a woman about when or whether to become a mother. Motherhood, in most cultures, is strongly associated with identity as a woman: even some of the women in the Swedish abortion study, who had firmly decided to end their pregnancies, noted that their pregnancy had caused them to feel as if

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\(^{106}\) Kero *et al.*, *supra* note 105, at 2559–60 (citing a range of studies that have found few negative emotional effects and broad experience of satisfaction and/or relief).

\(^{107}\) See Guthrie, *supra* note 74, at 882–902.


\(^{110}\) Gilovich & Medvec, *supra* note 105, at 380 (adopting a definition of regret as “‘a more or less painful cognitive and emotional state of feeling sorry for misfortunes, limitations, losses, transgressions, shortcomings, or mistakes. It is an experience of felt-reason or reasoned-emotion.’” (quoting JANET LANDMAN, *REGRET: THE PERSISTENCE OF THE POSSIBLE* 36 (1993)).
they had arrived at womanhood. Femininity, in addition, is culturally associated with caring for and protecting others, particularly children.

All these factors mean that the choice not to become a mother, to abort rather than nurture a fetus, is heavily socially-freighted. The fact that, even in this setting, women are able to experience relief when they have an abortion reflects both the great difficulties that unexpected motherhood can impose on those not prepared to undertake it, and the emergent social and cultural norms that define women through roles other than mother or caregiver as agents in control of their own lives. A view such as that ventured by the Court can change this subtle affective calculus.

Shifting this cultural balance was precisely what pro-life advocates set out to do with vehicles such as testimonials of Operation Outcry, which were submitted to the South Dakota legislature, and to Congress during hearings on the Partial-Birth Abortion Ban. Operation Outcry offered the experiences of two thousand women, selected and compiled by advocates, who had come to regret and suffer from their decisions to abort. This intervention sought to redefine the debate by highlighting what advocates believed was a neglected response. Yet, as they likely understood, this intervention did not simply describe, it also scripted emotion: the combination of experiential accounts featuring regret with theologically-infused accounts describing women's "natural" role as mother and nurturer sent a strong normative message to women. It reminded them what they should feel—by virtue of biology and morality—when they contemplate abortion. The Supreme Court's embrace of this view

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111 See Keros et al., supra note 105, at 2562.
112 Reva Siegel offers an excellent account of this campaign, as led by activist David Readon and organizations such as the Elliot Institute. See Siegel, supra note 76, at 1017–30.
113 "OPERATION OUTCRY is the project of THE JUSTICE FOUNDATION to end legal abortion by exposing the truth about its devastating impact on women, men and families." Operation Outcry, About Us, http://www.operationoutcry.org/pages.asp?pageid=27784 (last visited June 12, 2009). The Justice Foundation offers pro bono legal support for the litigation of conservative political issues.
114 Similar testimonials were provided to the Court in Carhart through the Brief of Sandra Cano, supra note 46 (brief supported by some 180 "post-abortive" women who offered close to 100 pages of testimony on their experiences).
115 See Siegel, supra note 76, at 1026–27 (reporting that Operation Outcry compiled and supplied to the legislature of South Dakota the statements of 2000 women who had come to regret their decision to abort).
116 See id. at 1018–21.
117 See id. at 1019–21.
118 In a forthcoming article, Clare Huntington makes a similar point about woman-centered anti-abortion arguments; however, she frames it in slightly different terms, arguing that the activists who advanced this rhetoric and the legal actors who adopted it used emotions to (re)construct social norms in relation to abortion. See Clare Huntington, Family Law's Textures:
in *Carhart* provided a potent reinforcement of that script. The social and political significance of the Court’s concern about women’s regret is also underscored by the remedy they provide. As Justice Ginsburg notes in dissent, the proper response to concerns about regret in decisionmaking is to insure that the choice in question is as well-informed as possible. Yet in *Carhart*, the Court responds by circumscribing the choice itself: although the restriction concerns only intact dilation and extraction abortions, the breadth of the Court’s concern about regret could inform broader restrictions. The fact that the Court responds to the possibility of regret by restricting the domain of women’s choices—and the fact that women’s rights to reproductive choice stand alone as the only rights whose exercise courts are prepared to second-guess—undermines emergent conceptions of women as actors and decisionmakers.

**CONCLUSION: AFFECTIVE ANALYSIS AND THE CONSTITUTION**

In conclusion I’d like to step back and think about the arguments for pursuing constitutional law in this particular way. I said at the outset that I was going to pair a recent theoretical interest of mine with the doctrinal field that Mel Durchslag and I share in common. But it is more, I think, than grasping a theoretical hammer and seeing everything, including constitutional law, as a nail. There are real advantages for thinking about constitutional law, in particular, in the ways that I’ve tried to elaborate, and I want to finish by offering a few of them.

The first of these additional benefits is epistemological. Exposing the role that emotions play, in general, helps us to resist the more unqualified versions of the claim that law is the domain of detached or disembodied reason. Highlighting the role of the emotions reminds us of the important realist lesson that judges are always, inevitably, contending with their own sometimes unruly passions. It also underscores the insight of critical scholars such as Martha Minow and

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119 Gonzalez v. Carhart, 550 U.S. 124, 184 (2007) (Ginsburg, J., dissenting). Some interventions by pro-life advocates have reflected this insight, using women’s regret to ground the imposition of additional “informed consent” warnings which must be administered prior to an abortion. An informed consent statute supported by David Reardon was submitted to the legislature in South Dakota, but later tabled in favor of the ban statute. See SOUTH DAKOTA BILL HISTORY REPORT 73 (2006), available at http://legis.state.sd.us/sessions/2006/billstatus.pdf (reporting history of House Bill 1216, “An Act to define the applicable standard of care in regard to screening of risk factors for all abortions except in the case of a medical emergency, to provide civil remedies, and to exempt medical emergencies from the requirements of this Act.”); see also Siegel, supra note 76, at 1027.
Robert Cover that judges who aren't aware of their own affective responses can underestimate the normative significance of the cases they're deciding, and judges who fail to understand the affective significance of cases for litigants can fail to take responsibility for the impact of their decisions on the lives of others. Cover framed this issue poignantly in his study of judges adjudicating the Fugitive Slave Act, whose ability to distance themselves from the lives of the people before them also permitted them to distance themselves from their own moral intuitions about the institution of slavery. These insights aren't unique to the constitutional area, but there are particular advantages to acknowledging the role of emotion here, because the claims of dispassion and objectivity are particularly prominent, even exaggerated, in this area. To take them on here is truly to expose the pervasiveness of emotion in law, and to give us a more multi-dimensional view of the process of legal decisionmaking.

Second, affective questions are operating potently in many kinds of constitutional cases: they may precipitate or infuse the conflict (as in the case of fear in Hamdi); they may be engaged directly on the face of the doctrine (as in Carhart). If we fail to acknowledge them, or we analyze them partially yet miss important features or implications of the emotions at stake, we risk rendering flawed opinions—just as we would if we failed to take account of all the facts, or failed fully to parse the applicable precedent. Part of this understanding is appreciating emotions as social phenomena: what have we learned about how fear operates in groups, or how it may be managed or controlled? Are there reasons that it is easier for legal actors to advert to fear, guilt, or regret when they are experienced by women, particularly mothers, than by other members of the polity? These issues are operating in and around many of the most salient constitutional issues of the day: law and emotions analysis does not import them into constitutional law; it gives us tools for handling, thoughtfully and responsibly, what is already there.

Finally, acknowledging and analyzing the affective dimensions of constitutional cases and constitutional decisionmaking becomes crucial as we begin to see the field extending beyond the work of...
courts to various forms of popular constitutionalism. Here, scholars are coming to recognize what has, from the founding to the Civil War, through the Great Depression to the civil rights struggle, been a major pattern in American constitutionalism: the complicated engagements between courts, democratic institutions, and members of a mobilized public. Those who approach the law not as institutionally-defined experts, but as citizens, who have not been socialized to resist or abstract from affective response, engage constitutional issues not only (or even primarily) doctrinally, but in terms of the deep, only semi-rationalized feeling states they generate. Hamdi was about the process due a citizen detained as an enemy combatant, but it was also about how the institutions that comprise our system of government should respond to the fear generated by an unanticipated and unprecedented vulnerability to terror.

Many people understand these decisions in affective terms that the Court acknowledges mainly in moments of crisis or transformation. Emotions form the context, the content, and the stakes of constitutional decisionmaking—perhaps particularly at a complicated moment when so many of our constitutional precepts, from equal protection, to reproductive rights, to national security, and the system of checks and balances, seem to be up for grabs. If we, as legal commentators and actors, fail to understand the affective ways these cases are conceived by the people who live under our Constitution, we risk having a court system, and a body of doctrine, that is isolated from and unaccountable to the people who live under it. As paradoxical as it may sound, encouraging decisionmakers to explore the affective dimensions of the Constitution may be essential to the Court's ongoing legitimacy.