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Pathetic Argument in Constitutional Law

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PATHETIC ARGUMENT IN CONSTITUTIONAL LAW

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Pathetic argument, or argument based on pathos, persuades by appealing to the emotions of the reader or listener. In Aristotle's classic treatment, it exists in parallel to logical argument, which appeals to deductive or inductive reasoning, and ethical argument, which appeals to the character of the speaker. Pathetic argument is common in constitutional law, as in other practical discourse—think of “Poor Joshua!”—but existing accounts of constitutional practice do not provide resources for understanding the place of and limitations upon such appeals when they appear in judicial opinions. This Article begins to fill that gap. Pathetic argument is one of the acceptable modes of persuasion that constitutional argument shares with other deliberative domains, though at its best it can be used to amplify arguments within the set of discourses—text, history, structure, precedent, and consequences—that make constitutional law a distinctive form of politics. Normatively, appeals to emotion are most easily justified in opinions that seek to declare rather than apply law; in separate writings; when addressed to accepted subjects of constitutional argument rather than the ultimate outcome in the case; and when they arouse other-regarding rather than self-regarding emotions. A nuanced account of the proper place of pathetic argument in constitutional law is instrumental to understanding what it means to engage, and not to engage, in constitutional discourse.

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INTRODUCTION

Much successful constitutional argument is, in a classical sense, pathetic. A pathetic argument is one that appeals to pathos, or emotion. Persuasion may result, Aristotle wrote, “[W]hen [the hearers] are led to feel emotion by the speech; for we do not give the same judgment when grieved and rejoicing or when being friendly and hostile.”¹ Pathos is one of several modes of persuasion in law, as in other practical discourse, and may be especially so in constitutional law, whose successful elaboration must align with our deepest commitments. A commitment whose evocation fails to stir emotion among the committed is unlikely to have been very deep.

1. Aristotle, *On Rhetoric: A Theory of Civic Discourse* bk. 1, ch. 2, § 5 (George A. Kennedy trans., Oxford Univ. Press 1991) (n.d.) (alteration omitted).

And yet one detects an unexamined ambivalence toward the appropriate role of emotion in constitutional discourse. Taxonomists of constitutional argument, even those whose project is descriptive, typically ignore or dismiss emotional appeal as a standard mode of persuasion in constitutional law. Philip Bobbitt, for example, devotes less than one sentence in his *Constitutional Fate* to “pathetic” argument, writing that it “has to do with the idiosyncratic, personal traits and thus reflects one feature of illegitimate judicial opinions which is often confounded with [ethical argument].”² Bobbitt’s concern appears to be that invoking pathos in a constitutional case requires the judge to individuate decisionmaking that should properly be general. The same basic concern animated objections to President Obama’s invocation of “empathy” and “compassion” as desirable traits in a Supreme Court Justice.³ As the majority opinion stated in *Roe v. Wade*, “Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection.”⁴

The author of that opinion, Justice Blackmun, would later write, dissenting in *DeShaney v. Winnebago County Department of Social Services*, that “compassion need not be exiled from the province of judging.”⁵ That statement appears just before what has become the canonical example of pathos in a judicial opinion. The *DeShaney* Court held that a state agency that failed to adequately investigate reports of child abuse could not be held liable under the Due Process Clause for resulting injuries to the child, Joshua DeShaney. Justice Blackmun began his final paragraph thus:

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, as the Court revealingly observes, “dutifully recorded these incidents in [their] files.” It is a sad commentary upon American life, and constitutional principles—so full of late of patriotic fervor and proud proclamations about “liberty and justice for all”—that this child, Joshua DeShaney, now is assigned to live out the remainder of his life profoundly retarded.⁶

2. Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* 95 (1982) [hereinafter Bobbitt, *Constitutional Fate*].

3. See *infra* text accompanying notes 89–100 (presenting President Obama’s statements that judges’ empathy and experiences assist in justice and criticism of those statements).

4. *Roe v. Wade*, 410 U.S. 113, 116 (1973) (emphasis added); see Terry A. Maroney, The Persistent Cultural Script of Judicial Dispassion, 99 *Calif. L. Rev.* 629, 633 (2011) (“[J]udicial dispassion has come to be regarded as a core requirement of the rule of law . . .”).

5. 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting).

6. *Id.* (internal citation omitted).

Anger, sadness, guilt, and shame are all in play in Justice Blackmun's opinion, drafted in his own hand.⁷ The individuation of Joshua DeShaney, the appeal drawn from his idiosyncratic, personal traits, is deliberate and effective.

Which Justice Blackmun—the one in *Roe* or the one in *DeShaney*—was true to the practice of constitutional law? Which Justice Blackmun was true to its aspirations? These questions form this Article's subject.

There is an insightful but surprisingly small literature on the related but quite distinct question of the role of emotion in judicial decisionmaking.⁸ Legal realists such as Jerome Frank and Arthur Corbin wrote of what they believed to be the inevitable influence of emotion as a constitutive element of a judge's personhood, and therefore of the decisions he reached.⁹ More recently, Richard Posner has argued that emotion invariably contributes to decisionmaking under uncertainty, for judges as for others.¹⁰ Martha Nussbaum and Terry Maroney, among others, have emphasized the compatibility between emotion and substantive rationality; on these accounts, what Maroney calls the "cultural script of judicial dispassion" does affirmative damage to the legal decisional process.¹¹

These discussions have focused predominantly on the judge as an object of emotional argument, the pathetic *appellee* as it were. Still less has been written of the distinct role of a judge as a producer rather than a recipient of emotional appeals. Law and literature scholars have approached law as a form of rhetoric, but have not much integrated their

7. See Linda Greenhouse, *Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey* 230–31 (2005) (including reproduction of Blackmun's draft).

8. A helpful summary of this scholarship appears in Maroney, *supra* note 4, at 652–64.

9. See Jerome Frank, *Law and the Modern Mind* 119 (Anchor Books 1963) (1930) ("The peculiar traits, disposition, biases and habits of the particular judge will . . . often determine what he decides to be the law."); Arthur L. Corbin, *The Law and the Judges*, 3 *Yale Rev.* 234, 250 (1914) ("Law is not logic, nor does reason play the chief part in its creation. It grows in the semi-darkness of ignorance and emotion, it is based upon racial experience, and it represents the custom and the interest and the desire of the average man."); see also Theodore Schroeder, *The Psychologic Study of Judicial Opinions*, 6 *Calif. L. Rev.* 89, 96 (1918) (describing judicial decisions as "revelation of the emotions, the phantasies, the desires, the persistent past life and the present intellectual status of the judge").

10. See Richard A. Posner, *How Judges Think* 105–10 (2008) [hereinafter Posner, *Think*].

11. Maroney, *supra* note 4, at 633 (calling idea of judicial dispassion "counterproductive" because it "undervalues what judicial emotion might bring to the table and enfeebles our ability deliberately to channel emotion in service of good judging"); see also Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 *Colum. L. Rev.* 269, 273–78 (1996) (defending "evaluative conception" of role of emotion in criminal law jurisprudence, which posits "emotions express cognitive appraisals" that can be both "morally evaluated" and improved through "moral education"). See generally Martha C. Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (2001) [hereinafter Nussbaum, *Upheavals*] (elaborating view of emotions as cognitive appraisals connecting one's external environment to one's significant commitments).

accounts with those offered within more mainstream constitutional scholarship.¹² Criminal law scholars have written of the special place of emotional appeals in assessing criminal culpability and calibrating punishment.¹³ To the degree most legal academics have considered the role emotional appeals play or should play in constitutional argument, they have largely assimilated their analysis to an assessment of the role of emotion in judicial decisionmaking, or else simply assumed that such appeals fall self-evidently outside the judicial role.

Taking pathetic argument in constitutional law as a *sui generis* subject, this Article challenges those assumptions both descriptively and normatively. If anything is self-evident, it is that appeals to pathos are an important element of constitutional practice. Yet the dominant typologies of constitutional argument do not provide resources for understanding or legitimating those appeals. Our ability to identify features of argument that are special to constitutional law is said to constrain and, therefore, to define constitutional law as a *distinctive* form of politics.¹⁴ Bobbitt famously described six archetypes of constitutional argument: historical, textual, structural, doctrinal, prudential, and ethical.¹⁵ But to cite just one clear example of pathetic argument, Justice Kennedy, dissenting in *Stenberg v. Carhart*, matter-of-factly describes a so-called partial birth abortion by saying, “The fetus, in many cases, dies just as a human adult or child would: It bleeds to death as it is torn limb from limb.”¹⁶ Justice Kennedy’s gruesome description of the procedure, designed deliberately

12. See generally James Boyd White, *Heracles’ Bow: Essays on the Rhetoric and Poetics of the Law* (1985) [hereinafter White, *Heracles’ Bow*] (developing conception of law as rhetorical process); Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 *Yale J.L. & Human.* 201 (1990) (applying insights from literary criticism to appellate judicial opinions).

13. See, e.g., Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 *U. Chi. L. Rev.* 361, 390–412 (1996) [hereinafter Bandes, *Empathy*] (applying normative theory of emotional appeals in law to use of victim impact statements); Kahan & Nussbaum, *supra* note 11, at 305 (arguing “quality of . . . offenders’ emotion is *one* consideration that matters in substantive criminal law”); Douglas A. Berman & Stephanos Bibas, *Engaging Capital Emotions*, 102 *Nw. U. L. Rev. Colloquy* 355, 356–61 (2008), available at <http://www.law.northwestern.edu/lawreview/colloquy/2008/17/LRColl2008n17Berman&Bibas.pdf> (on file with the *Columbia Law Review*) (seeking to recover space for overt appeals to emotion in capital context).

14. See Bobbitt, *Constitutional Fate*, *supra* note 2, at 6 (discussing United States’ unique “legal grammar” and its role in constitutional interpretation); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 *Harv. L. Rev.* 1189, 1194 (1987) [hereinafter Fallon, *Constructivist Coherence*] (finding five main categories of argument and authority in constitutional debate); cf. Stanley Fish, *Fish v. Fiss*, 36 *Stan. L. Rev.* 1325, 1333 (1984) (“The person who looks about and sees . . . a field already organized by problems, impending decisions, . . . etc. is not free to choose or originate his own meanings, because a set of meanings has . . . already chosen him and is working itself out in the actions . . . he is even now performing.”).

15. See Bobbitt, *Constitutional Fate*, *supra* note 2, at 3–119; Philip Bobbitt, *Constitutional Interpretation* 12–13 (1991) [hereinafter Bobbitt, *Constitutional Interpretation*] (listing modalities of constitutional argument).

16. 530 U.S. 914, 958–59 (2000) (Kennedy, J., dissenting).

to disgust and to shame the audience, masquerades as a cold recitation of facts but is integral to the opinion's rhetorical mission.

It is difficult to fit this practice neatly into what Bobbitt calls the "modalities" of constitutional argument.¹⁷ It is prudential in the sense that it means to alert the reader to the social and moral consequences of invalidating the state's ban on the procedure. But much constitutional argument, including argument squarely identified with other modalities, is prudential if by the label we mean only that it contemplates consequences for our social and moral life. Justice Kennedy's tactics in *Stenberg* constitute ethical argument in the sense that Kennedy's grounds for persuasion are rooted in a communal morality; he is advancing what Richard Fallon would call a "value" argument.¹⁸ But Bobbitt does not mean to conflate ethical argument with moral argument; ethical argument in his usage rather harkens to the classical identification of ethos as a rhetorical mode grounded in the character of the speaker, here the character of the American people as embodied in their constitutional arrangements.¹⁹

The best way to understand the function of Justice Kennedy's pathetic appeal is not as an archetype of argument in itself, analogous to historical, textual, and so on, but rather as a mode of persuasion. Pathetic argument in constitutional law attends to and manipulates the reader's emotions in order to persuade her either as to the ultimate adjudicative outcome or as to the substance or valence of established "modalities." The key, then, to understanding the role of pathetic argument in constitutional law lies in distinguishing subjects of argument from forms of rhetoric. What makes constitutional law special is that its theater of argument is confined largely to text, structure, history, doctrine, and consequences. What makes constitutional argument continuous with other forms of practical discourse is that it employs the same basic tools of persuasion with respect to those subjects: logos (appeals to logic), ethos (appeals to the speaker's character), and pathos (appeals to the listener's emotions).

Identifying the persistent role of pathos (or indeed ethos and logos) in constitutional argument does not by itself answer the normative question. There are several reasons to believe, however, that pathetic argument is at least sometimes an appropriate mode of persuasion in constitutional law. First, whether or not pathetic argument *can* be eliminated from constitutional law, it is in fact an established part of constitutional practice. Constitutional law depends on a substantial measure of popular acceptance for its legitimacy, and we have come to identify at least some arguments in the pathetic mode as an accepted constitutional form. Second, and significantly, constitutional adjudication at the appellate level

17. Bobbitt, *Constitutional Interpretation*, supra note 15, at 12.

18. Fallon, *Constructivist Coherence*, supra note 14, at 1205 ("[V]alue arguments assert claims about what is good or bad, desirable or undesirable, as measured against some standard that is independent of what the constitutional text requires.").

19. See Bobbitt, *Constitutional Fate*, supra note 2, at 94.

approaches a form of lawmaking in hard cases. It eschews error-correction and self-consciously seeks to establish rules and standards of prospective and general application.²⁰ Lawmaking is not merely conventionally understood as tolerating emotional appeals; rather, pathetic argument is essential to lawmaking because emotion is integral to public morality. Popular legitimation of constitutional adjudication requires judges to recognize, adapt to, and perhaps even shape the emotional responses of their audience. At each rung of the appellate ladder, pathetic argument becomes attributable ever less to bias and ever more to social awareness. Communicating this awareness improves both the democratic responsiveness and the administrability of constitutional rules. Finally, pathetic argument is unavoidable. Of course, that some phenomenon is inevitable does not mean we should not seek to minimize its destructive effects. But it does place the burden of persuasion on those who would argue, in the face of professional evolution, that pathetic argument is never appropriate.

Pathetic argument, like other forms, is context-specific. Overt appeals to emotion are often inappropriate in constitutional argument, as elsewhere in the law, and the appropriateness of such appeals necessarily depends on the subject of the argument and the nature of the emotions involved. It is not possible to impose a fixed dichotomy that specifies, by rule, when pathetic argument is acceptable and when it is not, but we can identify a set of factors likely to influence that judgment. First, it is useful to distinguish emotional appeals in the service of an accepted subject of constitutional argument from those that pertain solely to the ultimate issue in the case. Modes of persuasion may, but need not, modify the standard constitutional subjects. Thus, we can imagine pathetic historical argument—see, for example, Chief Justice Rehnquist’s recitation of John Greenleaf Whittier’s patriotic ballad “Barbara Frietchie” in his *Texas v. Johnson* dissent²¹—just as we can imagine pathetic argument simpliciter: “We should permit prohibitions on partial birth abortions because the procedure is offensive and disgusting.” Pathetic argument as to the ultimate issue fits less easily into the traditions of constitutional practice.

In addition to the subjects of pathetic constitutional argument, we might also wish to know the kinds of emotion being invoked. Under the now-dominant “cognitive theory” of emotions, our feelings are not necessarily impulsive and ad hoc but often reflect a rational response to information about the world.²² We are motivated to respond to external

20. See Henry Paul Monaghan, On Avoiding Avoidance, Agenda Control, and Related Matters, 112 Colum. L. Rev. 665, 683–85 (2012) (“While still frequently engaged in what we could regard as little more than ordinary dispute resolution, the supreme Court’s law declaration function has long since assumed overriding importance.”).

21. 491 U.S. 397, 424–25 (1989) (Rehnquist, C.J., dissenting).

22. See *infra* Part II.A (discussing feeling and cognitive theories of emotion respectively defining emotions as associated with specific physical sensations or particular objects of evaluation).

stimuli not by logos but by pathos, and motivated action is necessary to the vitality of constitutional law.²³ Emotions such as love, anger, or shame may produce both deliberation about the content of our commitments and, just as important, action in the service of that deliberation. Emotions such as jealousy, vengeance, or disgust might be less likely to produce normatively desirable action.²⁴ Or the opposite may be true.²⁵ Or it may just depend on context. In any event, it is worth doing the work needed to distinguish more from less productive emotion-generated responses.

Other factors that might be relevant to whether pathetic argument is appropriate include, as suggested above, whether the court's role in a case is better characterized as law-applying or law-announcing and whether the writer is speaking for the court or solely for himself or a subset of the court. Eccentricity in separate writing does less to damage the reputation of the court, and dissenting opinions are, often self-consciously, efforts at law reform. The closer the judge is to being an advocate, possessed of a distinct role morality, the more license the judge may have to employ the standard tools of legal advocates. Those tools have long included "jury arguments," so called even when they are presented to judges.²⁶

This Article proceeds largely as outlined above. Part I introduces the Peripatetic concept of pathos and identifies the traditional discomfort with pathetic argument in constitutional law. Part II defines emotional appeals and fits pathetic argument into existing accounts of constitutional methodology, specifically those of Bobbitt and Fallon. Part III makes the normative case for recognizing a role for pathetic argument in constitutional law. Part IV assesses the epistemic and practical purchase of identifying and accepting this approach to constitutional argument.

Appeals to logos and to ethos are relatively hierarchical approaches to legal persuasion. Privileging recourse to logic over appeals to emotion rewards higher education, formal language acquisition, and symbolic thinking. Privileging ethical over pathetic appeal presupposes shared reputational markers and implies an established cultural hegemony. Critical theorists have long resisted legal formalism partly on these

23. Cf. Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* 145–206 (2004) (describing ways in which "people out of doors" influenced constitutional development through nineteenth century).

24. See Martha C. Nussbaum, *Hiding from Humanity: Disgust, Shame, and the Law* 124–71 (2004) (criticizing disgust's role in creating legal norms).

25. See Dan M. Kahan, *The Progressive Appropriation of Disgust*, in *The Passions of Law* 63–65 (Susan A. Bandes ed., 1999) (defending disgust as expressive emotion in criminal law); Robert C. Solomon, *Justice v. Vengeance: On Law and the Satisfaction of Emotion*, in *The Passions of Law*, *supra*, at 123, 124 ("[J]ustice itself is (in part) a matter of emotion and... the desire for vengeance is basic to its concerns."); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. Chi. L. Rev. 591, 630–52 (1996) [hereinafter Kahan, *Alternative Sanctions*] (advocating shaming as appropriate alternative sanction); Eric A. Posner, *Law and the Emotions*, 89 Geo. L.J. 1977, 1999 (2001) (arguing feelings of disgust are unlikely to interfere with juror deliberations)..

26. See *infra* note 88.

grounds.²⁷ Identifying established pathetic practice, developing quality controls, and thereby more generally recovering a legitimate space for pathetic constitutional argument may help to address some of these concerns even as they give rise to others. Attention to pathos, and therefore to audience, in constitutional law carries the familiar risks that attach to protestant approaches to constitutional construction.²⁸ To the degree these risks are merely the wages of self-understanding, they are risks worth taking.

I. THE PROBLEM WITH PATHOS

Persuasion is vital to law and to democratic governance. The importance of persuasion within these domains is precisely what led the Ancient Greeks, the earliest democrats, to systematize and codify the forms of rhetoric.²⁹ Indeed, among Aristotle's chief contributions was his generalization of familiar concepts in legal rhetoric to nonlegal domains.³⁰ In so doing, he emphasized the nonemotional, logical elements of rhetoric.³¹ This Part discusses the very different modern American understanding of pathetic argument as an element of legal and constitutional practice. While emotional appeal remains a significant and much discussed approach to legal argument across several areas, it is generally dismissed as irrelevant or subversive in constitutional law and in judicial practice more generally.

A. The Classical Conception

Its antiquity notwithstanding, Aristotle's treatise *On Rhetoric* is the seminal work on the art of persuasion. It is dissected, criticized, and defended in modern courses on rhetoric, and a rhetorician's relative

27. See Robert M. Cover, Foreword: Nomos and Narrative, 97 Harv. L. Rev. 4, 42 (1983) [hereinafter Cover, Foreword] ("[T]o state the problem [to which courts respond] as one of unclear law or difference of opinion about *the* law seems to presuppose that there is a hermeneutic that is methodologically superior to those employed by the communities that offer their own law."); Mark V. Tushnet, Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles, 96 Harv. L. Rev. 781, 785 (1983) (challenging liberal embrace of interpretivism and neutral principles on grounds that "only coherent basis for their requisite continuities of history and meaning is found in the communitarian assumptions of conservative social thought").

28. See Sanford Levinson, Constitutional Faith 29 (1988) (describing "protestant" approach to constitutional interpretation as "based on the legitimacy of individualized (or at least nonhierarchical communal) interpretation" as opposed to "catholic" position that views Supreme Court as "dispenser of ultimate interpretation").

29. See George A. Kennedy, Introduction to Aristotle, supra note 1, at 7–8 [hereinafter Kennedy, Introduction] (describing occasions for use of civil rhetoric).

30. See id. at 9 (noting Aristotle criticized handbooks for concentration on judicial situations).

31. See id.; see also Aristotle, supra note 1, bk. 1, ch. 1, §§ 3–4 ("[P]ity and anger and such emotions of the soul do not relate to fact but are appeals to the juryman.").

affinity with Aristotle continues to be her central defining characteristic.³² *On Rhetoric* identifies three *pisteis*, or modes of persuasion, already discussed in brief: “[S]ome are in the character of the speaker [*ēthos*], and some in disposing the listener in some way [*pathos*], and some in the argument itself, by showing or seeming to show something [*logos*].”³³

For Aristotle, then, persuasion depends importantly on the quality of the inductive and deductive reasoning present in the argumentation (i.e., *logos*), but it also depends on the speaker’s success at demonstrating his reputation and integrity (i.e., *ethos*) and on his skill at arousing the emotions of his audience in favor of his position and against the position of his opponent (i.e., *pathos*). A speaker must appear to have practical wisdom, virtue, and good will, thereby establishing a measure of ethical authority.³⁴ For Aristotle, that authority was reflected in and thereby emerged from the content of the speech—whether it was “spoken in such a way as to make the speaker worthy of credence”—rather than from pre-existing reputational markers such as wealth or status.³⁵ This understanding of ethical argument differs from that of many of its modern discussants, but it was a crucial point for Aristotle, who believed *ethos* to be “almost, so to speak, the controlling factor in persuasion.”³⁶

Aristotle devoted ten chapters of *On Rhetoric* to emotional appeal.³⁷ He defined emotions as “those things through which, by undergoing change, people come to differ in their judgments,”³⁸ and so these chapters offer primers on how a speaker arouses, within the listener, seven dyadic sets of emotions or moods: anger or calmness; friendliness or enmity; fear or confidence; shame or shamelessness; kindness or unkindness; pity or indignation; envy or emulation.³⁹ For example, after describing numerous circumstances that tend to cause someone to be angry (e.g., “if someone works against him and does not cooperate with him”⁴⁰ or when others “speak badly of, and scorn, things [he] take[s] most seriously”⁴¹), Aristotle concludes the chapter on anger by saying, “[I]t is clear that it might be needful in speech to put [the audience] in the state of mind of those who are inclined to anger and to show one’s opponents as responsible for those things that are the causes of anger.”⁴² In the chapter on fear, he writes,

32. See George A. Kennedy, *Prooemion to Aristotle*, *supra* note 1, at ix–x (describing influence of Aristotelian rhetoric on modern rhetoric theorists).

33. Aristotle, *supra* note 1, bk. 1, ch. 2, § 3.

34. See *id.* bk. 2, ch. 1, § 5 (noting speaker with all these qualities will be “necessarily persuasive to the hearers”).

35. *Id.* bk. 1, ch. 2, § 4 (footnote omitted).

36. *Id.*

37. See *id.* bk. 2, chs. 2–11.

38. *Id.* ch. 1, § 8.

39. See *id.* chs. 2–11.

40. *Id.* ch. 2, § 9.

41. *Id.* § 13.

42. *Id.* § 27.

"[W]henver it is better [for a speaker's case] that they [i.e., the audience] experience fear, he should make them realize that they are liable to suffering; for [he can say that] others even greater [than they] have suffered."⁴³

Aristotle sought to disclaim exclusive or predominant reliance on pathos as a mode of persuasion, but he conceded its significance. His emphasis on pathetic argument maps onto his conception of rhetoric as attuned not just to speaker (hence, ethos) and subject (hence, logos), but also to audience (hence, pathos). The neo-Aristotelian philosopher Chaim Perelman, in his well-known treatise *The New Rhetoric*, writes, "The great orator, the one with a hold on his listeners, seems animated by the very mind of his audience."⁴⁴ Plato dismissed the sophists for pandering to the crowd, but Aristotle, even as he shared Plato's criticisms, was a more practical man. "[N]o orator, not even the religious orator," Perelman writes, "can afford to neglect this effort of adaptation to his audience."⁴⁵

B. Pathos in Modern Legal Practice

"Emotion pervades the law,"⁴⁶ Susan Bandes writes, and there are indeed legal contexts in which the use of emotional appeals is openly acknowledged as legitimate and even celebrated. The most ready examples emerge from criminal law. Our assessment of the gravity of particular offenses and our sentencing practices reflect moral judgments that may be inseparable from the emotions those judgments both validate and produce.⁴⁷ Thus, capital punishment relies on a theory of retribution that seems to require emotionally attuned moral judgments about whether death is deserved, or whether it is appropriate to express the community's outrage through the use of its ultimate sanction. We permit jurors to hear evidence of the emotional impact on the victim's family at the sentencing phase of capital trials in order to "counteract[] the mitigating evidence which the defendant is entitled to put in."⁴⁸ The sentencing phase thereby becomes a deliberate effort to persuade the juror to internalize the pain and suffering experienced by the victim's family or to grant mercy to the

43. Id. ch. 5, § 15.

44. Ch. Perelman & L. Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation* 24 (John Wilkinson & Purcell Weaver trans., Univ. of Notre Dame Press 1969) (1958).

45. Id.

46. Susan A. Bandes, Introduction to *The Passions of Law*, supra note 25, at 1 [hereinafter Bandes, Introduction].

47. See Berman & Bibas, supra note 13, at 355–56 (arguing emotion is unavoidable in capital punishment context); Kahan & Nussbaum, supra note 11, at 270 (asserting emotions are ubiquitous in criminal law and judgments of whether emotion is "reasonable" may influence legal assessment).

48. *Payne v. Tennessee*, 501 U.S. 808, 825 (1991) (quoting *Booth v. Maryland*, 482 U.S. 496, 517 (1987) (White, J., dissenting)).

defendant in contemplation of the social benefits of his continued existence or out of sympathy toward those his death would affect.

In *Payne v. Tennessee*, the case in which the Court permitted such evidence,⁴⁹ the sentencing jury heard testimony from the victim's mother recounting her young grandchild Nicholas's response to the murder of his mother, Charisse, and sister, Lacie Jo:

He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell him yes. He says, I'm worried about my Lacie.⁵⁰

In his closing argument to the jury, the prosecutor said:

There is nothing you can do to ease the pain of any of the families involved in this case. . . . But there is something that you can do for Nicholas.

Somewhere down the road Nicholas is going to grow up, hopefully. He's going to want to know what happened. And he is going to know what happened to his baby sister and his mother. He is going to want to know what type of justice was done. He is going to want to know what happened. With your verdict, you will provide the answer.⁵¹

Rebutting the defendant's closing argument, the prosecutor continued:

No one will ever know about Lacie Jo because she never had the chance to grow up. Her life was taken from her at the age of two years old. So, no there won't be a high school principal to talk about Lacie Jo Christopher, and there won't be anybody to take her to her high school prom. And there won't be anybody there—there won't be her mother there or Nicholas' mother there to kiss him at night. His mother will never kiss him good night or pat him as he goes off to bed, or hold him and sing him a lullaby.⁵²

For his part, the defendant presented testimony from a woman who stated that he "was a very caring person, . . . that he devoted much time and attention to her three children," and that her children "had come to love him very much and would miss him."⁵³

The rhetorical mode of both the prosecutor, overtly, and Payne's attorney, more subtly, was pathetic. The arguments violated neither governing statutes nor ethical rules and, after *Payne*, neither did they violate the Constitution. Indeed, one of the aggravating circumstances for imposition of the death penalty in Tennessee, as in many other states, is

49. The *Payne* Court overruled *Booth* and *South Carolina v. Gathers*, 490 U.S. 805 (1989), which had held that admission of victim-impact evidence and argument at a capital sentencing trial violated the Eighth Amendment.

50. *Payne*, 501 U.S. at 814–15.

51. *Id.* at 815.

52. *Id.* at 816.

53. *Id.* at 814.

whether the crime was “especially heinous, atrocious, or cruel.”⁵⁴ Persuading a jury that a crime fits this description without appealing to the jurors’ emotions is a neat trick that no one seriously expects prosecutors to accomplish.⁵⁵ As the *Payne* Court said, defending the use of victim-impact evidence, “[T]he testimony illustrated *quite poignantly* some of the harm that Payne’s killing had caused.”⁵⁶

Argumentation involving victim-impact evidence or death penalty mitigation is not the only place where emotional appeal is a legitimate element of criminal practice. Pleas for mercy based on childhood trauma, dependent partners and children, good deeds, amicability, or other factors liable to arouse the judge’s sympathy or pity are commonplace in criminal sentencing. Outside the sentencing realm, gradation of criminal culpability more generally requires an assessment of the defendant’s state of mind, and so evidence related to the nature of any potential provocations or possible grounds for sympathy or insanity are often admissible in criminal trials.⁵⁷ Defendants seeking to arouse contempt based on the provocative actions of the homicide victim often advance an imperfect self-defense, available at common law to defendants who committed a homicide out of a good-faith belief that their life was in danger.⁵⁸ Battered woman syndrome is one version of this defense.⁵⁹ Defenses of “honor” or “heat of passion”

54. Tenn. Code Ann. § 39-13-204(i)(5) (2012); see also Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today’s Arbitrary and Mandatory Capital Punishment Scheme*, 6 Wm. & Mary Bill Rts. J. 345, 364 (1998) (noting most states with capital punishment use version of heinous, atrocious, and cruel aggravator). The Supreme Court has long required states to adopt a narrowing construction of this aggravating factor in order to ensure that it is not so open-ended as to be arbitrary. See *Walton v. Arizona*, 497 U.S. 639, 654 (1990) (finding construction of state statute sufficiently narrow to meet constitutional muster), overruled on other grounds by *Ring v. Arizona*, 536 U.S. 584 (2002); *Proffitt v. Florida*, 428 U.S. 242, 255–56 (1976) (same). For example, the Tennessee instruction qualifies the aggravator in a typical way, with the phrase “in that it involved torture or serious physical abuse beyond that necessary to produce death.” Tenn. Code Ann. § 39-13-204(i)(5); see also *State v. Brogdon*, 457 So. 2d 616, 630 (La. 1984) (noting to apply aggravating factor in Louisiana “there must exist evidence, from which the jury could find beyond a reasonable doubt, that there was torture or the pitiless infliction of unnecessary pain on the victim”). This kind of language may constrain the scope of the prosecutor’s presentation, but it neither requires nor invites dispassion.

55. See Berman & Bibas, *supra* note 13, at 359 (noting quintessential jury questions in capital punishment cases are laden with emotion).

56. 501 U.S. at 826 (emphasis added). For a fuller discussion of the role of emotion in victim-impact testimony, see generally Bandes, *Empathy*, *supra* note 13.

57. See Douglas N. Walton, *Appeal to Pity: Argumentum ad Misericordiam* 174 (1997) (“Because the state of the defendant’s mind is a relevant issue in this type of defense, appeals to sympathy or compassion cannot be excluded from a criminal trial as irrelevant, generally.”).

58. See *id.* at 175–76 (discussing pity-based argument in imperfect self-defense context).

59. See Cathryn Jo Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill*, 36 Am. U. L. Rev. 11, 14–15 (1986) (“The defense is designed to persuade the fact-finder that the defendant’s status as a battered woman

killings are permitted to pursue similar strategies, to invite the jury to experience the emotional disturbance that allegedly precipitated the offense.⁶⁰

The victim-impact example makes clear, however, that pathetic argument in criminal law need not always be in the service of mitigation. Sentencing hearings may involve statements by prosecutors crafted to arouse contempt toward the accused or by the judge herself seeking to instill shame or remorse in the defendant. Dan Kahan has argued that criminal punishment itself often is and should be graduated not simply based on the harm caused by the defendant's acts or on the defendant's personal moral culpability but also, to paraphrase H.L.A. Hart, "as a means of venting or emphatically expressing moral condemnation."⁶¹ Kahan advocates shaming penalties as superior to alternative sanctions such as fines and community service because shaming better captures the expressive dimension of criminal punishment.⁶² Shaming penalties typically involve gratuitous public exposure for crimes, such as solicitation of a prostitute or sexual abuse of a child, that defy the community's conventional morality.⁶³ It is impossible to argue in favor of a shaming penalty or to impose one as a judge without recognizing and trading on the fact that certain crimes arouse enmity or disgust among the public and, when publicized, tend to deeply embarrass the perpetrator.

Pathetic argument does not receive unqualified acceptance even in the contexts just discussed. The three-Justice plurality that announced the opinion of the Court in *Gardner v. Florida* wrote, "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."⁶⁴ That statement routinely appears in death penalty opinions.⁶⁵ Jurors in capital cases are frequently instructed that they are not to decide

renders reasonable her belief that self-help was justified [and she] should be acquitted"); see also, e.g., *State v. Norris*, 279 S.E.2d 570, 573–74 (N.C. 1981) (permitting imperfect self-defense theory to reduce first degree murder to voluntary manslaughter in case involving battered woman defendant).

60. See Caroline Forell, *Homicide and the Unreasonable Man*, 72 *Geo. Wash. L. Rev.* 597, 601 (2004) (reviewing Cynthia Lee, *Murder and the Reasonable Man: Passion and Fear in the Criminal Courtroom* (2003)) ("Through the defenses of provocation and self-defense the law continues to empathize with violent men [by] defining reasonableness to mean typicality and then permitting juries to find atypical conduct derived from typical emotions sufficient as an excuse or justification.").

61. Kahan, *Alternative Sanctions*, *supra* note 25, at 596 (quoting H.L.A. Hart, *Law, Liberty & Morality* 65–66 (1963)).

62. See *id.* at 635–37 (explaining advantages of shaming punishments).

63. See *id.* at 631–34 (discussing four classes of shaming penalties—stigmatizing publicity, literal stigmatization, self-debasement, and contrition).

64. 430 U.S. 349, 358 (1977) (Stevens, J., plurality opinion).

65. E.g., *Schiro v. Summerlin*, 542 U.S. 348, 363 (2004) (Breyer, J., dissenting); *Mickens v. Taylor*, 535 U.S. 162, 189 (2002) (Stevens, J., dissenting); *Lankford v. Idaho*, 500 U.S. 110, 126 (1991).

punishment based on sympathy,⁶⁶ and the Court has rejected claims that such an instruction prevents the jury from considering mitigating evidence.⁶⁷ Courts have recognized a difference between mercy (OK) and sympathy (not OK),⁶⁸ just as they have recognized a distinction between retribution (OK) and vengeance (not OK).⁶⁹

Still, to the degree that these are formally different concepts, the ineluctable moral content of the criminal law means that, if the distinction is intended to track the use or nonuse of pathetic argument, it is a fiction in practice. A majority of the en banc Tenth Circuit addressed this tension in *Parks v. Brown*, one of the cases in which the Supreme Court eventually rejected a constitutional challenge to an antisympathy jury instruction⁷⁰:

“Mercy,” “humane” treatment, “compassion,” and consideration of the unique “humanity” of the defendant, which have all been affirmed as relevant considerations in the penalty phase of a capital case, all inevitably involve sympathy or *are sufficiently intertwined with sympathy* that they cannot be parsed without significant risk of confusion in the mind of a reasonable juror.⁷¹

Even if these considerations are all conceptually different, jurors cannot be expected to cleanse their minds of all emotion in applying them to evidence. Likewise, advocates cannot be expected, and are not expected,

66. See Kathryn Abrams, *Emotions in the Mobilization of Rights*, 46 Harv. C.R.-C.L. L. Rev. 551, 569 (2011) [hereinafter Abrams, *Emotions*] (“A source of particular controversy [is] the ‘anti-sympathy’ instruction frequently offered in capital cases, which informs the jury that it ‘must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.’” (quoting *California v. Brown*, 479 U.S. 538, 545 (1987))).

67. See *Brown*, 479 U.S. at 543 (“[A] rational juror could hardly hear this instruction without concluding that it was meant to confine the jury’s deliberations to considerations arising from the evidence presented, both aggravating and mitigating.”); see also *Saffle v. Parks*, 494 U.S. 484, 492–93 (1990) (rejecting defendant’s contention that anti-sympathy instructions may cause jurors who react sympathetically to mitigating evidence to disregard that evidence entirely).

68. Compare *Saffle*, 494 U.S. at 493 (“Whether a juror feels sympathy for a capital defendant is more likely to depend on that juror’s own emotions than on the actual evidence regarding the crime and the defendant.”), with *Penry v. Lynaugh*, 492 U.S. 302, 327 (1989) (“[S]o long as the class of murderers subject to capital punishment is narrowed, there is no constitutional infirmity in a procedure that allows a jury to recommend mercy based on the mitigating evidence introduced by a defendant.”), overruled on other grounds by *Atkins v. Virginia*, 536 U.S. 304 (2002).

69. See *Ceja v. Stewart*, 134 F.3d 1368, 1373 (9th Cir. 1998) (Fletcher, J., dissenting) (“In saying that ‘retribution’ can serve as a legitimate basis for imposing the death penalty, the Supreme Court has recognized an important distinction between the two concepts that the term might be held to embrace: the expression of moral outrage by a community; and the exaction of blood vengeance.”).

70. The jury instruction read, in relevant part: “You must avoid any influence of sympathy, sentiment, passion, prejudice or other arbitrary factor when imposing sentence.” *Parks v. Brown*, 860 F.2d 1545, 1552 (10th Cir. 1988), rev’d sub nom. *Saffle*, 494 U.S. 484.

71. *Id.* at 1555–56 (emphasis added).

to neglect the emotional dimensions of mercy and retribution in criminal sentencing.

Pathetic argument may have greater purchase in criminal practice than in other areas of legal advocacy, but if so, this is a difference in degree only. Appeal to the emotions of the audience, whether judge or jury, has been considered a legitimate, even essential aspect of legal advocacy at least since the rise of the legal realists.⁷² Arthur Bachrach wrote in 1932 that “brief writing is essentially a creative function in just as real a sense as writing dramas, novels, poems or short stories” and that the best advocates possess “a clear, emotional, as well as intellectual understanding” of the truth of their position.⁷³

Modern guides to trial advocacy are replete with admonitions that a good advocate must know her audience and must be willing to make emotional appeals.⁷⁴ For example, the American Bar Association’s (ABA) litigation section in 2001 published *The Winning Argument*, written by “some of the country’s leading trial attorneys,” the foreword of which identifies its goal as “promot[ing] high standards of practice through mentoring those who are less experienced.”⁷⁵ Chapter Two, “Winning Arguments Are Tailored to the Decision-Maker,” advises readers to consider the audience’s attitudes, beliefs, and values, to “[a]ssociate [their] case with [their] listener’s values,” and “[f]rame issues in emotionally compelling terms.”⁷⁶ Chapter Six, “Winning Arguments Appeal to Emotion,” encourages advocates to “[r]ecognize that judges are subject to emotion” and offers advice on how to tell a compelling story, how to be “[s]ensitive to your listeners’ [f]eelings,” and how to develop “emotional intelligence.”⁷⁷ Paul Mark Sandler’s *Anatomy of a Trial*, also an ABA publication, explicitly urges trial lawyers to rely on pathos in their opening statements: “Histrionics are never appropriate,” he writes, “but opening

72. See Helen A. Anderson, Changing Fashions in Advocacy: 100 Years of Brief-Writing Advice, 11 J. App. Prac. & Process 1, 10–12 (2010) (highlighting legal realist reaction against neutral judicial reasoning). Defenses of pathetic argument of course predate the realists. In Ancient Greece, handbooks on rhetoric advised legal advocates (who were then laypersons) to use their closing arguments (*epilogoi*) to “seek to arouse the emotions of the jury.” Kennedy, Introduction, *supra* note 29, at 9. Indeed, as Michael Frost writes, “What distinguishes the Greek and Roman analyses of legal discourse from modern analyses is their consistent focus on audience, the depth and detail of their analysis, and their candid discussions of how to manipulate judges and juries.” Michael Frost, Ethos, Pathos & Legal Audience, 99 Dick. L. Rev. 85, 87 (1994).

73. Arthur C. Bachrach, Reflections on Brief Writing, 27 Ill. L. Rev. 374, 377–78 (1932).

74. See Frost, *supra* note 72, at 85 (suggesting importance of understanding audience and appealing to emotion is often overlooked); see also Kenneth D. Chestek, The Plot Thickens: The Appellate Brief as Story, 14 Legal Writing 127, 135 (2008) (“[A]n appellate brief writer who overlooks the emotional appeal of her case does so at her client’s great peril.”).

75. Robert A. Clifford, Foreword to Ronald Waicukauski, Paul Mark Sandler & JoAnne Epps, *The Winning Argument*, at iii (2001).

76. Waicukauski, Sandler & Epps, *supra* note 75, at 32.

77. *Id.* at 86–89.

statements should make some emotional pull on the audience, however subtle.”⁷⁸ Advocates can appeal to emotion, for example, through modulation of their tone and volume, judicious use of storytelling, making eye contact, and body language more generally.⁷⁹ These suggestions are, of course, of a piece with approaches to persuasion outside of legal contexts. In introducing his treatise on *argumentum ad misericordiam* (“appeal to pity”), the rhetorician Douglas Walton writes that people accept appeals to pity in all kinds of cases—in trials, immigration hearings, parole cases, charitable appeals for aid, public relations campaigns on behalf of causes like animal rights, and all sorts of other causes.⁸⁰

There is indeed reason to believe such appeals should be more prevalent in certain legal contexts than in lay contexts. In an adversarial system, the attorney owes an ethical obligation of zealous representation to his client. Norms of representation in the United States extend that duty to ends that plainly transcend customary moral boundaries.⁸¹ Thus, Monroe Freedman concludes that a criminal defense attorney has a duty to seek to undermine the credibility of a witness he knows to be truthful;⁸² that he is required to put the defendant on the stand even if he knows she will commit perjury;⁸³ and that he must offer truthful legal advice even if he knows that the client will use the information obtained to commit perjury or other crimes.⁸⁴ Professional responsibility rules address each of these situations, and they are much debated within the profession, but to the degree governing ethics rules diverge from Freedman’s conclusions, they go no farther than to permit (rather than require) an attorney to mitigate the zealotry of his representation.⁸⁵ It is this normative posture of

78. Paul Mark Sandler, *Anatomy of a Trial: A Handbook for Young Lawyers* 33 (2011).

79. See *id.* at 34.

80. Walton, *supra* note 57, at xiii.

81. See David Luban, *Lawyers and Justice: An Ethical Study* xx, 52 (1988) (describing distinction between “role morality” and “common morality” and resultant lack of accountability to moral obligations created by adversary system); Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. Rev. 63, 63–66 (1980) (providing commentary on distinction between “professional responsibility” and “ordinary morality”); see also Leslie C. Levin, *Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others*, 47 Rutgers L. Rev. 81, 129 (1994) (finding only around half of surveyed New Jersey lawyers disclosed client intentions to commit unlawful acts likely to result in death or substantial bodily harm in situations in which state professional responsibility rules mandated disclosure).

82. Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich. L. Rev. 1469, 1475 (1966).

83. *Id.* at 1477–78.

84. *Id.* at 1479–80.

85. For instance see, respectively, Model Rules of Prof’l Conduct R. 3.1 (2010) (“A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may . . . so defend the proceeding as to require that every element of the case be established.”); *id.* R. 3.3(a)(3) (“A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.”); *id.* R. 1.2(d) (“[A] lawyer may discuss the legal consequences of any

barely qualified respect for the client's ends that leads Daniel Markovits to conclude that lawyers "unfairly prefer their clients over others and, moreover, serve their clients in ways that implicate common vices with familiar names: most notably, lawyers lie and cheat."⁸⁶ One need not adopt Markovits's position in full to concede that, at a minimum, an American lawyer's professional duties at least permit and may require him to offer a pathetic argument whenever he believes such an argument is more likely than not to advance his client's interests.

Most of the situations described above pertain most directly to lawyers trying to win cases or otherwise secure favorable outcomes before judges and juries. As discussed, a willingness to advance pathetic arguments may well fit within the role morality of a legal advocate, particularly a trial advocate, in an adversarial system. It is more controversial, though hardly unheard of,⁸⁷ to assume a similar duty in the appellate context, in which the audience comprises judges and in which the subject of discussion tends to focus on questions of law rather than fact.⁸⁸ It is far more controversial to say that judges should themselves use emotional appeals in the course of writing opinions. It is more controversial still to assert that there may a legitimate place for emotional appeals within the opinion of a judge deciding a constitutional interpretive question (as opposed, say, to conducting a sentencing hearing). The next section substantiates those claims. Note, however, that the argument to this point already complicates the view that pathos has no place at all in legal argument, including in constitutional argument. The principal rationale for appealing to emotion before a judge in a criminal case or in an ordinary civil action—namely, that such an appeal may succeed—applies equally to appellate argument and to constitutional adjudication, even if the likely payoff of such an argument is smaller. And so the case against pathetic argument in constitutional cases, if it is to persuade, must derive from the particular role morality of constitutional judges.

C. Pathos in Constitutional Judging

Overt appeal to emotion is as scandalous in judging as it is prevalent in trial advocacy treatises. The tone of the opposition to emotion is evident in the discourse surrounding the 2009 Supreme Court nomination of Sonia Sotomayor, which revolved around the related but distinct issue of the role of "empathy" and "compassion" in judicial decisionmaking. After Justice

proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.").

86. Daniel Markovits, *A Modern Legal Ethics* 25 (2008).

87. See Chestek, *supra* note 74, at 130 (describing value of empathy in appellate advocacy generally); Frost, *supra* note 72, at 85 (noting existence of only limited scholarship on role of emotion in appellate discourse).

88. Cf. Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 31–32 (2008) (arguing appeal to emotion is "jury argument" that should not figure into advocacy before judges).

Souter retired, President Obama said, “I view that quality of empathy, of understanding and identifying with people’s hopes and struggles, as an essential ingredient for arriving at just decisions and outcomes.”⁸⁹ In his statement nominating then-Judge Sotomayor to the Court, Obama said that personal experiences “can give a person a common touch and a sense of compassion; an understanding of how the world works and how ordinary people live. And that is why it is a necessary ingredient in the kind of justice we need on the Supreme Court.”⁹⁰

President Obama’s remarks do not directly address the role of pathetic argument in judging. Whether a judge is motivated by emotion in reaching decisions is distinct from whether she seeks to appeal to emotion in announcing them. But the reaction to the President’s remarks, viewed in combination with the reaction to other controversial statements made by Judge Sotomayor, help to diagnose the perceived problem with pathos playing any role in the judicial process.

Judge Sotomayor made at least three comments that combined with President Obama’s empathy discussion to create a meme of judicial lawlessness that grounded criticism of the nomination. Most famously, at a speech in 2001, Sotomayor said, “I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life.”⁹¹ In the same speech, she said, “I willingly accept that we who judge must not deny the differences resulting from experience and heritage, but attempt . . . continuously to judge when those opinions, sympathies and prejudices are appropriate.”⁹² Four years later, at a panel discussion in 2005, Judge Sotomayor said that a “court of appeals is where policy is made. And I know—I know this is on tape, and I should never say that because we don’t make law. I know. O.K. I know. I’m not promoting it. I’m not advocating it.”⁹³

All of these remarks—President Obama’s invocations of empathy and compassion, Judge Sotomayor’s suggestion that her status as a Latina was relevant to her decisionmaking, and her belief that appellate judges make policy—played important and interrelated roles in the nomination hearing and its surrounding discourse. Republican Senator Jeff Sessions, then the ranking member of the Senate Judiciary Committee, singled out each of those remarks in his opening statement at the hearing. It is worth quoting

89. Peter Baker, *In Search for New Justice, Empathy, or at Least ‘Empathy,’ Is Out*, N.Y. Times, Apr. 26, 2010, at A12.

90. Barack Obama, *Remarks by President in Nominating Judge Sonia Sotomayor to the United States Supreme Court* (May 26, 2009), available at <http://www.whitehouse.gov/the-press-office/remarks-president-nominating-judge-sonia-sotomayor-united-states-supreme-court> (on file with the *Columbia Law Review*).

91. Charlie Savage, *A Judge’s View of Judging Is on the Record*, N.Y. Times, May 15, 2009, at A21.

92. Sheryl Gay Stolberg, *A Trailblazer and a Dreamer*, N.Y. Times, May 27, 2009, at A1.

93. Savage, *supra* note 91.

his statement at some length, as it efficiently encapsulates a basic criticism:

[O]ur legal system is based on a firm belief in an ordered universe and objective truth. The trial is the process by which the impartial and wise judge guides us to the truth.

Down the other path lies a Brave New World where words have no true meaning and judges are free to decide what facts they choose to see. In this world, a judge is free to push his or her own political or social agenda. . . .

....

I am afraid our system will only be further corrupted . . . as a result of President Obama's views that, in tough cases, the critical ingredient for a judge is the "depth and breadth of one's empathy," as well as . . . "their broader vision of what America should be."

Like the American people, I have watched this process for a number of years, and I fear that this "empathy standard" is another step down the road to a liberal activist, results-oriented, and relativistic world where laws lose their fixed meaning, unelected judges set policy, [and] Americans are seen as members of separate groups rather than as simply Americans So we have reached a fork in the road . . . and there are stark differences.

I want to be clear:

I will not vote for—and no [S]enator should vote for—an individual nominated by any President who is not fully committed to fairness and impartiality toward every person who appears before them.

I will not vote for—and no Senator should vote for—an individual nominated by any President who believes it is acceptable for a judge to allow their personal background, gender, prejudices, or sympathies to sway their decision in favor of, or against, parties before the court. In my view, such a philosophy is disqualifying.

Such an approach to judging means that the umpire calling the game is not neutral, but instead feels empowered to favor one team over the other.

Call it empathy, call it prejudice, or call it sympathy, but whatever it is, it is not law. In truth, it is more akin to politics, and politics has no place in the courtroom.⁹⁴

For Senator Sessions, empathy is a code word for sympathy, which is a code word for prejudice. The prevalence of these qualities in judges calls to Sessions's mind a legal dystopia characterized by moral relativism,

94. Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 110th Cong. 6–7 (2009) (statement of Sen. Jeff Sessions, Member, S. Comm. on the Judiciary).

subjectivity, discretion, activism, opportunism, cultural pluralism, and partiality; in a word, bias.

The fear runs even deeper than this. It is not merely that emotional influence risks improper favoritism for one party over another, or risks injecting politics into legal decisionmaking. It is that denying emotion a place within the rule of law counters a cognitive bias in favor of the visible over the invisible, and short over long-term consequences. John Hasnas makes the point thus:

The law consists of abstract rules because we know that, as human beings, judges are unable to foresee all of the long-term consequences of their decisions and may be unduly influenced by the immediate, visible effects of these decisions. The rules of law are designed in part to strike the proper balance between the interests of those who are seen and those who are not seen. The purpose of the rules is to enable judges to resist the emotionally engaging temptation to relieve the plight of those they can see and empathize with, even when doing so would be unfair to those they cannot see.

Calling on judges to be compassionate or empathetic is in effect to ask them to undo this balance and favor the seen over the unseen [I]f the difference between the bad judge and the good judge is that the bad judge focuses on the visible effects of his or her decisions while the good judge takes into account both the effects that can be seen and those that are unseen, then the compassionate, empathetic judge is very likely to be a bad judge.⁹⁵

The problem Hasnas identifies is not just an ethical problem but implicates the judge's technical competence as well. The empathetic judge faces serious cognitive limitations even when empathy is viewed in its best possible light.

The point is important because, better than the concern with bias that Sessions focuses on, it responds to a standard move by Sotomayor's defenders: the claim that her critics elided the distinction between empathy and sympathy.⁹⁶ Empathy is best understood as a cognitive capacity rather than as an emotion as such.⁹⁷ It is "the ability to

95. John Hasnas, Op-Ed, *The Unseen Deserve Empathy Too*, *Wall St. J.*, May 29, 2009, at A15.

96. See, e.g., Baker, *supra* note 89 ("Empathy means being able to imagine oneself in the condition or predicament of another, while sympathy means sharing the feelings of another to the point of compassion or pity." (paraphrasing remarks by Pamela Karlan)).

97. See Maroney, *supra* note 4, at 637 ("Empathy can be defined not as an emotion but rather a capacity to imagine the world from the perspective of another."); Susan A. Bandes, *Empathetic Judging and the Rule of Law*, 2009 *Cardozo L. Rev. de•novo* 133, 136 (describing empathy as ability to take "imaginative leap into the mind of others") (quoting Candace Clark, *Misery and Company: Sympathy in Everyday Life* 34 (1997)).

understand and share the feelings of another”⁹⁸ as distinguished from “feelings of pity and sorrow for someone else’s misfortune.”⁹⁹ Defenders of an empathy standard wanted to emphasize that they rejected formalism, not neutrality, and that a judge should appreciate to the fullest extent possible the law’s effects on real people. Hasnas’s response defends formalism as a prophylactic safeguard of neutrality, promulgating the idea that we cannot help but to empathize selectively. Moreover, empathy invites sympathy even if it does not compel it. Adam Smith wrote that when we imagine ourselves in the position of another person, “[P]assion arises in our breast from the imagination.”¹⁰⁰ What is the use of a capacity to understand another’s feelings if a judge then refuses to permit those feelings to influence her behavior? Should judges aspire to empathize “better” or not at all?

The basis for Bobbitt’s criticism of pathetic argument as reflecting “the idiosyncratic, personal traits”¹⁰¹ is now clearer. If the trial advocacy guides are to be believed, appeal to pathos is most likely to succeed where the advocate is able to use emotion to form a bond with his audience. *The Winning Argument* recounts the strategy of the great English advocate James Scarlett: “It was said that the secret of his success was that he blended his mind with the minds of the jurors. Their thoughts were his thoughts.”¹⁰² It is for this reason that the book advises advocates to “[a]ssociate [their] case with [the] listener’s values”¹⁰³ and to “share the emotional response [they] seek” in the audience.¹⁰⁴ *Anatomy of a Trial* advises that lawyers should “avoid emotional appeals unless you can feel the emotion yourself.”¹⁰⁵

The critical response to the Sotomayor nomination suggests, however, that emotion is undisciplined and leads to prejudice and subjectivity. That judges should not only abide but should also assimilate themselves to the passions of the people seems precisely backwards. Hasnas’s allusion to the relationship between emotion and time calls to mind Alexander Bickel’s proposition that “government under law” means that “government should serve not only what we conceive from time to time to be our immediate

98. Concise Oxford American Dictionary 294 (Erin McKean et al. eds., 2006) (defining “empathy”).

99. *Id.* at 921 (defining “sympathy”).

100. Adam Smith, *The Theory of Moral Sentiments* ch. 1, § 1, para. 10 (Knud Haakonssen ed., Cambridge Univ. Press 2002) (1759).

101. Bobbitt, *Constitutional Fate*, *supra* note 2, at 95.

102. Waicukauski, Sandler & Epps, *supra* note 75, § 2.01, at 12.

103. *Id.* § 3.03, at 32.

104. *Id.* § 6.03, at 88.

105. Sandler, *supra* note 78, at 34; cf. Anthony T. Kronman, *The Lost Lawyer* 16 (1993) (describing ideal lawyer-statesman as possessing “qualities as much of feeling as of thought”).

material needs but also certain enduring values,”¹⁰⁶ and that “judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government.”¹⁰⁷ Bickel sought to justify the *countermajoritarian* nature of judicial review; on this view, disciplined thinkers have far less need to be checked by judges. The received wisdom is that “emotion has a certain narrowly defined place in law,” Bandes writes.¹⁰⁸ “It is assigned to the criminal courts. It is confined to those—like witnesses, the accused, the public—without legal training.”¹⁰⁹ A good judge enforces distance between law and the incautious emotionalism of the public: “[I]t is portrayed as crucially important to narrowly delineate that finite list and those proper roles, so that emotion doesn’t encroach on the true preserve of law: which is reason.”¹¹⁰

This Article began with a discussion of Justice Blackmun and the tension between his opinions in *Roe* and *DeShaney*. Justice Blackmun’s retirement was attended by the usual fond remembrances that follow an important figure’s withdrawal from public life.¹¹¹ Writing in the *New Republic*, however, Jeffrey Rosen decided to say what many believed.¹¹² After describing Justice Blackmun’s kind and generous personal disposition, Rosen wrote:

But feeling deeply is no substitute for arguing rigorously; and the qualities that made Blackmun an admirable man ultimately condemned him to be an ineffective justice. By reducing so many cases to their human dimensions and refusing to justify his impulses with principled legal arguments, Blackmun showed the dangers of the jurisprudence of sentiment.¹¹³

Rosen singled out two objectionable features of Justice Blackmun’s jurisprudence: “particularism—focusing on the human consequences of

106. Alexander M. Bickel, *The Least Dangerous Branch* 24 (Yale Univ. Press 1986) (1962).

107. *Id.* at 25–26.

108. Bandes, Introduction, *supra* note 46, at 2.

109. *Id.*

110. *Id.*; see Maroney, *supra* note 4, at 631 (“[T]o call a judge emotional is a stinging insult, signifying a failure of discipline, impartiality, and reason.”); cf. Scalia & Garner, *supra* note 88, at 32 (“Good judges pride themselves on the rationality of their rulings and the suppression of their personal proclivities, including most especially their emotions. And bad judges want to be regarded as good judges. So either way, overt appeal to emotion is likely to be regarded as an insult.”).

111. E.g., Ann Alpers, Tribute: Justice Harry A. Blackmun, 47 *Stan. L. Rev.* 1 (1994); Harold Hongju Koh, A Tribute to Justice Harry A. Blackmun, 108 *Harv. L. Rev.* 1 (1994).

112. See, e.g., Richard A. Posner, Judges’ Writing Styles (And Do They Matter?), 62 *U. Chi. L. Rev.* 1421, 1434 (1995) (calling several of Justice Blackmun’s more sentimental opinions, including *DeShaney*, “embarrassing performances precisely because they seem the unmediated expression of self”). Posner wrote the lower court opinion that *DeShaney* affirmed. *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 812 F.2d 298 (7th Cir. 1987).

113. Jeffrey Rosen, Sentimental Journey: The Emotional Jurisprudence of Harry Blackmun, *New Republic*, May 2, 1994, at 13.

every decision” and “compassion—a more abstract commitment to dramatizing the plight of the poor and the downtrodden, without reference to actual individuals.”¹¹⁴ Rosen argued that Blackmun’s sentimentality took both forms at different times and simultaneously reflects a lack of sophistication and a basic lawlessness.¹¹⁵

Rosen echoes common themes that help constitute Maroney’s “cultural script of judicial dispassion.” But his conclusion that Blackmun’s sentimentality reduced his effectiveness might be too quick. There is remarkable consensus among supporters and opponents of abortion rights that *Roe* is an unsuccessful opinion.¹¹⁶ Many conservatives fault the opinion for failing to treat with due gravity the state’s emotionally invested interest in the potential life of the fetus.¹¹⁷ It is considered unsuccessful by many liberals in part because it is, in Michael Dorf’s words, “emotionally empty,”¹¹⁸ deaf to the personal crisis of conscience that faces women (not doctors) burdened by an unwanted pregnancy. By contrast, “Poor Joshua!” a dissent, continues to be invoked in popular media,¹¹⁹ in books and scholarly articles,¹²⁰ and in classrooms,¹²¹ and remains the public face of the *DeShaney* decision. Herbert Eastman, a legal services lawyer and clinician writing in the *Yale Law Journal* in 1995, cited Justice Blackmun’s dissent as the kind of opinion that helps to sustain public interest litigators who face significant doctrinal obstacles:

[A]s Clarence Darrow often observed, in these agonizing cases where courts can hide behind law, there is always one judge or juror who will not. There may be more than one who will listen

114. *Id.* at 14.

115. See *id.*

116. See generally Jack M. Balkin, *Roe v. Wade: An Engine of Controversy*, in *What Roe v. Wade Should Have Said 3* (Jack M. Balkin ed., 2005) (discussing how *Roe* remains source of political and legal controversy).

117. See, e.g., Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 *Notre Dame L. Rev.* 995, 996–97 (2003) (“[T]he regime created in *Roe* . . . creates an essentially unrestricted substantive legal right of some human beings to kill—murder, really, since the power is plenary and requires no serious justification for its exercise—other human beings, at a rate of approximately a million and a half a year.”) (footnotes omitted).

118. Michael C. Dorf, *In Praise of Justice Blackmun: (Corrected) Typos and All*, 99 *Colum. L. Rev.* 1397, 1399 (1999).

119. E.g., Bob Egelko, *Head Against Heart in Pot Case: Supreme Court Reviews Local Law*, *S.F. Chron.* (Jan. 9, 2005, 4:00 am), <http://www.sfgate.com/opinion/article/Head-against-heart-in-pot-case-Supreme-Court-2739879.php#photo-2184644> (on file with the *Columbia Law Review*); Charles Lane, *Court Tackles Town’s Role in Child Safety*, *Wash. Post*, Mar. 21, 2005, at A2.

120. E.g., Lynne Curry, *The DeShaney Case: Child Abuse, Family Rights, and the Dilemma of State Intervention* 127, 130 (2007); Sharon Balmer, *From Poverty to Abuse and Back Again: The Failure of the Legal and Social Services Communities to Protect Foster Children*, 32 *Fordham Urb. L.J.* 935, 946 (2005).

121. See Erwin Chemerinsky, *Remembering a Justice Who Cared*, *Trial*, May 1999, at 92, 92 (noting he reads Justice Blackmun’s *DeShaney* dissent aloud whenever he teaches case).

to . . . the social context of the problems facing our clients, the identity of our clients and their stories, the wall of “us/them” separating our clients from the court and from us, and our own voices—our own response to the tragedies we witness.¹²²

If Justice Blackmun’s appeal in *DeShaney* was wrong, as many of the arguments in this Part suggest, it was not for lack of effectiveness.

II. THE PLACE OF PATHOS

In their treatise on persuading judges, Antonin Scalia and Bryan Garner explain that they “strongly” reject the notion that advocates should make emotional appeals to judges, but that it is “essential” to appeal to a judge’s “sense of justice.”¹²³ This Article’s principal subject diverges from theirs, but we may likewise wish to distinguish judicial appeals to the reader’s emotion from an appeal to her sense of justice, the latter of which we may presume to be uncontroversial. This Part seeks to define emotional appeals and to reconcile their use in constitutional opinions with prevailing descriptive accounts of constitutional argument. It concludes that pathetic argument is both identifiable and significant in United States constitutional law, but that such argument, like ethical argument, is better described as a mode of persuasion than as an archetype of constitutional argument.

A. *Pathos Defined*

It is common ground among scholars of the affective sciences that the border between emotions and other cognitive processes is and always will be disputed.¹²⁴ Efforts to outline the basic contours of the category we associate with the label of “emotions” tend to begin with our own experiences and intuitions.¹²⁵ In determining what does and does not qualify as an emotion or an emotional response, scholars begin by identifying the core conceptions of the category, try to describe the characteristics of those ideal conceptions, and then seek to extrapolate.¹²⁶ Research into facial expressions suggests that across a broad range of Western and non-Western cultures people associate particular

122. Herbert A. Eastman, *Speaking Truth to Power: The Language of Civil Rights Litigators*, 104 *Yale L.J.* 763, 854–55 (1995).

123. Scalia & Garner, *supra* note 88, at 31–32.

124. See Bandes, *Introduction*, *supra* note 46, at 10. The scholarship on emotion is vast and unwieldy, ranging across fields as diverse as psychology, philosophy, economics, neurology, anthropology, and biology. The impossibility of confining emotion scholarship to one field itself reflects the difficulty in arriving at a shared definition of emotion. See generally Paul E. Griffiths, *What Emotions Really Are* (1997) (arguing emotion describes phenomena too diverse to be captured by one term).

125. See Nussbaum, *Upheavals*, *supra* note 11, at 9.

126. See *id.*

expressions with happiness, anger, fear, sadness, disgust, and surprise.¹²⁷ Any theoretical account that seeks to define emotions must account for and resonate with our experience of these standard emotions, but it is difficult to say much else without courting significant controversy.

Aristotle described emotions broadly as “those things through which, by undergoing change, people come to differ in their judgments.”¹²⁸ This definition is not helpful in distinguishing emotions from other dynamic mental processes that influence individual decision making, but it is not yet clear that it needs to articulate that distinction. Arriving at a working definition of emotion is only instrumental, for our purposes, to understanding what is meant by an *appeal* to emotion in the context of a judicial decision. And so a definition of emotion is only useful to the degree that it helps us answer this second question. Thus, it is common ground that anger is an emotion, but in evaluating a judge’s appeal to the reader’s anger, it should matter, it seems, what the object of that anger is. Anger at the frailty of the majority’s logic is, plausibly, an emotion any dissenter should wish to stir. Upon reflection one may conclude that criticism of pathetic argument is directed not at the manipulation of “emotion” as such but rather at the context in which such argument occurs: the valence or character of the particular emotions evoked, the objects at which they are directed, and the rationales offered or implied in invoking them. If this is so, Aristotle’s definition may well suffice.

It is doubtful, though, that critics of pathetic argument would accept this deconstructive move. Garner and Scalia have something in mind when they suggest that an appeal to one’s sense of justice is importantly different from an appeal to emotion, and so it is worth spending some time with the literature to see whether we can uncover what that something is. The sprawling literature seeking to develop a taxonomy of emotion and to understand its basic ontology is not easily summarized, and I will not attempt to do so here.¹²⁹ It is both fruitful and manageable, however, to contrast two different, broad understandings of emotion: the “feeling theory” and the cognitive view. Doing so will help to clarify why a definition of emotion adequate to construct a true dichotomy between emotional appeals and appeals to one’s sense of justice is unlikely to emerge from the literature.

127. Paul Ekman & Dacher Keltner, Universal Facial Expressions of Emotion: An Old Controversy and New Findings, *in* Nonverbal Communication: Where Nature Meets Culture 27, 31–33 (Ullica Sergestråle & Peter Molnár eds., 1997).

128. Aristotle, *supra* note 1, bk. 2, ch. 1, § 8.

129. For a learned and helpful effort, see generally Ronald de Sousa, Emotion, Stanford Encyclopedia of Philosophy (Edward N. Zalta ed., Spring 2012), <http://plato.stanford.edu/archives/spr2012/entries/emotion/> (on file with the *Columbia Law Review*).

The first understanding of emotion we will consider is the so-called “feeling theory,” commonly associated with the work of William James.¹³⁰ Taking as his subject those emotions often linked with some physiological bodily response, James challenged the notion that what he called the “standard” emotions arise out of some independent mental process and subsequently produce the associated physical response. Rather it is the reverse: We apply a label to the feeling associated with a particular physical sensation:

Common sense says, we lose our fortune, are sorry and weep; we meet a bear, are frightened and run; we are insulted by a rival, are angry and strike. The hypothesis here to be defended says that this order of sequence is incorrect, that the one mental state is not immediately induced by the other, that the bodily manifestations must first be interposed between, and that the more rational statement is that we feel sorry because we cry, angry because we strike, afraid because we tremble, and not that we cry, strike, or tremble, because we are sorry, angry, or fearful, as the case may be. Without the bodily states following on the perception, the latter would be purely cognitive in form, pale, colourless, destitute of emotional warmth.¹³¹

James believed that emotions such as “[s]urprise, curiosity, rapture, fear, anger, lust, [and] greed” are conventional labels that we apply to mental states produced by “bodily disturbances”¹³²—the furrowing of the brow associated with worry, the lump in the throat tied to shame, the perspiration of fear, and so forth.¹³³ James arrived at this view through a kind of thought experiment in which he sought to imagine the mental states that carry the labels of various emotions without any attendant physical manifestations and found that he could not. Experiencing some phenomenon as “funny” is inseparable from the physical response of laughter.¹³⁴ Likewise, one cannot extract any abstract concept of rage away from its physical manifestations, from “flushing of the face,” “dilation of the nostrils,” and “clenching of the teeth.”¹³⁵ According to James, “[a] purely disembodied human emotion is a nonentity.”¹³⁶

If emotions have no substance independent of their associated physical feelings, then how do we know that the feeling precedes the

130. See William James, *What Is an Emotion?*, 9 *Mind* 188, 188–205 (1884) (arguing emotional brain-processes are sensorial brain-processes variably combined); see also Carl Georg Lange & William James, *The Emotions* (1922) (collecting essays by James and Lange explicating their view). A variation on the feeling theory is also associated with David Hume, see David Hume, *A Treatise of Human Nature* (John P. Wright et al. eds., Everyman Paperbacks 2003) (1739).

131. James, *supra* note 130, at 190.

132. See *id.* at 189.

133. See *id.* at 192–93.

134. See *id.* at 193.

135. *Id.* at 194.

136. *Id.*

emotion rather than vice versa? James answers this with another anecdotal observation, namely that experiencing the bodily changes associated with emotions tends to make our perception of them more acute, as when crying intensifies our pain or moping amplifies our sadness.¹³⁷ James further discusses the experiences of people experiencing depression or paranoia, who may easily dissociate their perceived feeling from their cognitive response to some stimulus but who nonetheless find themselves in the grip of overwhelming physical sensations or disturbances.¹³⁸

On the feeling theory of emotion just described, an intentional appeal to emotion can only be understood as an attempt to excite one of the physical states that we associate with emotions. But describing such an effort as ipso facto objectionable in the context of appeals to or by judges runs headlong into the most trenchant objection to the feeling theory within the philosophical literature: that emotions tend to have intentional objects and to presuppose cognitive propositions about those objects.¹³⁹ On this view, fear of death and fear of spiders are different emotions; the content of the emotion cannot be explained or understood unless we know something about death and about spiders (and likely about the individual's personal history). Describing someone as euphoric without associating that euphoria with some object of evaluation—a new job, a new lover, a successful exam performance, and so on—may describe a mood or an appetite but not an emotion. At a minimum, *some* emotions (love, say) have propositional objects that are integral to the emotion's genetic structure, and so it will not do to condemn "emotion" as necessarily severable, for example, from one's sense of justice.¹⁴⁰

For simplicity, I will associate the cognitive view with Nussbaum, who explicates a version in great detail in her 2001 book *Upheavals of Thought*.¹⁴¹ On Nussbaum's account, emotions cover a diverse set of phenomena but they are distinct from the rote physical manifestations James linked to them in four ways. First, as discussed, they are "about something: they have an object,"¹⁴² and the emotion's identity depends on its object. Feelings of envy or hope, for example, are unintelligible apart

137. See *id.* at 197–98.

138. See *id.* at 199–200.

139. See Demian Whiting, *The Feeling Theory of Emotion and the Object-Directed Emotions*, 19 *Eur. J. Phil.* 281, 282 (2009) (explaining objection to feeling theory based on intentional objects of emotions).

140. Cf. Posner, *Think*, *supra* note 10, at 106 ("Indignation at a wrong is consistent with corrective justice; sympathy for a litigant is not.").

141. Nussbaum, *Upheavals*, *supra* note 11. This view has many variants. See generally, e.g., Jerome Neu, *A Tear Is an Intellectual Thing: The Meanings of Emotion* (2000); Robert C. Solomon, *The Passions: The Myth and Nature of Human Emotions* (1984); George Pitcher, *Emotion*, 74 *Mind* 326 (1965).

142. Nussbaum, *Upheavals*, *supra* note 11, at 27 (emphasis omitted).

from their objects.¹⁴³ Second, the object is “intentional” in that it is experienced subjectively by the person bearing the emotion,¹⁴⁴ and that person’s subjectivity in view of the object is integral to distinguishing one emotion from another.¹⁴⁵ Different individuals may form different emotions in relation to identical objects.¹⁴⁶ Third, emotions are evaluative: They “embody not simply ways of seeing an object, but beliefs—often very complex—about the object.”¹⁴⁷ Thus, for Nussbaum, “to have anger, I must have an even more complex set of beliefs: that some damage has occurred to me or to something or someone close to me; that the damage is not trivial but significant; that it was done by someone; probably, that it was done willingly.”¹⁴⁸ One’s evaluation may be excessive or inappropriate in relation to prevailing social norms, or even false in relation to one’s other beliefs,¹⁴⁹ but the evaluation itself is nonetheless critical to identifying the phenomenon as some particular emotion rather than as another that shares a physiological manifestation.¹⁵⁰ Fourth, emotions involve a perception of value in their objects; the object is viewed as important to the person’s individual flourishing.¹⁵¹ This quality attaches even when that sense of value is inconsistent with one’s “reflective ethical beliefs.”¹⁵²

Nussbaum defends both the view that emotion is a kind of judgment and the counterintuitive view that there is nothing more to emotion than judgment.¹⁵³ Many cognitivists resist the latter proposition.¹⁵⁴ For example, Peter Goldie argues that our deeply subjective experience of

143. See *id.* at 35.

144. *Id.* at 27.

145. See *id.* at 27–28 (suggesting people attach different emotions to objects depending on their internal perceptions).

146. Think, for example, how winners and losers form different emotions in response to the same sporting event. See Andrew Ortony, Gerald L. Clore & Allan Collins, *The Cognitive Structure of Emotions* 4 (1988) (“[I]n a very real sense, both the winners and the losers are reacting to the same objective event. It is their *construals* of the event that are different”).

147. Nussbaum, *Upheavals*, *supra* note 11, at 28.

148. *Id.* at 28–29.

149. See *id.* at 35–36 (describing how false beliefs can be retained in face of contradictory knowledge).

150. See *id.* at 29–30 (arguing “[o]nly an inspection of the thoughts discriminates” between different emotions).

151. See *id.* at 30–31.

152. *Id.* at 52.

153. See *id.* at 43–45 (arguing “not only that judgments of the sort we have described are necessary constituent elements in the emotion, but also that they are sufficient”). Nussbaum argues that emotion-based judgments result from vivid and intimate visualizations of their objects: “[T]he emotions typically have a connection to imagination, and to the concrete picturing of events in imagination.” *Id.* at 65.

154. See, e.g., Richard Wollheim, *On the Emotions* 10 (1999) (“[I]magination can induce a particular emotional state in someone who does not have the emotional disposition that state would ordinarily manifest.”).

emotion involves a “feeling towards” the emotion’s object that cannot be rationally articulated as a belief, desire, or judgment, and that varies widely between individuals, but is nonetheless intelligible.¹⁵⁵ The important point is that the dominant view among contemporary philosophers is that there is a kind of intelligence to emotions. They are not visceral and arbitrary, as is sometimes supposed; like thoughts and other cognitive instruments, they can be rational or irrational, based on accurate or inaccurate perceptions of one’s environment, consistent with one’s general constellation of beliefs, desires, and values or not.¹⁵⁶

It is not obvious what view of emotions those who criticize pathetic judicial argument have in mind, nor is it obvious whether they have any particular view in mind. There is reason to believe, however, that some version of the cognitive theory captures those critics’ working premise better than the feelings theory. If emotions are merely conventional labels for physical feelings, then it is enigmatic to say that an argument is “appealing” to emotion at all. We would as soon pop a balloon behind the listener’s head. But dominant varieties of the cognitive theory assume that emotions may be judged appropriate or inappropriate, may be learned or unlearned, and are, in a qualified way, predictable. The feelings theory does not necessarily deny these possibilities, but it is at least easier to agree that emotions are malleable in these ways if one also believes that emotions are partly constituted by particularized intentional objects and involve value judgments about those objects.

In any event, in order to accept the simple view that judicial appeals to emotion are categorically inappropriate, one likely must adopt the corollary that emotions and rational judgment are never mutually dependent.¹⁵⁷ On this view, it is never the case that a phenomenon fairly labeled an emotion is integral to individuals’ normative assessments of propositions of law. This view is radical¹⁵⁸ and, as Part II.B shows, is likely not the view underlying the objection to pathetic argument in constitutional law. Moreover, as Part III.A seeks to demonstrate, holding the unusual position just described is necessary but not sufficient to make

155. Peter Goldie, *The Emotions: A Philosophical Exploration* 19 (2002).

156. See generally Kahan & Nussbaum, *supra* note 11, at 275–301 (contrasting “mechanistic” and “evaluative” conceptions of emotion).

157. Alternatively, one might adopt the related view that emotions and rational judgment are mutually dependent rarely enough that a prophylactic rule prohibiting pathetic arguments is sensible.

158. Arguably, James did not himself hold this view. Recall that he limited his inquiry to emotions that have “a distinct bodily expression.” James, *supra* note 130, at 189. He conceded that there are “feelings of pleasure and displeasure, of interest and excitement, bound up with mental operations, but having no obvious bodily expression for their consequence,” but he concluded that in the absence of any such expression “such a judgment is rather to be classed among awarenesses of truth: it is a cognitive act.” *Id.* at 189, 202 (emphasis omitted). It may be, then, that the difference between James and at least some cognitivists is semantic.

out a normative case against *all* instances of pathetic argument in constitutional law.

B. *Pathos and Constitutional Argument*

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹⁵⁹ the Court upheld most of Pennsylvania's abortion regulations but refused to overrule *Roe v. Wade*.¹⁶⁰ Justice Scalia ended his partial concurrence with a description of the portrait of Roger Taney that hangs in the Caspersen Room of the Harvard Law School Library. "There is a poignant aspect to today's opinion," Justice Scalia wrote, referring to the length and tone of the joint opinion of Justices O'Connor, Kennedy, and Souter, which sought to leverage the Court's credibility to help settle the national controversy over abortion rights.¹⁶¹ He continued:

There comes vividly to mind a portrait by Emanuel Leutze that hangs in the Harvard Law School: Roger Brooke Taney, painted in 1859, the 82d year of his life, the 24th of his Chief Justiceship, the second after his opinion in *Dred Scott*. He is all in black, sitting in a shadowed red armchair, left hand resting upon a pad of paper in his lap, right hand hanging limply, almost lifelessly, beside the inner arm of the chair. He sits facing the viewer, and staring straight out. There seems to be on his face, and in his deep set-eyes, an expression of profound sadness and disillusionment. Perhaps he always looked that way, even when dwelling upon the happiest of thoughts. But those of us who know how the lustre of his great Chief Justiceship came to be eclipsed by *Dred Scott* cannot help believing that he had that case—its already apparent consequences for the Court and its soon-to-be-played-out consequences for the Nation—burning on his mind. I expect that two years earlier he, too, had thought himself "call[ing] the contending sides of national controversy to end their national division by accepting a common mandate rooted in the Constitution."¹⁶²

Justice Scalia's opinion is an example of pathetic argument. It is not paradigmatically so, like "Poor Joshua!," but its mode of persuasion is pathetic all the same.¹⁶³ It advances a legal argument: affirming a constitutional right to abortion is akin to affirming a constitutional right to keep slaves in federal territories. But the argument is occluded beneath a thick layer of pathos. Justice Scalia, a skilled rhetorician, means to compare the visage of Roger Taney, a villain within the American constitutional narrative, with the joint opinion. He knows that showing rather than

159. 505 U.S. 833 (1992).

160. 410 U.S. 113 (1973).

161. *Casey*, 505 U.S. at 1001 (Scalia, J., concurring in part and dissenting in part).

162. *Id.* at 1001–02.

163. Bandes writes: "Emotion tends to seem like part of the landscape when it's familiar, and to become more visible when it's unexpected." Bandes, Introduction, *supra* note 46, at 11.

telling us that abortion is like slavery and that *Roe* is like *Dred Scott* enlivens the moral message and makes his opponent's position feel not just wrong but shameful.

Philip Bobbitt has identified six "modalities" of constitutional argument: historical, textual, doctrinal, prudential, structural, and ethical. Which modality does Justice Scalia's opinion best reflect? It makes no reference to the Framers or to either the original or current meaning of any relevant constitutional language or provision. It does not draw inferences from constitutional structures or constitutionally embedded institutional relationships. It does refer to precedent—*Dred Scott*—but its treatment of that precedent is not doctrinal in the usual sense. Justice Scalia's interest in *Dred Scott* is independent of the reasoning in Chief Justice Taney's opinion. It is prudential in one sense—it cares deeply about the institutional consequences of continued Court involvement in abortion decisions. But it is the opposite of prudential in the sense that it proposes a "prudential" course on a priori moral rather than practical grounds.

We are left with one option within Bobbitt's taxonomy: ethical argument. Ethical argument captures the proposition that the preferred result "comports with the sort of people we are and the means we have chosen to solve political and customary constitutional problems."¹⁶⁴ Ethical argument is a potentially capacious category whose contours have challenged scholars in the decades since *Constitutional Fate* was written.¹⁶⁵ Bobbitt seeks to cabin the category by arguing that the relevant ethos that sustains ethical argument is the ethos of limited government.¹⁶⁶ It is, at the least, awkward to characterize Justice Scalia's position in *Casey* as ethical in this sense, premised as it is on the state's absolute freedom to require women to bear and beget children. Indeed, in expounding the category Bobbitt himself advances an ethical argument in favor of abortion rights.¹⁶⁷

One possibility is that Justice Scalia's *Casey* opinion employed a seventh modality—pathetic argument—and that this modality was either overlooked by Bobbitt or is (as Bobbitt suggests)¹⁶⁸ illegitimate. Bobbitt

164. Bobbitt, *Constitutional Fate*, supra note 2, at 94–95.

165. See Patrick O. Gudridge, *False Peace and Constitutional Tradition*, 96 Harv. L. Rev. 1969, 1975 (1983) (reviewing Bobbitt, *Constitutional Fate*, supra note 2) (describing Bobbitt's definition of ethos as appearing "almost empty"). Compare Mark Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law* 111 (1988) (distinguishing two types of moral philosophy as "systematic moral philosophy" and "moral philosophy of community"), with Philip Bobbitt, *Is Law Politics?*, 41 Stan. L. Rev. 1233, 1287–301 (1989) (reviewing Tushnet, supra) (vigorously disputing Tushnet's identification of ethical argument with moral argument).

166. See Bobbitt, *Constitutional Interpretation*, supra note 15, at 20 ("The fundamental American constitutional ethos is the idea of limited government, the presumption of which holds all residual authority remains in the private sphere.").

167. See Bobbitt, *Constitutional Fate*, supra note 2, at 157–65 (proposing ethical argument "[g]overnment may not coerce intimate acts").

168. See supra text accompanying note 2.

was right to resist this categorization. The original understanding of a constitutional provision or the plain meaning of its text are legitimate subjects of constitutional inquiry, which is to say that they wield authority within constitutional practice; historical and textual argument are therefore modalities inasmuch as they advance propositions with respect to those subjects. Pathos, by contrast, is not a subject of constitutional inquiry and is not a source of constitutional authority. This is not a metaphysical truth, and there are domains—spousal relations, for example—in which pathos is in fact a source of authority. But in constitutional law, pathos is better described as a feature of constitutional conversation, a means rather than an end. The appeal to pathos occurs not because pathos offers information about substantive constitutional content but because appealing to pathos helps win constitutional arguments.¹⁶⁹ Pathetic legal argument, then, is a mode of persuasion as to the substance and valence of particular legal propositions: Some outcome must be thus because deep down in your heart you know thus to be true.

Let us return to Justice Scalia's opinion in *Casey*. This Article intimated above that the argument type in play was not doctrinal,¹⁷⁰ but that conclusion was premature. A doctrinal argument asserts that some result follows from analysis of controlling precedent. But there is more than one way of persuading someone that that assertion is true. The most obvious ways, at least to lawyers, are by syllogism, enthymeme, and example.¹⁷¹ A syllogism is a form of deductive reasoning that infers a conclusion from two or more premises:

"*Dred Scott* is wrong." (major premise)

"*Roe* is like *Dred Scott*." (minor premise)

"*Roe* is wrong." (conclusion)

An enthymeme is a syllogism that is complete but for unspoken assumptions:

"*Roe* is wrong because it is like *Dred Scott*."

The major premise ("*Dred Scott* is wrong") is unstated, leaving only the minor premise ("*Roe* is like *Dred Scott*") and the conclusion ("*Roe* is wrong.").¹⁷² Reasoning by example has an inductive rather than a deductive logical structure:

"*Dred Scott* uses substantive due process."

"*Dred Scott* is wrong."

169. See Aristotle, *supra* note 1, bk. 1, ch. 2, § 7 (arguing rhetoric is "partly a method (like dialectic) with no necessary subject of its own but partly a practical art derived from ethics and politics on the basis of its conventional uses").

170. See *supra* text accompanying notes 163–164.

171. See Aristotle, *supra* note 1, bk. 1, ch. 2 ("Every one who effects persuasion through proof does in fact use either enthymemes or examples: there is no other way.").

172. *Dred Scott* is sufficiently anticanonical that this particular enthymeme could suppress both the major premise and the conclusion and still be well understood: "*Roe* is like *Dred Scott*."

“Therefore cases that use substantive due process are wrong.”

Enthymeme in particular is a common feature of doctrinal argument in federal courts, for doctrinal arguments often reason from the assumed but unstated premise that prior Supreme Court decisions or appellate decisions from within the deciding court’s circuit are formally binding.

A very different way of advancing a doctrinal argument is to place significant emphasis on the opinion’s author, not because the author is controlling authority but because the author is worthy of respect. The Supreme Court, for example, frequently identifies opinions written by Richard Posner even when they are majority panel opinions, a courtesy granted few other lower court judges.¹⁷³ A 2004 study analyzing citations from 1998 to 2000 found that Judge Posner was more cited outside his own circuit than any other appellate judge.¹⁷⁴ Antitrust opinions written by Robert Bork or Frank Easterbrook,¹⁷⁵ civil procedure opinions written by Charles Clark,¹⁷⁶ and lower court opinions authored by judges who later became Supreme Court Justices or who were on the Court but riding

173. See, e.g., *United States v. Juvenile Male*, 131 S. Ct. 2860, 2864 (2011) (citing *CFTC v. Bd. of Trade of Chi.*, 701 F.2d 653, 656 (7th Cir. 1989) (Posner, J.)); *Schwab v. Reilly*, 130 S. Ct. 2652, 2675 (2010) (Ginsburg, J., dissenting) (citing *In re Polis*, 217 F.3d 899, 903 (7th Cir. 2000) (Posner, J.)); *Merck & Co. v. Reynolds*, 130 S. Ct. 1784, 1803 (2010) (Scalia, J., concurring in part and concurring in the judgment) (citing *Tregenza v. Great Am. Commc’ns Co.*, 12 F.3d 717, 721–22 (7th Cir. 1993) (Posner, J.)).

174. See Stephen J. Choi & G. Mitu Gulati, *Choosing the Next Supreme Court Justice: An Empirical Ranking of Judge Performance*, 78 S. Cal. L. Rev. 23, 50 (2004). This result is partly though not entirely explained by Judge Posner’s extraordinary productivity. See *id.* at 54.

175. E.g., *Am. Needle, Inc. v. Nat’l Football League*, 130 S. Ct. 2201, 2212 (2010) (citing *Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210 (D.C. Cir. 1986) (Bork, J.)); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 560 n.6 (2007) (Stevens, J., dissenting) (citing Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. Rev. 635 (1989), as authority based in part on his “background in antitrust law”); *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 338 (1991) (Scalia, J., dissenting) (citing *Fishman v. Estate of Wirtz*, 807 F.2d 520, 564–68 (7th Cir. 1986) (Easterbrook, J., dissenting in part)). See also *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 889, 897 (2007) (citing Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* (Free Press 1993) (1978)); *id.* at 895, 897, 905, 907 (citing Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 *Antitrust L.J.* 135 (1984) [hereinafter *Easterbrook, Vertical Arrangements*]; *id.* at 914 (Breyer, J., dissenting) (citing Bork, *supra*); *id.* at 910, 914 (citing Easterbrook, *Vertical Arrangements, supra*).

176. See, e.g., *Twombly*, 550 U.S. at 582 (Stevens, J., dissenting) (citing *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944)) (discussing Judge Clark’s ruling interpreting pleading standards six years after publication of Federal Rules of Civil Procedure, of which he was a leading drafter); *Zahn v. Int’l Paper Co.*, 414 U.S. 291, 297 (1973) (discussing *Hackner v. Guar. Trust Co. of N.Y.*, 117 F.2d 95 (2d Cir. 1941)) (citing Judge Clark’s influence in interpreting class action rules and adoption of his interpretation by other federal courts), superseded by statute, Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, as recognized in *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 557, 566–67 (2005).

circuit often receive special treatment as well.¹⁷⁷ If the first means of doctrinal persuasion is based on logic, this means is based on character.

Finally, a judge wishing to rely on a prior precedent or doctrinally established proposition could do so by appealing to the emotions of the audience. It is infrequent that a judicial precedent reliably stirs emotion, but *Dred Scott* is the rare opinion that has that capacity. The Court both abided the status of slavery as a perpetual feature of American politics and denied that black Americans ever could be U.S. citizens.¹⁷⁸ When Justice Scalia sought to counter the “poignant” joint opinion in *Casey*, he chose carefully and well. And in evoking *Dred Scott* through narrative, he distanced himself from any particular proposition or feature of Chief Justice Taney’s opinion. The point was less to reason in conventional terms than to set a mood.

The three modes of persuasion just described align with the three forms of rhetoric Aristotle identified: logos, ethos, and pathos. Each form may be used to modify a particular subject of constitutional argument. That is, a judge may seek to persuade the audience as to the substance or valence of arguments from history, text, structure, precedent, and consequences through any of the three modes of persuasion. Thus, doctrinalism as a category of constitutional argument may be further subdivided into logical, ethical, and, as with Justice Scalia’s *Casey* opinion, pathetic varieties. Each of the four other established “modalities” may also be parsed in this way.

To illustrate the basic idea, I provide examples below of how each mode of persuasion—logos, ethos, and pathos—may modify each of five common types of constitutional argument: text, history, structure, doctrine, and consequences. These argument types are approved by Bobbitt¹⁷⁹ and a version of each also finds favor with Richard Fallon, whose typology of argument is frequently cited by commentators.¹⁸⁰ The cross-categorizations discussed below—the application of logos, pathos,

177. See, e.g., *Vaden v. Discover Bank*, 129 S. Ct. 1262, 1281 (2009) (Roberts, C.J., concurring in part and dissenting in part) (designating First Circuit opinion *Hartford Fin. Sys., Inc. v. Fla. Software Servs., Inc.*, 712 F.2d 724 (1st Cir. 1983), as written by Judge Breyer)); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 75–76 (1873) (citing *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3320)) (discussing decision by Justice Washington in circuit court); id. at 97–98 (Field, J., dissenting) (same); id. at 116 (Bradley, J., dissenting) (same); *Hayburn’s Case*, 2 U.S. (2 Dall.) 409, 410 n.1 (1792) (discussing circuit court actions in three cases that together included five of six Justices of Court).

178. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404–05 (1857) (noting slaves were considered “subordinate and inferior class of beings” and thus had no right to citizenship), superseded by constitutional amendment, U.S. Const. amend. XIV.

179. As I discuss below, Bobbitt identifies what I have called “consequences” with prudential argument. See *infra* text accompanying notes 278–281.

180. See Fallon, *Constructivist Coherence*, *supra* note 14, at 1194–209 (outlining five general types of accepted constitutional argument as deriving from text, Framers’ intent, constitutional theory, precedent, and values). Fallon refers to what this Article calls structural argument as “constitutional theory.” Id. at 1200–02.

and ethos to particular subjects of constitutional argument—represent ideal types. What follows should not be taken either to suggest neat lines of division between various categories or to suggest that those categories do not sometimes overlap in whole or in part. It is important, however, to conduct this exercise in some detail, as the approach to constitutional argument it reveals is unfamiliar. Some readers will intuitively resist the proposition, defended below, that pathetic constitutional argument stands in parallel rather than adverse relation to its logical or ethical analogs.

1. *Text.* — Textual constitutional argument centers around discovering the meaning of the words used in the Constitution. A textual argument may consider either the historical or the contemporary meaning of constitutional language, but original-meaning textualism overlaps considerably with historical argument.¹⁸¹ Although many textualists are formalists, textual argument need not be formalistic. A broad inquiry into the meaning of a text may reveal its meaning to be idiomatic, colloquial, or a term of art. The meaning of a text may also be understood at many different levels of generality; identifying an argument as textualist does not ipso facto commit the argument to any particular level of abstraction.¹⁸²

Persuading a listener that constitutional text has some particular meaning may be accomplished in any number of ways. Among the most common today are the use of contemporaneous dictionaries and reference to usage in canonical texts such as *The Federalist Papers*. We will take up *The Federalist Papers* and related sources in the discussion of historical argument below. Dictionary arguments may be described either as logical or as ethical forms of persuasion. They are logical insofar as the speaker assumes that the dictionary will be treated as controlling the definition of the word—as noted, it may not. Dictionary definitions are ethical insofar as, apart from whether the dictionary definition is dispositive, a dictionary is considered an unbiased and respected source of the definition of words.

One approach to textual argument that is more surely in the logical mode is what Akhil Amar calls intratextualism.¹⁸³ In engaging in intratextualism, “[T]he interpreter tries to read a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same (or a very similar) word or phrase.”¹⁸⁴ Thus, an intratextualist seeking to define “inferior” officers in order to understand the scope of the President’s appointments power would look elsewhere in the Constitution to uses of the same word—in this example,

181. Bobbitt identifies textual argument solely with contemporary definitions. See Bobbitt, *Constitutional Fate*, *supra* note 2, at 25–26.

182. See Jack M. Balkin, *Living Originalism* 14 (2011) [hereinafter Balkin, *Originalism*] (describing textualist approach attending to whether text describes rule, standard, or principle).

183. See Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747, 748 (1999) [hereinafter Amar, *Intratextualism*].

184. *Id.*

in the document's references to "inferior" tribunals and "inferior" courts.¹⁸⁵ The form of argument is enthymematic: Constitutional provision A has some particular meaning because constitutional provision B has that meaning, on the unstated premise that the use of language is consistent across the Constitution.

Amar uses *McCulloch v. Maryland*¹⁸⁶ as one of his prime examples of intratextualism,¹⁸⁷ but *McCulloch* is also useful as a powerful example of what we might term ethical textualism. Recall that the first question in *McCulloch* was whether the federal government had the constitutional power to incorporate a bank.¹⁸⁸ Maryland, contesting the constitutionality of the Bank of the United States, argued that the word "necessary" as used in the Necessary and Proper Clause should be read restrictively, as to limit Congress's power to legislate to only those means that are indispensable to its enumerated ends.¹⁸⁹ In rebutting this argument, Chief Justice Marshall argues, in one of the opinion's most famous passages, that the word "necessary" should not be so constrained:

The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confiding the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code.¹⁹⁰

Here, the argument for a particular reading of the text follows from the fact that "those who gave these powers" had particular aims in mind. It does not follow directly, in the originalist sense that might simply assimilate the meaning of the word "necessary" to the intentions of its authors. Rather, it follows in the sense that a contrary reading would disappoint the Founders and diminish their work: It would "give the

185. See *id.*; see also U.S. Const. art. I, § 8, cl. 9 (granting Congress power to "constitute Tribunals inferior to the supreme Court"); *id.* art. III, § 1 (providing that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish").

186. 17 U.S. (4 Wheat.) 316 (1819).

187. Amar, *Intratextualism*, *supra* note 183, at 755–57 (discussing Chief Justice Marshall's cross-reference of Necessary and Proper Clause with use of term "absolutely necessary" in U.S. Const. art. I, § 10).

188. The second question was whether a state had the power to tax the bank's operations. See *McCulloch*, 17 U.S. (4 Wheat.) at 425–35.

189. See *id.* at 413.

190. *Id.* at 415 (emphasis omitted).

Constitution “the properties of a legal code.” Respect for the “character of the instrument” therefore pushes toward a particular reading of its language. A narrow reading is beneath the U.S. Constitution.

Pathetic argument may be textualism’s most elusive mode. Textualist claims tend to have a positivist cast and are frequently set in opposition to consequentialist arguments likely to engage the emotions of the American people. At the same time, the most consistent textualists in the Court’s history, Justice Black and Justice Scalia, are also among the Court’s most gifted rhetoricians. It would be surprising if they could achieve that status without ever resorting to pathetic argument, including in instances in which the text is the subject of argument. Consider the following passage, also from Justice Scalia’s partial dissent in *Casey*:

[T]he issue in these cases [is] not whether the power of a woman to abort her unborn child is a “liberty” in the absolute sense; or even whether it is a liberty of great importance to many women. Of course it is both. The issue is whether it is a liberty protected by the Constitution of the United States. I am sure it is not.¹⁹¹

Justice Scalia then explains the basis for his conclusion: Abortion is not mentioned in the Constitution and has long been subject to prohibition in the United States.¹⁹² But that is the *second* part of the argument. Justice Scalia in fact begins his case in chief with his reference to reproductive freedom as the “power of a woman to abort her unborn child.”¹⁹³ This phrasing implicitly likens abortion to murder, which is also a liberty interest that does not count as one for constitutional purposes. The argumentation works subliminally, eliciting disgust for abortion in advance of any logical argument for including or excluding it from constitutional protection.

2. *History.* — Historical constitutional argument is frequently identified with some version of originalism, a family of theories that hold that either constitutional meaning or the appropriate resolution of constitutional controversies does or should proceed from the way in which the text was originally understood or the way in which the drafters of some operative constitutional provision would have expected the controversy to be adjudicated. These broad qualifications of the originalist position underscore the fact that originalism cannot easily be described as a single theory. Previous efforts to catalog the different versions of originalism have tended to distinguish those versions that train on the original meaning of the Constitution’s text from those that seek guidance in the intentions or expectations of its ratifiers or drafters,¹⁹⁴ or else (and

191. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 980 (1992) (Scalia, J., concurring in part and dissenting in part).

192. *Id.*

193. *Id.*

194. E.g., Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 *Loy. L. Rev.* 611, 620 (1999).

nonexclusively) to identify the level of generality at which the adjudicator is to assess the meaning of constitutional text.¹⁹⁵

Distinguishing forms of constitutional persuasion from subjects of constitutional inquiry helps us to identify a different set of categories to apply to argumentation grounded in constitutional history. In so doing it helps us better to articulate both what distinguishes originalist from nonoriginalist approaches and what distinguishes different originalist arguments from each other.

Original-meaning originalism arose in response to two trenchant critiques of the once-dominant original-intent formulation. First, it is difficult, perhaps impossible, to isolate a single original intent underlying provisions passed by multimember bodies with different perspectives, ideologies, agendas, and degrees of forethought.¹⁹⁶ Second, there is significant evidence that a large number of constitutional drafters would not have endorsed intentionalist interpretive premises, raising the discomfiting (for intentionalists) prospect that the original intent behind the Constitution is to disclaim original-intent interpretation.¹⁹⁷ The force of these criticisms was amplified by the fact that the conception of constitutional authority underlying original-intent originalism was initially undertheorized. Original-meaning originalism emerged as a more fully theorized alternative. The inquiry into original meaning is said to be appropriate because the Constitution is a written text: To the degree it is binding at all, it is binding because that text is authoritative, and the “meaning” of a text is logically supplied by its *original* meaning. The predominant original-meaning theories are best understood, then, as forms of logical historical argument.¹⁹⁸ The historical inquiry is limited by

195. See, e.g., Balkin, *Originalism*, supra note 182, at 23–24 (articulating form of originalism that “pays attention to the reasons why constitutional designers choose particular types of language”); Ronald Dworkin, *A Matter of Principle* 48–50 (1985) (arguing level of abstraction of specificity by which we define authorial intention may determine content of that intention).

196. See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204, 213–17 (1980) (arguing that for certain provisions, amendment’s framers may have had determinate intent, while adopters had no intent or indeterminate intent).

197. See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885, 887–88 (1985) (“As understood by its late eighteenth and early nineteenth century proponents, the original intent relevant to constitutional discourse was not that of the Philadelphia framers, but rather that of the parties to the constitutional compact—the states as political entities.”).

198. Many nominally intentionalist originalists also ground their normative vision in the status of the text as binding authority, or at least on the common assumption that the text binds us. See, e.g., Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* xi (1999) (“[A] jurisprudence of original intent . . . seeks to recover the textual intentions of the ratifiers in order to bring them to bear in settling current constitutional disputes.”); Larry Alexander & Saikrishna Prakash, “Is that English You’re Speaking?” Why Intention Free Interpretation is an Impossibility, 41 San Diego L. Rev. 967, 969 (2004) (“[O]ne cannot interpret texts without reference to the intentions of some author.”); Richard S. Kay, *Original Intention and Public Meaning in Constitutional*

the logic of the argument from authority that undergirds the original-meaning theory: It includes only those sources that illuminate how a reasonable person at the time would have understood the meaning of a particular text.

It is unsurprising that a version of originalism that predominates among legal scholars is in the logical mode; academic norms demand nothing less. But academics are famously unburdened by the need to persuade nonacademics of the validity of their ideas, and it is not at all obvious that original-meaning originalism is the dominant mode outside of legal academe. Nonacademic public discourse around originalism does not tend to distinguish original meaning from original intent,¹⁹⁹ and originalism in the courts is variously consistent with both theories.²⁰⁰ Reference to the intentions and expectations of various drafters, to statements offered at the Constitutional Convention in Philadelphia, and to the writings of Madison or Hamilton in *The Federalist Papers* are the common stock of originalist opinions,²⁰¹ and yet all of these sources more evidently support original intent than original meaning.

Academic supporters of original-meaning originalism often defend such references as providing examples of how reasonable or informed people would have understood the words used in the Constitution,²⁰² but the practice in the courts seems to confirm the pull of intentionalist

Interpretation, 103 Nw. U. L. Rev. 703, 709 (2009) (defining “original intended meaning” as “the meaning that textual language had for the relevant enactors”). Contrary to original-meaning originalists, this school identifies the meaning of a text with how its authors or ratifiers would have expected the text to be understood. To the degree that an intentionalist grounds his theory of authority in this linguistic argument, such an individual is engaged in *logical* historical argument.

199. See Jamal Greene, *Selling Originalism*, 97 Geo. L.J. 657, 688 (2009) (“[That] original intent and original meaning are but two sides of the same interpretative coin . . . is untrue as a matter of constitutional theory but true as a matter of constitutional politics.”).

200. Compare *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008) (espousing original-meaning originalism), with *id.* at 636 (Stevens, J., dissenting) (using purposive originalism), and with Jamal Greene, *The Case for Original Intent*, 80 Geo. Wash. L. Rev. 1683 (2012) [hereinafter Greene, *Original Intent*] (noting ways originalism as practiced in courts is consistent with original-intent theory).

201. See Greene, *Original Intent*, *supra* note 200, at 1685 (“*The Federalist* . . . [is] one of the two main sources of the intentions of the Constitution’s drafters.”).

202. See Justice Antonin Scalia, *Address Before the Attorney General’s Conference on Economic Liberties in Washington, D.C.* (June 14, 1986), in *Office of Legal Policy*, U.S. Dep’t of Justice, *Original Meaning Jurisprudence: A Sourcebook* 101, 103 (1987) (“[T]he expressions of the Framers . . . are strong indications of what the most knowledgeable people of the time understood the words to mean.”); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 Geo. L.J. 1113, 1133 (2003) (noting Farrand’s Records “are an excellent, first-rate resource of rich insight into original linguistic meaning”); Saikrishna B. Prakash, *Unoriginalism’s Law Without Meaning*, 15 Const. Comment. 529, 537 (1998) (reviewing Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (1996)) (“[T]he framers’ or ratifiers’ comments about a particular phrase or provision are often a fairly good reflection of what that phrase or provision commonly was understood to mean.”).

reasoning.²⁰³ Most telling in this regard is the low opinion many originalist judicial writings appear to have for anti-Federalists. Discounting the views expressed by Brutus²⁰⁴ or The Federal Farmer²⁰⁵ in favor of those expressed by Publius is difficult to explain on the logic of original-meaning originalism.²⁰⁶ But once we understand that historical arguments are advanced at least as much in the ethical as in the logical mode, it is easy to explain a preference for those who supported rather than opposed ratification of the Constitution. Federalists, to paraphrase Marshall, are “approved authors.”²⁰⁷

Conceived as an ethical mode of historical argument, original-intent originalism is able to respond to the criticisms that gave rise to original meaning. An adjudicator who advances an ethical historical argument has no need to “aggregate” the intentions of multiple authors, because he self-consciously privileges particular draftsmen.²⁰⁸ The intentions of the Constitution’s authors as to the appropriate interpretive technique are, likewise, not conclusive when the reason to refer to those intentions—the persuasive character of the Framers—permits them to be deployed selectively. The Framers’ technical views on interpretive method may be less culturally salient, and therefore less available as an ethical resource, than their views on constitutional substance. In addition, unlike dominant

203. See Greene, *Original Intent*, supra note 200, at 1690 (noting “deep reliance” on intentionalist sources, contrasted with “shallow reliance” on original-meaning sources).

204. The writings of Brutus have been attributed to Robert Yates. See 2 *The Complete Anti-Federalist, Objections of Non-Signers of the Constitution and Major Series of Essays at the Outset* 358 (Herbert J. Storing with Murray Dry eds., 1981) (explaining arguments for and against attribution of Brutus essays to Yates).

205. The Federal Farmer might have been Richard Henry Lee, though this has been disputed. See *id.* at 103 (discussing limited contemporary source material identifying Lee as author).

206. See Greene, *Original Intent*, supra note 200, at 1692–94 (comparing equally credible, widely available, but largely ignored anti-Federalist sources with commonly cited Federalist sources).

207. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413 (1819). Identifying some originalist arguments as ethical illuminates other curious practices as well. For example, the Supreme Court appears to prefer Federalist essays written by Madison, a former President often described as the Father of the Constitution, to those written by Hamilton, a notorious (and literal) bastard. See Ira C. Lupu, *The Most-Cited Federalist Papers*, 15 *Const. Comment.* 403, 410 (1998) (noting Court’s approximately equal citation of papers by Hamilton and Madison, despite Hamilton having written twice as many). On Hamilton’s reputation and lineage, see Ron Chernow, *Alexander Hamilton* 5, 8–16 (2004) (describing Hamilton’s temperament and backgrounds of his unmarried parents).

208. Original-intent originalists also tend, understandably on the ethical view, to privilege historical figures, such as Washington or Jefferson, who had little or no role in drafting the Constitution. Washington presided over the Constitutional Convention but did not participate actively in the debates. See 6 Douglas Southall Freeman, *George Washington, Patriot and President*, 112–13 (1975) (describing Washington’s limited role at Convention). Though hardly an indifferent observer, Jefferson was in France during the Constitution’s drafting and ratification. See William Howard Adams, *The Paris Years of Thomas Jefferson* 263–65 (1997) (discussing Jefferson’s views on proposed Constitution).

versions of original-meaning originalism, a form of originalism grounded in ethos permits reference to the original subjective expectations of the drafters as a direct source of authority. Again, the contribution of those expectations to the argument at issue is not in supplying the meaning of constitutional terms or phrases but rather in drawing on the views of heroic figures held out as specially representative of the American constitutional tradition.

Historical argument need not be limited to some particular foundational moment. Judicial references to “postenactment legislative history,” sometimes criticized as bearing an uncertain relationship to textualism or originalism,²⁰⁹ are not uncommon in U.S. courts.²¹⁰ Such references may address the early practices of the American people or their leaders, as for example when nineteenth-century state or federal practice is used to elucidate the meaning of the Establishment Clause.²¹¹ Such references may also speak more broadly to a set of narratives we tell ourselves about ourselves: our stable political institutions,²¹² our status as a Judeo-Christian nation,²¹³ our tolerance of dissent,²¹⁴ and so forth. Thus, Justice Scalia’s jurisprudence trains not only on the original meaning of the Constitution but also on “the longstanding traditions of American society.”²¹⁵ This kind of originalism is readily, and appropriately, characterized as “ethical.” The traditions invoked speak most directly to the nation’s “small c” constitution; it is as if America herself has vouched for the propositions those traditions are meant to support.

Certain ethical claims are so deeply felt that they predictably engage the emotions. In *Texas v. Johnson*, the Court held that a state could not

209. See *Dist. of Columbia v. Heller*, 554 U.S. 570, 662 n.28 (2008) (Stevens, J., dissenting) (calling postenactment legislative history “least reliable source of authority for ascertaining the intent of any provision’s drafters”).

210. See, e.g., *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 530–34 (1982) (citing several pieces of postenactment legislative history in interpreting Title IX).

211. See *Wallace v. Jaffree*, 472 U.S. 38, 104–06 (1985) (Rehnquist, J., dissenting) (citing nineteenth-century sources supporting narrow interpretations of Establishment Clause); *Marsh v. Chambers*, 463 U.S. 783, 788–91 (1983) (discussing historical practice in interpretation of Establishment Clause).

212. See *Davis v. Bandemer*, 478 U.S. 109, 144–45 (1986) (O’Connor, J., concurring in the judgment) (“There can be little doubt that the emergence of a strong and stable two-party system in this country has contributed enormously to sound and effective government.”).

213. See *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 894 (2005) (Scalia, J., dissenting) (highlighting commonalities in historical religious practices in United States).

214. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”).

215. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 980 (1992) (Scalia, J., concurring in part and dissenting in part); see also *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 520 (1990) (Scalia, J., concurring) (“[T]he Constitution contains no right to abortion. It is not to be found in the longstanding traditions of our society . . .”).

criminally punish someone for burning an American flag in protest.²¹⁶ Chief Justice Rehnquist begins his dissenting opinion, which Justice White and Justice O'Connor joined, as follows: "In holding this Texas statute unconstitutional, the Court ignores Justice Holmes' familiar aphorism that 'a page of history is worth a volume of logic.'" ²¹⁷ That opening is more explicit than usual that logic is not the only mode of persuasion in constitutional law.

The dissent proceeds to demonstrate, less through prose than verse, the "unique position" the American flag holds as a national symbol.²¹⁸ Rehnquist's dissent quotes from Ralph Waldo Emerson's "Concord Hymn," which envisions the colonial flag flying above the first shots of the American Revolution;²¹⁹ it excerpts generously from the lyrics of the Star-Spangled Banner;²²⁰ and it recites all sixty lines of John Greenleaf Whittier's "Barbara Frietchie." The poem tells the (likely apocryphal) tale of a nonagenarian woman who waved the Union flag in the face of Stonewall Jackson's advancing Confederate division during the rebels' march through Frederick, Maryland.²²¹ Whittier takes the reader on a journey through the lush autumn landscape of rural Maryland,

Apple- and peach-tree fruited deep,
Fair as a garden of the Lord.²²²

For those for whom the poem is effective, the bosom begins to swell about here:

Forty flags with their silver stars,
Forty flags with their crimson bars,
Flapped in the morning wind: the sun
Of noon looked down, and saw not one.
Up rose old Barbara Frietchie then,
Bowed with her fourscore years and ten;
Bravest of all in Frederick town,
She took up the flag the men hauled down;
In her attic-window the staff she set,
To show that one heart was loyal yet.²²³

On Whittier's telling, Frietchie's heroism moves General Jackson himself, who upon seeing her pick up a fallen flag, orders his men to hold their fire:

Quick, as it fell, from the broken staff
Dame Barbara snatched the silken scarf;

²¹⁶. 491 U.S. 397, 420 (1989) (concluding state's interest in preserving symbolic value of flag insufficient to justify criminal punishment).

²¹⁷. *Id.* at 421 (Rehnquist, C.J., dissenting).

²¹⁸. *Id.* at 422.

²¹⁹. *Id.*

²²⁰. *Id.* at 423.

²²¹. *Id.*

²²². *Id.* at 424.

²²³. *Id.*

She leaned far out on the window-sill,
And shook it forth with a royal will.
'Shoot, if you must, this old gray head,
But spare your country's flag,' she said.
A shade of sadness, a blush of shame,
Over the face of the leader came;
The nobler nature within him stirred
To life at that woman's deed and word:
'Who touches a hair of yon gray head
Dies like a dog! March on!' he said.²²⁴

Rehnquist's use of the poem is not originalist in the traditional sense. The opinion is not directed at the original meaning of the First Amendment or the intentions of its drafters. The argument embedded within the Chief Justice's use of poetry is nonetheless, as he informs the reader, historical. The opinion scans American history from a bird's eye rather than at a point and identifies a reverence for the flag as an *idée fixe*. Rehnquist then seeks to communicate that reverence by sowing within the reader the deep pride of patriotism. The subject matter is historical, the mode of persuasion pathetic.

3. *Structure*. — Structural argument may refer to more than one approach to constitutional interpretation. It is commonly associated with the work of Charles Black and the series of lectures that would become the celebrated *Structure and Relationship in Constitutional Law*.²²⁵ Black believed that certain constitutional outcomes followed from the presuppositions underlying the institutional arrangements the Constitution established. The clearest example of this genus of structural argument is Chief Justice Marshall's argument in *McCulloch* as to why Maryland may not tax the Bank of the United States. Doing so would imply a sovereignty of state over nation that is inconsistent with the structure of the U.S. government and its representative institutions.²²⁶

Structural argument relates to what Fallon refers to as "constitutional theory" argument. By this he means arguments grounded in particular constitutional arrangements that, unlike narrow interpretivism, "claim to understand the Constitution as a whole, or a particular provision of it, by providing an account of the values, purposes, or political theory in light of which the Constitution or certain elements of its language and structure are most intelligible."²²⁷ Fallon associates different versions of "constitutional theory" argument with different levels of altitude from which the interpreter assesses the relevant constitutional values or

224. *Id.* at 425.

225. Charles L. Black, Jr., *Structure and Relationship in Constitutional Law* (1969).

226. See *id.* at 15 ("In [*McCulloch*], perhaps the greatest of our constitutional cases, judgment is reached not fundamentally on the basis of that kind of textual exegesis which we tend to regard as normal, but on the basis of reasoning from the total structure which the text has created.").

227. Fallon, *Constructivist Coherence*, *supra* note 14, at 1200 (classifying Black's arguments as "middle level of theoretical argumentation").

purposes.²²⁸ Thus, a high-altitude theory is one that, like John Hart Ely's representation-reinforcement theory, specifies a particular value or set of values underlying the constitutional structure and seeks to solve constitutional controversies wholly or largely in light of those values.²²⁹ Black, who identifies not one but several values embedded within the Constitution's structures and relationships,²³⁰ sits at a medium level of generality.²³¹ Purposive approaches to interpretation of specific constitutional provisions sit at the most "particularistic" level of generality among those approaches that Fallon includes within this category.²³²

As with text and history, we may additionally distinguish structural arguments by reference to distinctive methods of persuasion. Logical structuralism is not hard to find. For example, in *INS v. Chadha*, the Court held that structural principles of bicameralism and presentment prohibited Congress from enacting a one-house veto enabling it to override the President's decision to suspend deportation of an alien.²³³ The logic of the decision was straightforward. Major premise: Congress has the power to make laws only through the lawmaking procedures established in Article I. Minor premise: The decision to force deportation of someone for whom deportation had been suspended is a legislative act; it repeals or amends the discretionary authority previously granted to the Attorney General.²³⁴ Conclusion: The one-house veto exercised in this case is unconstitutional.

The flip side of *Chadha's* rule is the nondelegation doctrine, which notionally prevents excessive conferral of discretion to the Executive to engage in fundamentally legislative activities.²³⁵ The nondelegation doctrine is also typically justified in logical structural terms, as is the related (and equally moribund) doctrine preventing the President from

228. See *id.* at 1200–02 (explaining three different levels of analysis).

229. See John Hart Ely, *Democracy and Distrust* 73–101 (1980) (identifying political process value immanent within constitutional structure); see also David A.J. Richards, *Toleration and the Constitution* 67–68 (1989) (defending theory placing respect for individual freedom of conscience at center of constitutional interpretation).

230. See Black, *supra* note 225, at 11–21 (identifying values of federal supremacy, free travel rights, and national economic unity).

231. See Fallon, *Constructivist Coherence*, *supra* note 14, at 1200.

232. *Id.* at 1201.

233. 462 U.S. 919 (1983) (arguing structural constitutional constraints supersede efficiency concerns).

234. See *id.* at 954 (“Congress’ decision to deport Chadha—no less than Congress’ original choice to delegate to the Attorney General the authority to make that decision, involves determinations of policy that Congress can implement in only one way . . .”); see also Akhil Reed Amar, *America’s Unwritten Constitution* 370 n.* (2012) (presenting “two formal proofs of the unconstitutionality of the legislative veto”).

235. See *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 472–76 (2001) (holding section of Clean Air Act assigning determination of national ambient air quality standards to EPA did not unconstitutionally delegate legislative power); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529–42 (1935) (finding section of National Industrial Recovery Act permitting President to issue “codes of fair competition” unconstitutional).

exercising lawmaking power with or without purported delegation. As Justice Black wrote for the Court in the *Steel Seizure* case, the most lucid example of this doctrine at work, “In the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.”²³⁶ Notably, Justice Jackson’s more celebrated concurring opinion, though far less formalist, also exemplifies logical structuralism. Under Justice Jackson’s famous tripartite categorization of Presidential authority, that authority varies with the level of congressional support not just because the opinion of Congress is worthy of respect but because congressional authority either adds to or subtracts from that of the President, as if the power of the political branches were a matter of arithmetic rather than, well, power.²³⁷

Ethical structuralism is also relatively easy to find, once one knows what to look for. This is because what Bobbitt terms ethical argument is in many ways continuous with structural argument. Each is, Bobbitt writes in *Constitutional Interpretation*, “an inferred set of arguments” that “do not depend on the construction of any particular piece of text, but rather the necessary relationships that can be inferred from the overall arrangement expressed in the text.”²³⁸ As Patrick Gudridge writes, “Ethical argument, Bobbitt seems to think, takes [Charles] Black’s approach one step further: it generalizes ideas of structure to encompass notions of individual rights directly.”²³⁹ The problem in trying to understand what makes ethical argument unique is that Black was perfectly willing to extend his arguments to cases implicating individual rights—indeed, rights cases are among his core examples.²⁴⁰ To the degree, then, that we are persuaded that the ethos underlying a particular ethical argument is embedded within our constitutional arrangements—as with Bobbitt’s ethos of limited government—it appears that ethical argument *is* structural argument, if often at a different level of abstraction than Black’s version.

Consider *Bolling v. Sharpe*.²⁴¹ The rule of *Brown v. Board of Education*²⁴² forbidding segregation of public schools under the Equal

236. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 587 (1952).

237. See *id.* at 635–38 (Jackson, J., concurring).

238. Bobbitt, *Constitutional Interpretation*, *supra* note 15, at 20.

239. Gudridge, *supra* note 165, at 1978; see also Bobbitt, *Constitutional Interpretation*, *supra* note 15, at 20 (“Structural argument infers rules from the powers granted to governments; ethical argument, by contrast, infers rules from the powers denied to government.”).

240. See Black, *supra* note 225, at 8–13 (discussing *Carrington v. Rash*, 380 U.S. 89 (1965) (striking down Texas Constitution’s provision prohibiting members of Armed Forces who became Texas residents due to their station in Texas from voting in Texas)); *id.* at 15–17 (discussing *Crandall v. Nevada*, 73 U.S. 35 (1868) (finding Nevada tax on leaving state violated fundamental right to travel)); *id.* at 35–39 (discussing *Gitlow v. New York*, 268 U.S. 652 (1925) (incorporating First Amendment limits on federal power to states through Fourteenth Amendment)).

241. 347 U.S. 497 (1954).

242. 347 U.S. 483 (1954).

Protection Clause applies identically to the schools of the federally administered District of Columbia even though the Equal Protection Clause does not by its terms apply to the federal government. No obvious textual argument explains this result²⁴³ but, the Court states, “In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.”²⁴⁴ The putative “unthinkability” of refusing to apply equal protection principles to the federal government has come in for serious criticism.²⁴⁵ As Michael McConnell writes, “The decision of the framers of the Fourteenth Amendment to impose its limitations only on the states, far from being ‘unthinkable,’ reflects their understanding of the institutional capacities of various units of government within our system.”²⁴⁶ Ely piles on: “[U]nthinkable in what sense?” he asks, one page after referring to the opinion as “gibberish.”²⁴⁷

Many of *Bolling*’s numerous critics assume its mode of persuasion to be logical rather than ethical. It is obviously quite “thinkable” textually that the constitutional regime with respect to individual rights would be different for states and the federal government. The First and the Fourteenth Amendments explicitly refer to Congress and to states, respectively, in establishing constitutional standards for treatment of individuals.²⁴⁸ Neither is it unthinkable structurally under the logic of our federal arrangements and the Fourteenth Amendment. As McConnell notes, various structural guarantees aim to insulate the federal government from dominance by any particular group of interests, thereby making it less likely that the various branches of the federal government would combine in opposition to minorities.²⁴⁹ But *Brown*’s rejection of the

243. But see Ryan C. Williams, *Originalism and the Other Desegregation Decision*, 99 Va. L. Rev. 493, 594–98 (2013) (arguing Fourteenth Amendment’s Citizenship Clause applies certain equality guarantees against the federal government).

244. *Bolling*, 347 U.S. at 500.

245. See David E. Bernstein, *Bolling*, Equal Protection, Due Process, and *Lochner*phobia, 93 Geo. L.J. 1253, 1257–61 (2005) (collecting criticisms).

246. Michael W. McConnell, McConnell, J., Concurring in the Judgment, in *What Brown v. Board of Education Should Have Said* 158, 167 (Jack M. Balkin ed., 2001).

247. Ely, *supra* note 229, at 32–33.

248. U.S. Const. amend. I; *id.* amend. XIV, cl. 1.

249. See McConnell, *supra* note 246, at 167 (“By virtue of [its] greater diversity, the federal government is less likely to countenance the systematic oppression of minority groups without our midst.”); see also *The Federalist* No. 10, at 77 (James Madison) (Clinton Rossiter ed., 1961) (discussing advantages of large republics in mitigating effects of faction); *The Federalist* No. 51, *supra*, at 320 (James Madison) (arguing power will be limited under new Constitution by “contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places”). As Richard Primus has noted, since *Bolling* was decided, the Supreme Court has never found that a federal statute, regulation, or practice unconstitutionally discriminated against racial minorities. Richard A. Primus, *Bolling Alone*, 104 Colum. L. Rev. 975, 978 (2004). As of 2004, when Primus conducted his study, there had been only twelve

doctrine of “separate but equal” meant not only to shift doctrine in a formal sense but to chart the country on a new ethical course.²⁵⁰ Identity between the standards limiting racial discrimination that apply to states and the federal government was a structural reality, or so Chief Justice Warren argued, because our ethos required it.

The third mode of persuasion and the one of greatest interest, pathetic argument, likewise may be, and has been, applied to the constitutional structure. The Court held in *Arizona v. United States* that states are preempted from, in effect, creating their own immigration policies that supplement federal immigration enforcement.²⁵¹ Dissenting from this holding, Justice Scalia chose to end his opinion by highlighting the problems to which the Arizona legislature believed it was responding:

As is often the case, discussion of the dry legalities that are the proper object of our attention suppresses the very human realities that gave rise to the suit. Arizona bears the brunt of the country’s illegal immigration problem. Its citizens feel themselves under siege by large numbers of illegal immigrants who invade their property, strain their social services, and even place their lives in jeopardy. Federal officials have been unable to remedy the problem, and indeed have recently shown that they are unwilling to do so. Thousands of Arizona’s estimated 400,000 illegal immigrants—including not just children but men and women under 30—are now assured immunity from enforcement, and will be able to compete openly with Arizona citizens for employment.²⁵²

Justice Scalia’s dissenting opinion was almost entirely devoted to a structural argument: that in the absence of an express congressional or constitutional prohibition, border control is a residual and significant element of state sovereignty.²⁵³ Most of the opinion is, broadly speaking, in the logical mode. He cites Vattel’s treatise on the law of nations to show

reported cases in which an African American litigant had succeeded in a lower federal court or a state court on a claim of racial discrimination brought against the federal government. In only one such case did the decision result in invalidation of a federal statute or codified federal regulation. See *id.* at 991–92 (citing *Simkins v. Moses H. Cone Mem’l Hosp.*, 323 F.2d 959 (4th Cir. 1963)).

250. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (“This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children.”).

251. See 132 S. Ct. 2492, 2510 (2012) (“Arizona may have understandable frustrations with the problems caused by illegal immigration . . . but the State may not pursue policies that undermine federal law.”).

252. *Id.* at 2522 (Scalia, J., concurring in part and dissenting in part).

253. See *id.* at 2511 (“As a sovereign, Arizona has the inherent power to exclude persons from its territory, subject only to those limitations expressed by the Constitution or constitutionally imposed by Congress.”).

the original understanding of the power to exclude,²⁵⁴ and demonstrates through citation to early laws and cases that immigration law remained the province of state governments even long after ratification.²⁵⁵ But he seals the deal by evoking one of our basest emotions: fear. Fear of crime, fear of death, and, perhaps as bad in lean economic times, fear of job loss.

4. *Doctrine.* — Doctrinal argument is argument grounded directly in the holdings of relevant judicial and political precedents or advanced by reference to a purposive or justificatory theory derived from those holdings.²⁵⁶ Having already discussed some of the ways in which doctrinal argument may be subdivided into logical, ethical, and pathetic modes, I devote little time here to further elaboration.²⁵⁷ It is useful, however, to show some of the common forms of doctrinal rhetoric beyond the *Roe* and *Dred Scott* examples.

The Supreme Court's decision in the *Health Care Cases* provides a ready example of logical doctrinal argument.²⁵⁸ The opinion of the Chief Justice and the joint dissent in the case both argued that Congress lacks power under the Commerce Clause to regulate "inactivity."²⁵⁹ The opinions variously offered textual, historical, structural, and prudential arguments for that view, but they also proposed a simple doctrinal justification: "As expansive as our cases construing the scope of the commerce power have been, they all have one thing in common: They uniformly describe the power as reaching 'activity.' It is nearly impossible to avoid the word when quoting them."²⁶⁰ It is quite true that the regnant formulation of the scope of congressional power under the Commerce Clause at the time of the *Health Care Cases* permitted Congress to regulate "activities,"²⁶¹ and so it is perfectly logical to conclude, inductively, that Congress may not regulate inactivity. A dissenter from this view would argue that the Court's references to "activities" in previous formulations followed from the fact that activity, and not inactivity, was at issue in those cases. But without reference to some additional, nondoctrinal argument,

254. *Id.* (citing Emer de Vattel, *The Law of Nations* bk. II, ch. VII, § 94, at 309 (Béla Kapossy & Richard Whatmore eds., Liberty Fund 2008) (1758)).

255. *Id.* at 2511–13.

256. See Bobbitt, *Constitutional Interpretation*, *supra* note 15, at 17–18 ("[W]hen we say that a neutral, general principle derived from the caselaw construing the Constitution should apply, does not apply or may apply, we make an appeal in a *doctrinal* mode."); Fallon, *Constructivist Coherence*, *supra* note 14, at 1202 ("Constitutional disputes frequently abound with analysis of the meanings of judicial precedents.").

257. See *supra* text accompanying notes 170–178.

258. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

259. *Id.* at 2587–89 (Roberts, C.J.); *id.* at 2649–50 (Scalia, J., dissenting, joined by Kennedy, Thomas & Alito, JJ.).

260. *Id.* at 2587 (Roberts, C.J.).

261. See, e.g., *United States v. Lopez*, 514 U.S. 549, 558–59 (1995) ("Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce." (citations omitted)).

that response is not sufficient to decide that Congress may regulate inactivity under the Commerce Clause.

Ethical and pathetic doctrinalism both recur around the Court's use of one of its most powerful and common rhetorical devices: reference to anticanonical cases. Anticanonical cases are those cited as examples of constitutional law gone awry. *Dred Scott*,²⁶² *Plessy v. Ferguson*,²⁶³ *Lochner v. New York*,²⁶⁴ and *Korematsu v. United States*²⁶⁵ are frequently cited in U.S. courts, but almost never in ways meant to signal agreement with their underlying reasoning or conclusions.²⁶⁶ These cases often serve as doctrinal stand-ins for deep ethical propositions. Thus, Chief Justice Rehnquist framed his opposition to heightened scrutiny for commercial speech by likening it to the *Lochner* era, "in which it was common practice for this Court to strike down economic regulations adopted by a State based on the Court's own notions of the most appropriate means for the State to implement its considered policies."²⁶⁷ The three most prominent members of the anticanon—*Dred Scott*, *Lochner*, and *Plessy*—are particularly suited to ethical doctrinalism. This is because their anticanonicity results in part from their status as symbols of what our canonical constitutional moments repudiated: slavery, economic due process, and Jim Crow, respectively.²⁶⁸ Citing these cases signals opposition to what the nation might have become (or once was), but is not now.

The subject matter of these cases and the practices they blessed—namely, forms of racial and economic subjugation—lend themselves to deployment in pathetic doctrinal argument as well. Justice Scalia's use of *Dred Scott* in his *Casey* coda provides one example.²⁶⁹ Justice Thomas's references to *Dred Scott* and *Plessy* in his separate opinion in *Parents Involved in Community Schools v. Seattle School District No. 1* provide another.²⁷⁰ There, concurring with a Court decision that invalidated race-

262. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), superseded by constitutional amendment, U.S. Const. amend. XIV.

263. 163 U.S. 537 (1896), overruled by *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

264. 198 U.S. 45 (1905).

265. 323 U.S. 214 (1944).

266. See Jamal Greene, *The Anticanon*, 125 Harv. L. Rev. 379, 386 (2011) [hereinafter Greene, *Anticanon*] (defining anticanon as "examples of how not to adjudicate constitutional cases").

267. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 589 (1980) (Rehnquist, J., dissenting).

268. See Greene, *Anticanon*, supra note 266, at 468 ("Reconstruction is the repudiation of *Dred Scott*, the New Deal era a repudiation of *Lochner*, and the civil rights revolution a repudiation of *Plessy*").

269. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 1001 (1992) (Scalia, J., concurring in part and dissenting in part) (drawing similarity between *Casey* and *Dred Scott* in intention to call "contending sides of national controversy to end their national division by accepting common mandate rooted in the Constitution").

270. 551 U.S. 701 (2007).

conscious attempts to integrate the public schools of Seattle and Louisville, Justice Thomas thus responded to the suggestion that deliberate efforts at racial integration may be benign:

[I]f our history has taught us anything, it has taught us to beware of elites bearing racial theories. See, e.g., *Dred Scott v. Sandford* (“[T]hey [members of the ‘negro African race’] had no rights which the white man was bound to respect”). Can we really be sure that the racial theories that motivated *Dred Scott* and *Plessy* are a relic of the past or that future theories will be nothing but beneficent and progressive? That is a gamble I am unwilling to take, and it is one the Constitution does not allow.²⁷¹

Within our constitutional culture, describing pro-integration school officials (not to mention Justice Breyer in dissent) as “elites bearing racial theories” akin to those that found favor in *Dred Scott* and *Plessy* is an epithet meant to provoke shame and wariness, perhaps even enmity.

Anticanonical cases are distinctive in that they stand simultaneously for apparently inconsistent propositions.²⁷² *Plessy* represents both racial formalism and acontextual colorblindness.²⁷³ *Dred Scott* represents both excessive positivism and moral activism by judges.²⁷⁴ *Lochner* represents both the improper use of substantive due process and the use of substantive due process at all.²⁷⁵ These propositions bear some logical tension, but the ethical and pathetic valences of the decisions are less particularized and therefore more unitary.

5. *Consequences.* — The category of argument I have labeled “consequences” requires explanation and limitation. Arguing in favor of some proposition based on consequences is obviously not particular to constitutional law.²⁷⁶ It is enlightening to consider argument from consequences in light of the Bobbitt archetype with which it is most clearly associated: prudential argument. Bobbitt says that prudential argument is concerned with the wisdom of permitting a particular exercise of government power,²⁷⁷ but his examples suggest that the measure of whether the decision was wise or unwise is the institutional standing of the judiciary or the degree to which representative institutions are

271. Id. at 780–82 (Thomas, J., concurring) (footnote omitted).

272. See Greene, Anticanon, *supra* note 266, at 460–61 (“[A]rguments against these cases span the ideological spectrum.”).

273. Id. at 460.

274. Id.

275. Id.

276. See Daniel A. Farber, Book Review, 67 Minn. L. Rev. 1328, 1329 (1983) (reviewing Bobbitt, *Constitutional Fate*, *supra* note 2) (disputing prudentialism as distinctively legal convention).

277. See Bobbitt, *Constitutional Interpretation*, *supra* note 15, at 16–17 (describing prudential argument as introduction of “practical effects of constitutional doctrine into the rationales underpinning doctrine”).

permitted to function effectively.²⁷⁸ Prudential or consequentialist argument thus understood speaks to a certain judicial pragmatism that recognizes that securing the rule of law over time requires the exercise of practical wisdom.²⁷⁹ Judges must attend to the “political and economic circumstances surrounding [a] decision.”²⁸⁰

The general approach sketched in this Part should by now be clear enough to proceed quickly through the examples of logical, ethical, and pathetic prudential argument. The political question doctrine, whereby federal courts refuse to entertain particular questions otherwise within their jurisdiction in deference to other branches, typifies prudential argument. The first of the factors listed in *Baker v. Carr* as defining a political question is the doctrine’s logical prototype: “a textually demonstrable constitutional commitment of the issue to a coordinate political department.”²⁸¹ Under this prong, it is to the institutional benefit of the judiciary to avoid wading into matters that are textually—and therefore transparently—committed to the other branches of government. If prudentialism can be said to have a logic, it is that the judicial department should mind its own business.

We see ethical prudential argument in those cases, among others, suggesting that judges should stay their hand where doing otherwise would cause injury to some distinctively American institution. Consider, for example, Justice Powell’s argument for the Court in *San Antonio Independent School District v. Rodriguez*, in which he refused to apply heightened scrutiny to legally abetted intrastate but interdistrict wealth disparities in primary and secondary school public education because judicial oversight would threaten local control of schools.²⁸² As Powell wrote, augmenting his ethical claim by reference to an iconic judicial figure, “Mr. Justice Brandeis identified as one of the peculiar strengths of our form of government each State’s freedom to ‘serve as a laboratory; and try novel social and economic experiments.’”²⁸³

For pathetic prudentialism we may look to the dissenting opinion of Justice Scalia in *Boumediene v. Bush*.²⁸⁴ The *Boumediene* Court held that Congress could not withhold the privilege of the writ of habeas corpus from enemy combatants held at Guantánamo Bay, Cuba.²⁸⁵ Justice Scalia noted that the Administration chose the naval detention facility at Guantánamo Bay in reliance on prior precedent suggesting that federal

278. See generally Stephen Breyer, *Active Liberty* (2005) (defending view of constitutional interpretation privileging democratic participation).

279. See Bickel, *supra* note 106, at 128 (recognizing value of judicial restraint in political democracy).

280. Bobbitt, *Constitutional Fate*, *supra* note 2, at 61.

281. 369 U.S. 186, 217 (1962).

282. 411 U.S. 1, 49–51 (1973).

283. *Id.* at 50.

284. 553 U.S. 723, 826 (2008) (Scalia, J., dissenting).

285. *Id.* at 771 (majority opinion).

courts lacked habeas jurisdiction over foreign territory.²⁸⁶ His most memorable line was both prudential and pathetic. After reminding the reader that “America is at war with radical Islamists” and consistently referring to the terrorist network against whom that war was waged as “the enemy,” Justice Scalia writes:

The game of bait-and-switch that today’s opinion plays upon the Nation’s Commander in Chief will make the war harder on us. It will almost certainly cause more Americans to be killed. That consequence would be tolerable if necessary to preserve a time-honored legal principle vital to our constitutional Republic. But it is this Court’s blatant *abandonment* of such a principle that produces the decision today.²⁸⁷

The opinion situates the Court’s actions in opposition not to “the President” but to the “Commander in Chief” in a time of war. It is thus prudential. It then claims that the Court has made the war “harder on *us*,” placing the Court and his readership under the umbrella of the military’s protection.²⁸⁸ The coup de grace, of course, is that the majority’s decision “will almost certainly cause more Americans to be killed.”²⁸⁹ Blood is on Justice Kennedy’s hands: He should be ashamed of himself.

6. *Ethos*. — The table below summarizes the discussion in this Part so far. In the left-hand column are five established modalities of constitutional argument. The row of headers lists the three standard modes of persuasion. Many of the examples discussed above are represented in the resulting cross-tabulations.

TABLE 1: MODALITIES OF ARGUMENT AND MODES OF PERSUASION

	Logos	Ethos	Pathos
Text	Intratextualism	<i>McCulloch</i> definition of “necessary”	Scalia dissent in <i>Casey</i>
History	Original-meaning originalism	Original-intent originalism	Rehnquist dissent in <i>Texas v. Johnson</i>
Structure	<i>INS v. Chadha</i>	<i>Bolling v. Sharpe</i>	Scalia dissent in <i>Arizona v. United States</i>

286. Id. at 828 (Scalia, J., dissenting).

287. Id. at 827–28.

288. Id. at 828 (emphasis added).

289. Id. at 828.

Doctrine	Activity/inactivity distinction	Anticanon	Thomas concurrence in <i>Parents Involved</i>
Consequences	Political question doctrine: textual commitment	Local control of schools in <i>Rodriguez</i>	Scalia dissent in <i>Boumediene</i>

Bobbitt identified and devoted much of *Constitutional Fate* to elaboration of ethical argument as a sixth, distinct modality.²⁹⁰ On this view, “ethos” should more appropriately be listed in the left-hand column rather than the top row of Table 1. But remaining faithful to the Aristotelian conception of ethos as parallel to rather than modified by logos and pathos has some advantages over Bobbitt’s approach. Most significantly, it substantially mitigates—or, better, explains—what Gudridge has called the “scattershot” quality of Bobbitt’s examples of ethical argument.²⁹¹

The metes and bounds of the category have long been obscure, even on Bobbitt’s terms. Bobbitt has argued, for example, that the only American ethos reflected in the Constitution is the ethos of limited government.²⁹² Although ethical argument itself is by now a well-accepted form, I am aware of no scholar besides Bobbitt who accepts this curious limitation,²⁹³ and Bobbitt’s own application of it is not transparent. For example, as Daniel Farber notes, Bobbitt appears to include fairness to Indians as reflecting the American ethos²⁹⁴ when “it is painfully obvious that virtually nothing is as American as stealing land from Indians.”²⁹⁵ Apart from that fact, it is not clear how that ethic relates to limited government; one can easily imagine ways in which either fairness or unfairness to Indians is compelled by some conception of limited government. “The persuasiveness of Bobbitt’s ethical arguments . . . depends in part on the predisposition of their recipients to see the analogies [he makes] in Bobbitt’s way,” Gudridge writes.²⁹⁶ It is for like

290. Bobbitt, *Constitutional Fate*, supra note 2, at 93–177.

291. Gudridge, supra note 165, at 1975.

292. Bobbitt, *Constitutional Interpretation*, supra note 15, at 21. Bobbitt appears to mean that the only justifiable ethical argument is one that draws on a principle of limited government, but it is difficult to say why this is so or indeed how it meaningfully constrains the category. See also Bobbitt, *Constitutional Fate*, supra note 2, at 144–46 (discussing general limitations of federal government as being crux of ethical modality).

293. See, e.g., Mark Tushnet, *Justification in Constitutional Adjudication: A Comment on Constitutional Interpretation*, 72 Tex. L. Rev. 1707, 1716 (2004) [hereinafter Tushnet, *Justification*] (noting criticism of Bobbitt’s conception of ethical arguments).

294. See Bobbitt, *Constitutional Fate*, supra note 2, at 115–18 (discussing *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831)).

295. Farber, supra note 276, at 1332.

296. Gudridge, supra note 165, at 1976.

reasons that Bobbitt's treatment of this category has been called "idiosyncratic,"²⁹⁷ "misleading,"²⁹⁸ and "seriously flawed."²⁹⁹

Three examples from *Constitutional Fate* show how understanding ethical argument as a mode of persuasion makes better sense of this important category. In the *Pentagon Papers Case*, the Supreme Court refused, on First Amendment grounds, to permit the President to enjoin the publication of classified information relating to the origins and conduct of the Vietnam War.³⁰⁰ This result is difficult to justify textually, since the First Amendment does not by its terms apply to the President (or, for that matter, to the judiciary), but Bobbitt explains the case as an application of ethical argument: "It would be intolerable if a President could use means to restrict a free press that Congress plainly could not... [b]ecause it would be inconsistent with the ethic expressed by the First Amendment."³⁰¹

The second example comes from *Trop v. Dulles*, in which the Court held that the government could not revoke citizenship as punishment for wartime desertion.³⁰² The plurality opinion of Chief Justice Warren formally justified the outcome in Eighth Amendment terms: Making someone stateless is an unusual form of punishment and imposes a significant disability, rendering "[h]is very existence... at the sufferance of the country in which he happens to find himself."³⁰³ Reformulating *Trop* in what he describes as ethical terms, Bobbitt writes that the decision better rests on the principle that "representative government, created by the People acting as a whole, could not begin slicing off parts of the Polity without the consent of the People."³⁰⁴

The final example is *Moore v. City of East Cleveland*, which invalidated a municipal law that prohibited extended family members from living together in a single housing unit.³⁰⁵ Bobbitt characterizes as ethical the substantive due process basis for Justice Powell's plurality opinion, that "the institution of the family is deeply rooted in this Nation's history and tradition."³⁰⁶

The relevant ethical claims in the three opinions just discussed are the application of free speech and press guarantees to the Executive; the incapacity of a representative government to deconstruct its polity; and

297. Tushnet, Justification, *supra* note 293, at 1716.

298. Farber, *supra* note 276, at 1332.

299. Martin H. Redish, Judicial Review and Constitutional Ethics, 82 Mich. L. Rev. 665, 671 (1984) (reviewing Bobbitt, *Constitutional Fate*, *supra* note 2).

300. See *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971).

301. Bobbitt, *Constitutional Fate*, *supra* note 2, at 101-02.

302. 356 U.S. 86, 103 (1958) (plurality opinion).

303. *Id.* at 101.

304. Bobbitt, *Constitutional Fate*, *supra* note 2, at 104.

305. 431 U.S. 494, 499-506 (1977) (plurality opinion).

306. See Bobbitt, *Constitutional Fate*, *supra* note 2, at 96 (quoting *Moore*, 431 U.S. at 503 (1977)).

the sanctity of the family. What binds these claims? Protection for each of these values can be rooted in a norm of limited government, but that is true of virtually any value derived from a case the government loses.

In fact, the points Bobbitt wishes to make in citing these cases do not require him to articulate a sixth modality. Each fits into a more conventional modality—just not necessarily the logical mode of that modality. Thus, the argument that “Congress” as used in the First Amendment is not literal is a textual argument; advancing the argument by asserting the intolerability of the alternative within the American system is ethical in its rhetoric. The notion that revoking citizenship without consent is incompatible with representative government falls into the heartland of a structural argument: It is easy to visualize Charles Black making precisely the same moves. Again, the *ipse dixit* character of the argumentation suggests an ethical cast. Finally, the idea that our history and tradition protect the liberty to define one’s own family is clearly an historical argument, though as with many historical arguments grounded in ongoing traditions, it is in the ethical mode.³⁰⁷ What unites these cases is less a subject of argument like the other modalities and more a mode of persuasion with respect to distinct subjects.³⁰⁸

This Part has demonstrated that pathetic argument is a form of persuasion in parallel to logical and ethical argument that may apply to each of the traditional subjects of constitutional argument: text, history, structure, doctrine, and consequences. This Part has not demonstrated, nor sought to demonstrate, that pathetic argument is an appropriate method of persuasion in any particular case or set of cases, nor has it sought to compare it normatively with logical or ethical argument. The next Part addresses these questions.

Significantly, this Part also has not suggested that pathetic forms of rhetoric are used—or are appropriate—only in relation to some identifiable and accepted subject of argument. Drawing direct connections between rhetorical modes and subjects of constitutional argument is useful in situating this Article’s claims within the existing literature, and may well have normative import,³⁰⁹ but plainly there are instances in which pathetic argument has been used primarily to persuade the reader as to the ultimate adjudicative outcome, unmediated by legal niceties. Gutwrenching statements of the facts in cases involving criminal

307. See *supra* text accompanying notes 209–215 (noting ethical elements of historical arguments).

308. Describing ethical, logical, and pathetic argument as modes of persuasion arguably aligns them with Bobbitt’s definition of his interesting term “modalities”: “the ways in which legal propositions are characterized as true.” Bobbitt, *Constitutional Interpretation*, *supra* note 15, at 12. Bobbitt’s particular interest in ethical argument, which is the closest of his list to being a modality in precisely this sense, may bear responsibility for his formulation.

309. See *infra* Part III.C.4 (criticizing use of pathetic arguments without connection to “usual constitutional forms”).

procedural rights provide a ready example.³¹⁰ “Poor Joshua!” may provide another.³¹¹ As the next Part discusses, if this kind of unmediated appeal to emotion is the main target of critics of pathetic argument, then those critics need to say more about whether and to what degree the *mediated* appeals discussed in this Part should be permitted.

III. THE POSSIBILITIES OF PATHOS

Is pathetic argument becoming of a constitutional judge? This Part defends the view that it is at least sometimes appropriate for judges in constitutional cases to seek to persuade the reader of some legal proposition by way of an emotional appeal. This view does not depend on the claim, discussed in Part II.A and below, that emotions always or often embody intelligent judgments. Even if we adopt the minority position of the feeling theorists, the place of pathetic argument as an established element of constitutional practice and its relevance to legal persuasion would support, if not always compel, its validity. That said, the insights of cognitive theorists as to the structure of emotions and their relation to judgment may nonetheless be relevant to assessing the particular circumstances under which pathetic argument is appropriate and the frequency with which such circumstances obtain.

Part III.A summarizes the views of cognitive theorists as relevant to the normative case for emotional appeal in judicial opinion-writing. Part III.B then makes that normative case. This Article argues that emotional appeals by constitutional judges are partly constitutive of constitutional practice, are democratically desirable in some circumstances, may improve the administrability of constitutional rules, and are inevitable. Part III.C discusses a set of interrelated and overlapping considerations that, taken together, inform whether and to what degree pathetic argument is proper within our system. These considerations include whether the opinion is a separate writing or for the court, whether the court itself is acting in a “law-announcing” capacity, the nature of the

310. See, e.g., *Schiro v. Farley*, 510 U.S. 222, 224–25 (1994) (recounting details of Schiro’s conviction for murder of Laura Luebbehusen; Schiro hit Luebbehusen on head repeatedly with glass liquor bottle and iron and raped her repeatedly before and after her death).

311. A parallel to the “Poor Joshua!” dissent may be found in Justice Scalia’s dissenting opinion in *Lafler v. Cooper*, 132 S. Ct. 1376, 1391–96 (2012) (Scalia, J., dissenting), which held that a criminal defendant may claim ineffective assistance of counsel based on poor legal advice resulting in rejection of a plea bargain offer and conviction after a full and fair trial. *Id.* at 1388 (majority opinion). Justice Scalia ends his dissent by personalizing the respondent’s victim: “Released felon Anthony Cooper, who shot repeatedly and gravely injured a woman named Kali Mundy, was tried and convicted for his crimes by a jury of his peers, and given a punishment that Michigan’s elected representatives have deemed appropriate. Nothing about that result is unfair or unconstitutional.” *Id.* at 1398 (Scalia, J., dissenting).

particular emotion involved, and whether the emotional appeal is directed at persuasion as to an established subject of argument.

A. The Good of Emotions

It will be difficult to arrive at a normative judgment about appeals to emotion without first deciding what emotions are good for. Part II.A discussed a range of views as to what constitutes emotion and characterized the “cognitive” view as the belief that emotions are, in important respects, subjective judgments attached to some intentional object. If emotions operate in parallel to other cognitive processes that help us to evaluate and to assess propositions about our environment, then it may well shift the burden to those who would claim that pathetic argument is never an appropriate rhetorical strategy for a constitutional judge. It is beyond this Article’s scope to defend the cognitive view in full, but it is worth exploring how much accepting this view would help to answer the normative question that sits at the heart of this Part.

A simple example from the law of evidence is instructive. Under the Federal Rules of Evidence, and in most state courts, an “excited utterance” is an exception to the general prohibition on hearsay.³¹² The Federal Rules define an excited utterance as “[a] statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.”³¹³ The idea is that a spontaneous statement made within the anxiety or excitement of the moment, before any opportunity for reflection, is less likely to have been fabricated.³¹⁴ The exception is therefore consistent with a common Freudian intuition that raw emotions can reveal our true views about the world, and, conversely, that logical reasoning can abide manipulation and obfuscation.³¹⁵ At the same time, criticism of the excited utterance exception foregrounds the complexity of the relationship between emotions and truth claims.³¹⁶ Excited utterances are considered reliable because they more or less accurately report the

312. See Fed. R. Evid. 803(2); see also *White v. Illinois*, 502 U.S. 346, 355 n.8 (1992) (declaring excited utterance exception to be “firmly rooted” and recognized in “nearly four-fifths” of states). Under *Crawford v. Washington*, 541 U.S. 36 (2004), and its progeny, excited utterances may be introduced as hearsay in a criminal case if—as will often be the case—they were made in the course of an “ongoing emergency.” *Davis v. Washington*, 547 U.S. 813, 826–28 (2006); see also Andrew Dylan, Note, Working Through the Confrontation Clause After *Davis v. Washington*, 76 Fordham L. Rev. 1905, 1932 (2007) (“*Davis’s* ongoing emergency test tends to flatten the distinction between confrontation analysis and hearsay analysis under the excited utterance exception.”).

313. Fed. R. Evid. 803(2).

314. 6 John Henry Wigmore, *Evidence in Trials at Common Law* § 1747, at 195 (James H. Chadbourne ed., 1976) (explaining traditional rationale for spontaneous exclamation exception).

315. See Maroney, *supra* note 4, at 643 (discussing excited utterance exception).

316. See Aviva Orenstein, “My God!”: A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule, 85 Calif. L. Rev. 159, 178–83 (1997) (presenting psychological critique of excited utterance exception).

speaker's perceptions, not because they nudge those perceptions any closer to reality. Judgments made in haste or in moments of stress, shock, or euphoria may be less likely to be deliberately mendacious, but they may be more susceptible to cognitive breakdowns that impair perception.³¹⁷

Cognitivists have lent both theoretical and empirical support for the view that emotions function in just the way the excited utterance exception contemplates. Dan Kahan describes three different models of how emotions function in risk perception,³¹⁸ which is crucial to forming judgments about legal rules. On one model, the "rational weigher theory," emotions are the psycho-physical expression of risk perceptions arrived at through a rational balancing of costs and benefits.³¹⁹ On a competing model, the "irrational weigher theory," emotions act as heuristics to compensate for our inability to rationally assess costs and benefits. As crude substitutes for balanced assessments, they systematically impair our judgments and lead to identifiable biases in our perception of risk.³²⁰ On a third model, the "cultural evaluator theory," rather than helping us to maximize our welfare in a narrow sense, emotion helps to align our judgments with the social meaning of particular activities.³²¹ An individual's aim on this view is to make judgments consistent with a world that expresses her core beliefs. Emotions are an important conduit between those core beliefs and states of affairs that conform to or resist them.

There is considerable evidence that emotion indeed precedes and motivates assessments of value. It has been observed, for example, that individual perceptions of risk tend to vary inversely with individual perceptions of benefit.³²² This negative correlation requires explanation, since risk bears no necessary relationship to benefit (and to the degree that it is related, we might expect the relationship to be positive). One plausible explanation is that our initial reaction to some propositions is an affective reaction that jointly informs our assessment of risks and benefits.³²³ Consistent with this hypothesis, a 1994 study by Ali Alhakami and Paul Slovic found that the quantified intensity of individuals' affective evaluations of particular phenomena, such as nuclear power or bicycles,

317. See *id.* at 181 ("[B]ut the very stress that makes them so honest can also interfere with their ability to perceive, transcribe, and remember events.").

318. Dan M. Kahan, *Two Conceptions of Emotion in Risk Regulation*, 156 U. Pa. L. Rev. 741, 744–52 (2008).

319. *Id.* at 745–46.

320. *Id.* at 746–48.

321. *Id.* at 748–49.

322. See Ali Siddiq Alhakami & Paul Slovic, *A Psychological Study of the Inverse Relationship Between Perceived Risk and Perceived Benefit*, 14 Risk Analysis 1085, 1085 (1994) (presenting studies depicting inverse relationship between risk perception and benefit perception).

323. See *id.* ("We find that the inverse relationship is . . . indicative of a confounding of risk and benefit in people's minds.").

were strong predictors of the degree of negative correlation between perceived risk and perceived benefit.³²⁴ That is, strongly held feelings about an object or activity led people to judge the object or activity as either high risk and low benefit (with unfavorable attitudes as the independent variable) or low risk and high benefit (with favorable attitudes as the independent variable).³²⁵ Additional experimental research has found that time pressure, which tends to diminish the opportunity for nonaffective forms of cognition, increases the magnitude of the negative correlation between risk and benefit.³²⁶ This and similar studies have led many researchers to conclude that affect “comes prior to, and directs, judgments of risk and benefit.”³²⁷

Emotions help us connect our external environment to our values. Nussbaum uses a helpful example that originates with the neuroscientist Antonio Damasio.³²⁸ “Elliot” was a man in his thirties with damage to his prefrontal cortex that required surgery.³²⁹ Elliot had no difficulty performing a very wide range of cognitive tasks, such as remembering dates, names, and other details of his personal and professional life as well as being capable of high-level discussion of macro issues such as politics and the economy.³³⁰ But he lost all sense of responsibility. He could not motivate himself to get up in the morning, he could not be trusted to manage his tasks at work, his attention span was sporadic and unpredictable, and his judgment of character seemed to suffer.³³¹ Elliot was intelligent and otherwise healthy but, Damasio writes, he was “unable to reason and decide in ways conducive to the maintenance and betterment of himself and his family, no longer capable of succeeding as an independent being.”³³²

Follow-up revealed that Elliot had another problem: He could not emote. With an unusually acute memory for detail, he related tragic personal events with complete detachment.³³³ Topics of conversation that had once affected him deeply no longer caused any emotional reaction in

324. See *id.* at 1095 (“A person’s general affective evaluation of the item was the major predictor of the risk/benefit correlation.”).

325. *Id.*

326. See Melissa L. Finucane et al., *The Affect Heuristic in Judgments of Risk and Benefits*, 13 *J. Behav. Decision Making* 1, 6–7 (2000); cf. Richard S. Lazarus, *Emotion and Adaptation* 131 (1991) (presenting data establishing increased negative correlation between risk and benefit).

327. Finucane, *supra* note 326, at 3.

328. Nussbaum, *Upheavals*, *supra* note 11, at 116 (discussing Damasio’s patient “Elliot”); see also Antonio R. Damasio, *Descartes’ Error: Emotion, Reason, and the Human Brain* 36–37 (1994) (introducing patient with damage to prefrontal cortex).

329. Damasio, *supra* note 328, at 34–35.

330. *Id.* at 35.

331. *Id.* at 36–37.

332. *Id.* at 38.

333. *Id.* at 44–45.

any direction.³³⁴ Additional study of other patients with prefrontal damage similar to Elliot's found each of them to have both defective decisionmaking ability and "flat" emotion.³³⁵ These cases then led to further research that revealed multiple sections of the brain the impairment of which simultaneously hinders "goal-oriented thinking" and "emotion and feeling."³³⁶ These findings lend significant plausibility to Nussbaum's conclusion, drawing on the work of Damasio and others, that "emotions provide the animal (in this case human) with a sense of how the world relates to its own set of goals and projects."³³⁷

Maroney usefully summarizes the ascendant cognitivist conclusions as to the utility of emotions.³³⁸ She writes that emotion "reveals reasons, motivates action in service of reasons, enables reason, and is educable."³³⁹ Emotions are evaluative, in some way, and reflect beliefs that are not just ministerial reactions to stimuli but can be normatively evaluated, can be taught,³⁴⁰ and should be judged rational or irrational piecemeal rather than on the whole. But emotions enable particular kinds of evaluations: They are assessments of value, and therefore motivate judgment, prioritization, and consequently action in a way that, as poor Elliot teaches, nonaffective cognition cannot.³⁴¹

B. The Good of Pathetic Argument

Who is a constitutional judge's ideal reader?³⁴² Surely it is not Elliot, but why not? Answering this question seems to require a theory of what constitutional law is and what it aspires to be. The excited utterance example suggested that the reliability of an emotion-laden judgment depends on the nature of the claim under evaluation. Emotion may enable that judgment to better resonate with our core values even as it biases our evaluation of historical or empirical facts. The intelligence of an emotional judgment, in other words, depends on what the decider's ends are. But to

334. *Id.* at 45.

335. See *id.* at 54–58 (discussing historical cases from 1932, 1940, and 1948 of patients exhibiting symptoms similar to those of Elliot).

336. See *id.* at 70 ("[T]here appears to be a collection of systems in the human brain consistently dedicated to the goal-oriented thinking process we call reasoning, and . . . also involved in emotion and feeling . . .").

337. Nussbaum, *Upheavals*, *supra* note 11, at 117.

338. See Maroney, *supra* note 4, at 642–51 (discussing roles of emotion and reason in law).

339. *Id.* at 642.

340. See *id.* at 648 n.96 (citing James J. Gross & Ross A. Thompson, *Emotional Regulation: Conceptual Foundations in Handbook of Emotional Regulation* 3, 13–15 (James J. Gross ed., 2007), as overview of "cognitive change" strategy for altering emotions).

341. Cf. Hume, *supra* note 130, at 236 ("Reason is, and ought only to be the slave of the passions . . .").

342. See White, *Heracles' Bow*, *supra* note 12, at 96–99 (exploring interpretation of "meaning" based on how document's ideal reader would understand its bearing on present cultural and political circumstances).

assume that the object of constitutional judging is to prove some positive proposition rather than to align the law with the values of the governed is to beg the question.

This Section offers four normative justifications for the use of pathetic argument in constitutional law. These justifications proceed from different assumptions about what constitutional law ought to be. All four justifications support the view that pathetic argument is not always appropriate, but that whether it is or is not better aligns with how emotional appeals are made than with whether they are made at all.

1. *Pathetic Argument as Conventional.* — Pathetic argument may be appropriate to the degree that it constitutes a standard move in constitutional law. Constitutional law, like politics, is beset with reasonable disagreement over the outcomes it supports.³⁴³ In deciding whether some approach to constitutional law is appropriate, it will not generally be helpful to assess the results that approach produces, since doing so simply reproduces intractable disagreement.³⁴⁴ The more useful way to evaluate a constitutional method is by reference to its consistency with accepted practices of constitutional decisionmaking.³⁴⁵ An approach is properly “constitutional” if it fits the usual grammar of constitutional law.³⁴⁶ Part II.B showed that this was true with respect to at least some forms of pathetic argument at least some of the time.

Concededly, the notion that pathetic argument is appropriate because it is used has a certain just-so quality. Note, however, that all of the pathetic examples from Part II.B are from cases decided in the last three decades. This is not to say that pathetic argument was never used before then, but it does suggest the possibility that the pathetic mode was less common before the advent of modern substantive due process and before the rise of legal realism.³⁴⁷ Substantive due process has invited

343. See Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *Yale L.J.* 1346, 1366–69 (2006) (arguing consensus about constitutionally protected rights is not exempt from general disagreement about major political issues).

344. Looking to results may be helpful on the margins, as for example when some approach calls into question the validity of canonical cases or the invalidity of anticanonical ones. See Cass R. Sunstein, *In Defense of Liberal Education*, 43 *J. Legal Educ.* 22, 26 (1993) (“[A]n approach to constitutional interpretation is unacceptable if it entails the incorrectness of *Brown v. Board of Education*.”).

345. See Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 *N.Y.U. L. Rev.* 570, 582–84 (2001) (arguing extent to which practice is embedded provides support for its constitutionality).

346. See J.M. Balkin & Sanford Levinson, *Constitutional Grammar*, 72 *Tex. L. Rev.* 1771, 1775 (1994) (discussing importance of “law talk” in legitimate constitutional arguments); James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 *U. Chi. L. Rev.* 684, 689 (1985) (suggesting law be defined as “particular set of resources made available by a culture for speech and argument”).

347. See generally Laura Krugman Ray, *Judicial Personality: Rhetoric and Emotion in Supreme Court Opinions*, 59 *Wash. & Lee L. Rev.* 193 (2002) (cataloguing differences in rhetoric between Stone and Rehnquist Courts).

constitutional judges to inquire into, variously, values “implicit in the concept of ordered liberty,”³⁴⁸ “principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,”³⁴⁹ and choices that enable one to “define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”³⁵⁰ Legal realism dispelled the notion that law, and especially constitutional law, could be reduced to a mechanistic formula insensitive to the biases and predilections of the decider. Established modalities of argument rise and fall in prominence in ways that feed back into the degree to which their use is acceptable. Imagine, if you can, *District of Columbia v. Heller*³⁵¹ being written in 1978 instead of 2008. Mainstream constitutional thinkers would instinctively have coded both its pro-gun result and its unapologetically originalist methodology—the myopic focus on history as a subject of constitutional discourse—as wrong.³⁵² Things change. There is no reason to believe that modes of constitutional persuasion are any less susceptible to these dynamics than subjects of constitutional argument.

2. *Pathetic Argument as Democratic.* — Pathetic argument is valuable because of its power to persuade. In politics, we expect leaders to persuade the electorate that the policies they are pursuing are in line with the polity’s values. If emotion is necessary to forming those kinds of judgments, as evidence suggests,³⁵³ then pathetic argument is both desirable and essential to politics.³⁵⁴ Constitutional law aspires to be different from politics—or at least to be different from electoral politics—but we must ask whether the dimension of difference either requires or suggests a different attitude toward appeals to emotion.³⁵⁵

Imagine you get a speeding ticket—eighty miles per hour in a sixty-five mile per hour zone—and are required to appear before a judge. You plead guilty and the judge requires you to pay a fine. Before letting you go,

348. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), overruled by *Benton v. Maryland*, 395 U.S. 784 (1969).

349. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934), overruled in part by *Malloy v. Hogan*, 378 U.S. 1 (1964).

350. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

351. 554 U.S. 570 (2008).

352. See Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 Harv. L. Rev. 191, 223–24 (2008) (discussing skeptical view of individual rights-based Second Amendment arguments in 1980s).

353. See *supra* Part III.A (summarizing views of cognitive theorists with respect to relationship between emotions and assessments of value).

354. See Drew Westen, *The Political Brain: The Role of Emotion in Deciding the Fate of the Nation* 55–57 (2008) (discussing role of emotional reactions in politics); see also Dan T. Coenen, *The Story of The Federalist: How Hamilton and Madison Reconceived America* 47–50 (2007) (cataloguing appeals to emotion appearing in *The Federalist Papers*).

355. See Maroney, *supra* note 4, at 636 (remarking, in Enlightenment thinking, “[s]ome quantum of emotion . . . was to be expected from legislative and executive officials” but not judges).

the judge chastises you in open court for engaging in dangerous behavior. He points to your young son playing with a toy truck in the back of the courtroom and says, "Some little boy just like him is alive today only because you were lucky enough not to blow out a tire at the wrong time."

The judge has made a pathetic appeal for you not to drive so fast. He assumes that you value the life of your child and he believes that your experience of shame, guilt, or sadness will help to connect your behavior to your values. The feelings the judge seeks to invoke may well perform that function much better than a monetary fine. But that kind of appeal would feel out of place in a judicial opinion. The appeal is for your ears—only in part because we recognize the subjectivity of emotion. We all have different values, as much as we all have different personal memories, experiences, and perceptive capacities. That our emotional response to some object can be expected to differ from our neighbor's is part of what constitutes the response as an emotion rather than some other cognitive process.³⁵⁶ Pathetic arguments are, in Bobbitt's phrase, "idiosyncratic" because emotions are themselves idiosyncratic.

But constitutional law is not like traffic tickets. The speed limit is verifiable and typically transparent, its status as a governing rule is not usually questioned, and whether a driver has surpassed it is a question of physics rather than metaphysics. Constitutional law (in hard cases, at least)³⁵⁷ requires a judge to persuade a reader that conduct that some political actor often believed efficacious and legal violated (or did not violate) a rule or (more often) standard or principle whose authority derives from some combination of inertia, *general* acceptance by the American people, historical provenance, or social desirability. And so the feat of persuasion is not simply to have the reader internalize the social policy embedded in an agreed-upon rule; it is to have the reader accept the applicability and authority of the rule itself.³⁵⁸ This task is not only more difficult but it is necessarily "idiosyncratic." In the absence of any accepted metarule that prioritizes different sources of constitutional meaning,³⁵⁹ the practice of constitutional law is the practice of persuading diverse citizens to share the priorities of the adjudicator.³⁶⁰ To the degree that

356. See Nussbaum, *Upheavals*, supra note 11, at 27–28 (discussing subjective nature of perception and emotional responses).

357. Cf. Frederick Schauer, *Legal Realism Untamed*, 91 *Tex. L. Rev.* 749, 764–73 (2013) (arguing legal realist challenge extends to cases appearing easy on basis of formal legal materials).

358. Cf. Robert A. Ferguson, *Judicial Rhetoric and Ulysses in Government Hands*, 15 *Rhetoric & Pub. Aff.* 435, 439 (2012) [hereinafter Ferguson, *Judicial Rhetoric*] ("[T]he more controversial the decision, and the more uncertain the consequences, the greater the need for [judicial] commentary that reaches outward while answering an inward matter.").

359. See Bobbitt, *Constitutional Interpretation*, supra note 15, at 155–62 (discussing lack of usefulness of such metarule if one did exist).

360. Among the diverse citizens, of course, are the parties before the court. See Ferguson, *Judicial Rhetoric*, supra note 358, at 437 ("The need for persuasion is more intense in a judicial opinion [than in ordinary discourse], because the multiple 'hearer' in

emotions are vital to one's capacity to set priorities in light of one's values, emotional appeals must form part of constitutional practice.

This justification for pathetic argument is ultimately democratic. Persuading the audience that an argument is properly constitutional requires the judge to persuade the audience that it is consistent with or compelled by their values. Failing to do so does not necessarily deprive the rule the argument supports of the force of law (hence the countermajoritarian difficulty) but it may deprive it of democratic justification. Alexander Bickel may have put the point best, if unwittingly. Bickel emphasized that the countermajoritarian difficulty is misleading if we understand judges to be custodians of our long-term values:

[M]any actions of government have two aspects: their immediate, necessarily intended, practical effects, and their perhaps unintended or unappreciated bearing on values we hold to have more general and permanent interest. . . . [W]hen the pressure for immediate results is strong enough and emotions ride high enough, [legislators] will ordinarily prefer to act on expediency rather than take the long view. . . . Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government. This is crucial in sorting out the enduring values of a society [Courts can] appeal to men's better natures, to call forth their aspirations³⁶¹

This reads like a brief for the position that judges should avoid emotional appeal, until we remember Elliot. Emotional impairment seemed to prevent Elliot from connecting his everyday judgments to his aspirations. Stephen Holmes writes, echoing Bickel, that "[a] constitution is Peter sober while the electorate is Peter drunk,"³⁶² but Damasio's description of Elliot calls to mind a different but equally resonant sort of inebriate—listless, distracted, unable to rouse himself to action. The revolution must be equal parts Enjolras and Combeferre,³⁶³ as moved by passion as grounded in reason.³⁶⁴

court is formally divided with at least one reluctant auditor and probably more in the disappointed party.").

361. Bickel, *supra* note 106, at 24–26.

362. Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* 135 (1995).

363. Victor Hugo writes that Enjolras "was subject to unexpected outbursts of soul," whereas Combeferre preferred "to bring the human race into accord with its destiny gradually, by means of education, the inculcation of axioms, the promulgation of positive laws; and, between two lights, his preference was rather for illumination than for conflagration." 3 Victor Hugo, *Les Misérables* bk. 4, at 68–69 (Isabel F. Hapgood trans., New York, Thomas Y. Crowell & Co. 1887) (1862).

364. See Abrams, *Emotions*, *supra* note 66, at 570–71 ("[T]he mobilization of rights is informed and infused by varied forms of affect . . ."). This capacity can be pernicious, and not just in the obvious ways that revolutionary France calls to mind. See *infra* Part IV.B (recognizing potential for appeals to emotion to stoke regressive forms of populism). It may

Pathetic argument may have still greater democratic justification insofar as we understand constitutional law in expressive terms.³⁶⁵ Much constitutional doctrine derives from the social meaning of particular governmental practices, such as racial discrimination or religious endorsement.³⁶⁶ The Constitution's text and history may be indeterminate as to whether, for example, the Constitution permits racial gerrymandering, the specific harm of which is difficult to articulate or measure,³⁶⁷ but *Shaw v. Reno*³⁶⁸ and its progeny recognize that racial gerrymanders that create bizarrely shaped districts upset expectations about political community in the name of a single value—race—whose relationship to representative politics is itself contested and complex.³⁶⁹ Certain kinds of violations are of the “we know it when we see it” sort precisely because law interacts with social reality in a way that is impossible either to quantify or to ignore. The judgment that certain practices are unconstitutional is not intelligible unless the adjudicator appreciates the values the practice communicates and ties them to her own. Denying the pathetic mode to constitutional judges therefore disables them in seeking public approval and understanding of their work.

It may do even more. This Part has assumed that emotional appeal enables persuasion, and that its capacity to do so may recommend it, in some cases, whether or not emotion also enables rational judgment in the traditional sense. But recall that emotion may also be necessary to basic cognition, and so emotional appeal may be necessary to explanation of constitutional law. Accepting this claim requires accepting at least some cognitivist premises about the basic ontology of emotion, but crucially it does not presuppose any indeterminacy in constitutional law. Many

also undermine the persuasiveness of the opinion if used too clumsily, as perhaps with “Poor Joshua!” and with Chief Justice Rehnquist’s flag-burning opinion.

365. See Elizabeth S. Anderson & Richard H. Pildes, Expressive Theories of Law: A General Restatement, 148 U. Pa. L. Rev. 1503, 1504–05, 1531–64 (2000) (arguing “existing practices of moral and legal evaluation are best understood through expressivist perspectives” and constitutional doctrine is best understood through conceptions of expressive dimensions of state action).

366. See *id.* at 1532 (noting Equal Protection Clause and Establishment Clause are “areas scholars most often point to as best understood in expressivist terms”).

367. See Richard H. Pildes & Richard G. Niemi, Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After *Shaw v. Reno*, 92 Mich. L. Rev. 483, 499–506 (1993) (contending *Shaw* teaches modes of constitutional analysis extending beyond analysis of policy purpose and effect, and “value reductionism”).

368. 509 U.S. 630, 642 (1993) (holding unconstitutional instances where newly drawn district is “so extremely [geographically] irregular on its face” as to be understood only as “effort to segregate the races for purposes of voting”).

369. See Anderson & Pildes, *supra* note 365, at 1539 (attributing expressive harm of racial redistricting to improper association of political identity and race); Pildes & Niemi, *supra* note 367, at 526 (observing *Shaw v. Reno* illustrates government cannot constitutionally redistrict such that race supplants other relevant values).

familiar tools of exposition—metaphor,³⁷⁰ personalization of abstract concepts,³⁷¹ slippery slope arguments³⁷²—are most powerful when they engage the emotions, if only to ensure that a complex or obscure point is understood.³⁷³

3. *Pathetic Argument as Administrable*. — In December 1997, Shirley Ree Smith was convicted and sentenced to fifteen years to life in prison for shaking her seven-week-old grandson too violently while putting him to sleep.³⁷⁴ The evidence that the child died of so-called Shaken Baby Syndrome rather than Sudden Infant Death Syndrome was heavily disputed at trial.³⁷⁵ Her conviction was affirmed on appeal and she failed to obtain postconviction relief in state courts.³⁷⁶ A federal district court denied her petition for writ of habeas corpus, but the Court of Appeals for the Ninth Circuit reversed and ordered that the writ be granted on the basis of insufficient evidence.³⁷⁷

The Supreme Court granted certiorari and vacated and remanded without argument for reconsideration in light of *Carey v. Musladin*.³⁷⁸ *Musladin* had to do with neither Shaken Baby Syndrome nor the sufficiency of the evidence standard. In *Musladin*, a panel of the Ninth Circuit had reversed a district court's denial of habeas relief on the issue of whether it violated a murder defendant's fair trial rights to allow members of the victim's family to wear buttons depicting the victim in the front row of the gallery.³⁷⁹ What the two cases principally had in common was an alleged misapplication by a Ninth Circuit panel of the standard for granting habeas relief codified in the Antiterrorism and Effective Death Penalty Act.³⁸⁰

The Ninth Circuit either did not get the message or ignored it. On remand, the panel reinstated the grant of habeas relief, concluding that its

370. See, e.g., *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 560 (1989) (Blackmun, J., concurring in part and dissenting in part) (“[A] chill wind blows.”).

371. See, e.g., *Brown v. Plata*, 131 S. Ct. 1910, 1949–50 (2011) (embedding photographs of overcrowded conditions in California prisons in opinion holding substandard medical treatment resulting from conditions violated Eighth Amendment).

372. See, e.g., *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2591 (2012) (Roberts, C.J.) (arguing government’s position in favor of upholding mandate to purchase health insurance would likewise permit mandate to purchase “cars or broccoli”).

373. If one accepts the claim that emotion invariably influences judicial decisionmaking—a premise this Article does not endeavor to defend—then appealing to the reader’s emotion might perform an additional democratic service: candor.

374. Andrew Blankstein, *Woman Convicted in Grandson’s Shaking Death*, L.A. Times (Dec. 9, 1997), <http://articles.latimes.com/1997/dec/09/local/me-62263> (on file with the *Columbia Law Review*); see also *Smith v. Mitchell*, 437 F.3d 884, 888 (9th Cir. 2006), vacated sub nom. *Patrick v. Smith*, 550 U.S. 915 (2007).

375. *Smith*, 437 F.3d at 886–88.

376. *Id.* at 888.

377. *Id.* at 890.

378. *Patrick*, 550 U.S. 915 (2007); see *Carey v. Musladin*, 549 U.S. 70 (2006).

379. See *Musladin*, 549 U.S. at 73 (discussing procedural history of case).

380. See 28 U.S.C. § 2254(d)(1) (2006).

earlier decision was “unaffected by *Musladin*.”³⁸¹ The State again petitioned for certiorari. Again the Court granted the petition and vacated and remanded in light of another case, *McDaniel v. Brown*,³⁸² in which the Ninth Circuit had been reversed on a grant of habeas relief. On remand, the panel again reinstated its original opinion, concluding that “nothing in *Brown* is inconsistent with our prior decision or our method of reaching it.”³⁸³ The State once more petitioned for certiorari, and this time the Supreme Court summarily reversed with a written opinion.³⁸⁴

I recite this sequence to demonstrate that the Supreme Court’s audience is not limited to the American people and that other actors within the federal system have the capacity to resist the Court’s directives.³⁸⁵ The Court sits atop a pyramid of lower federal courts and, with respect to issues of federal law, formally controls the decisions of the state courts. Supreme Court decisions also must be enforced by executive officials, must be followed by administrative agencies in the course of rulemaking and enforcement activity, and must be honored by legislative drafters across the country. As with any appellate court, the Supreme Court’s efforts at persuasion must attend to the many different decisionmakers who must implement and negotiate its decisions.³⁸⁶ In a setting of radical institutional pluralism, failure to persuade may have powerful consequences for the administration of judicial doctrine.³⁸⁷

381. *Smith v. Patrick*, 508 F.3d 1256, 1258 (9th Cir. 2007).

382. 130 S. Ct. 665 (2010).

383. *Smith v. Mitchell*, 624 F.3d 1235, 1237 (9th Cir. 2010).

384. See *Cavazos v. Smith*, 132 S. Ct. 2, 7–8 (2011) (holding evidence sufficient to support finding child died from Shaken Baby Syndrome). California Governor Jerry Brown subsequently granted Smith executive clemency. Carol J. Williams, *Woman Won’t Be Sent Back to Prison*, L.A. Times, Apr. 7, 2012, at AA1.

385. See Doni Gewirtzman, *Lower Court Constitutionalism: Circuit Court Discretion in a Complex Adaptive System*, 61 Am. U. L. Rev. 457, 459–62, 472–74, 477–81 (2012) (discussing how discretionary space in constitutional interpretation allows for “occasional departures from the Supreme Court’s desired course of action” by lower courts); Gudridge, *supra* note 165, at 1986–89 (discussing lower courts’ resistance to Supreme Court rulings and initiation of development of new areas of constitutional law). See generally Adam Shinar, *Dissenting from Within: Why and How Public Officials Resist the Law*, 40 Fla. St. U. L. Rev. 601, 609–11, 630–46 (2013) (describing methods by which public officials may resist implementing laws, including defiance, nonacquiescence, bulletproofing, outsourcing, prioritization, and interpretation).

386. See Gerald B. Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 Va. L. Rev. 1545, 1561 (1990) (“Like the lawyer-advocate, the judge has a number of audiences she must persuade that she is right and that the losing party’s lawyer is wrong. These audiences include the appellate courts, the legal community, the losing party . . . , and the public at large.”).

387. See Donald R. Songer, Jeffrey A. Segal & Charles M. Cameron, *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 Am. J. Pol. Sci. 673, 690, 692 (1994) (concluding judges on courts of appeals were “relatively faithful agents” of their Supreme Court principal but their responsiveness to Court “did not prevent entirely the judges on the courts of appeals from pursuing their own policy preferences”).

None of this is to say that attention to pathetic argument would have reined in the Ninth Circuit in the shaken baby case. But eschewing an otherwise effective mode of persuasion complicates the Court's task as a principal. The "cultural script of judicial dispassion"³⁸⁸ encouraged the Court to ignore the expressive dimension of the case, which involved attaching the enormous social meaning of a potential life term in prison to the case of a grandmother who was trying to put her infant grandson to sleep.³⁸⁹ The Ninth Circuit panel was quite plausibly affected by this dimension but was never engaged on its terms.

4. *Pathetic Argument as Inevitable.* — In the end, the best normative case for treating some pathetic arguments as appropriate may simply derive from the inevitability of their deployment. This is not, in the main, a fatalistic argument that simply gives up on the capacity of human judges to perform their jobs professionally. It is, rather, a second-best argument that proceeds from the assumption (which I do not hold) that emotional appeal would be absent in an ideal world. When an ideal world is unattainable, we should ask ourselves how to make the best of its alternative. And the way to make the best of a world in which constitutional judges sometimes advance pathetic arguments is to develop and support a set of best pathetic practices. Treating emotional appeals as forbidden allows them to proceed when unnoticed—as when judges embellish the facts in capital appeals or augment their own authority by treating legal texts as having obvious meanings³⁹⁰—but not when such appeals are transparent, as in "Poor Joshua!" As Part III.C discusses below, that pattern does not likely map on to the contexts in which pathetic argument is most easily justified.

C. *When to Be Pathetic*

The reasons why pathetic arguments are sometimes appropriate in constitutional law inform the related question of *when* such arguments are appropriate. If convention partly dictates the answer to the normative question, it might tell us still more about the contexts in which judges tend to make emotional appeals. If democratic considerations particular to the nature of constitutional law make pathetic argument necessary to constitutional practice, then we will want to attend to the particular conditions under which emotional engagement improves democratic reflection over the subjects of constitutional cases. Constitutional practice, constitutional law, the scope and substance of emotions as an experiential category, and the definition of an "appeal" to emotion are sufficiently complex that we can safely assume that the normative question is not

388. See Maroney, *supra* note 4, at 629.

389. See Kahan, *Alternative Sanctions*, *supra* note 25, at 605–30 (discussing social meanings connotatively expressed through various forms of punishment).

390. See James Boyd White, *Judicial Criticism*, 20 Ga. L. Rev. 835, 849–57 (1986) (identifying this latter move in Chief Justice Taft's majority opinion in *Olmstead v. United States*, 277 U.S. 438 (1928)).

binary. It is unlikely to be obvious in any given case whether an emotional appeal is in bounds or out, just as it is often unclear whether some deep political argument is “constitutional,” or whether a feeling or mood is an “emotion.”

That said, this Part proposes four overlapping considerations that, in combination, are relevant to assessing when pathetic arguments are appropriate in opinion-writing by constitutional judges. A fifth consideration—the subtlety of the appeal—is worth mentioning here only so that its relevance may be appropriately qualified. In many instances, a pathetic appeal is more likely to succeed if it is not obvious. If an opinion-writer is to derive good practices from convention, which suggests ambivalence toward emotional appeals, he must not ignore the perils of the overwrought opinion. But subtlety is surely not the only consideration, and it is difficult to derive criteria—independent of subtlety’s capacity to persuade in any particular case—that help us to assess its appropriate use more generally. Further, as the considerations below suggest, the insights derived from convention are not the only ones relevant to the normative question.

1. *Separate Writings.* — First, we should care whether the putative pathetic argument appears as part of an opinion of a court or whether it is part of a separate writing. Pathetic arguments are more likely to be appropriate in the latter instance. The reason is partly a matter of convention: Pathetic arguments are more common in separate opinions. A certain kind of formalism (some would say “sophistry”³⁹¹ or “legalistic argle-bargle”³⁹²) has survived both legal realism and critical legal studies; its resilience may reflect popular preference as much as inertia,³⁹³ and so pathetic argument may simply be less persuasive when an opinion purports to declare the law.³⁹⁴ But there are also sound theoretical reasons for giving greater latitude to concurrences and dissents. An opinion that does not speak for the court is typically urging law reform, either addressed to colleagues on the bench or addressed to members of the political branches. It is uncontroversial, or should be, that law creation by political bodies does and should attend at least in part to pathos.³⁹⁵ As discussed, it is more controversial that judge-made law should adopt a

391. *Roper v. Simmons*, 543 U.S. 551, 627 (2005) (Scalia, J., dissenting).

392. *United States v. Windsor*, 133 S. Ct. 2675, 2709 (2013) (Scalia, J., dissenting).

393. See Jamal Greene, Nathaniel Persily & Stephen Ansolabehere, *Profiling Originalism*, 111 *Colum. L. Rev.* 356, 416 (2011) (noting Americans’ affinity toward “rule of law” values).

394. See *infra* Part III.C.2 (discussing consideration of law declaration in pathetic argument).

395. See *supra* text accompanying note 94 (opining on impropriety of judicial use of pathetic argument); see also Westen, *supra* note 354, at 117–24 (explaining link between emotion and voting behavior); Elizabeth B. Clark, “The Sacred Rights of the Weak”: Pain, Sympathy, and the Culture of Individual Rights in Antebellum America, 82 *J. Am. Hist.* 463, 475–87 (1995) (describing vivid emotional appeals by American abolitionists).

similar focus, but separate opinions in constitutional cases often emphasize dimensions of the problem neglected or glossed over by the court majority. Once it is conceded that pathetic arguments are part of the judge's toolkit, it must also be conceded that it is at least permissible for a separate writing to encourage their use in a particular case. For like reasons, pathetic arguments are more likely to be appropriate when advanced by litigants or other legal advocates than when advanced by judges.³⁹⁶

2. *Law Declaration.* — A second significant and related consideration is whether the court's work is best described as "law-announcing" or "law-applying." As between the two, pathetic argument is generally more appropriate in opinions written by law-announcing bodies or actors in contexts that call for, as Henry Monaghan puts it, "law declaration" rather than "dispute resolution."³⁹⁷ When a court declares the law, its concern is with concretizing previously indeterminate legal rules or standards and its gaze is fixed on the future rather than the past. Dispute resolution is focused on historical rather than legislative facts, on the particular parties before the court, and on whether the defendant's conduct violated a well-established rule of law.³⁹⁸ No bright line separates these categories at the margins but it remains a useful distinction, particularly at the Supreme Court. The Court understands itself to be concerned primarily with law declaration, as evidenced by its shrinking docket and its codified standard for granting certiorari: Rule 10 states that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."³⁹⁹

This dichotomy finds a loose parallel in Aristotle's distinction between "deliberative" and "judicial" or "forensic" rhetoric.⁴⁰⁰ Deliberative rhetoric is addressed to one who is adjudicating "future happenings" such as "[a] member of a democratic assembly," whereas judicial rhetoric is addressed to one who is "judging the past," such as a member of a jury.⁴⁰¹ Our general unease in conceding that judges make law is grounded in the reality that legitimate construction of legal rules and standards requires a careful weighing of competing societal values. A judge cannot easily perform this task without making those values intelligible through emotional engagement. The notion that a judge might

396. See *supra* text accompanying notes 74–87 (describing pathetic argument's role in trial advocacy).

397. Monaghan, *supra* note 20, at 668.

398. This distinction may overlap with, but does not neatly track, the distinction between facial and as-applied challenges. The Court's skepticism about entertaining facial challenges reflects a reluctance to decide cases not before it, but an as-applied challenge on which certiorari is granted may well involve deep uncertainty as to the content of the applicable constitutional rule.

399. Sup. Ct. R. 10.

400. Aristotle, *supra* note 1, bk. 1, ch. 3, §§ 3–4.

401. *Id.* § 2.

make *constitutional* law is even more unsettling, since his decision displaces the democratically enacted laws of the community and the democratically accountable actions of its leaders. As Marie Failing writes, the work of the Supreme Court, in particular, “ranges beyond the forensic, to deliberative and epideictic tasks necessary in the creation of an ongoing constitutional community of trust.”⁴⁰² Some constitutional doctrines invite this kind of value-balancing more than others; consider, for example, the “evolving standards of decency” inquiry in the Eighth Amendment context,⁴⁰³ or the “shocks the conscience” standard for a due process violation.⁴⁰⁴

A court that understands itself to be applying established legal rules to a common fact situation need not make a judgment nor solicit the audience’s judgment as to the values underlying the law or the interplay between those values and the particular circumstances of the accused. The relevant balancing has already been authoritatively performed. The function of an opinion in this context is simply to establish, as a factual matter, that the defendant’s conduct cleared or failed to clear a preset bar. There is less of a role for prudential arguments, which is why the speeding ticket colloquy discussed in Part III.B.2 should not ordinarily find its way into an opinion. But as the court’s orientation becomes increasingly prospective, we may understand pathetic assessment of a litigant as a broader commentary on those similarly situated.⁴⁰⁵ In proposing law reform, it is quite appropriate for a judge to apprise the audience of the stakes of the chosen course and potential alternatives.⁴⁰⁶ Doing so is likely to be more effective if pathetic argument is, in some form, on the table. This might be particularly so when the legal doctrines at issue rely on some conception of expressive harm rather than measurable injury.⁴⁰⁷

402. Marie A. Failing, *Not Mere Rhetoric: On Wasting or Claiming Your Legacy*, *Justice Scalia*, 34 *U. Tol. L. Rev.* 425, 435 (2003).

403. See *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958) (explaining meaning of phrase “cruel and unusual punishment” is not static).

404. See *Rochin v. California*, 342 U.S. 165, 172 (1952) (explaining “due process of law” requires “judgment . . . mindful of reconciling the needs both of continuity and of change in a progressive society”).

405. For this reason, pathetic argument may be more appropriate in cases where equitable relief is sought. This consideration likely provides limited independent explanatory power at the Supreme Court, where virtually all of the Court’s work is, in a sense, prospective.

406. See Failing, *supra* note 402, at 436 (claiming appellate courts have responsibility to move audiences toward legal or social reform).

407. Pathetic argument may therefore have a special role to play in an area that sits largely outside of constitutional law and nominally outside of criminal law: assessment of punitive damages. Punitive damages are awarded to express the community’s outrage at tortious conduct. This expressive dimension may help explain the otherwise puzzling constitutional doctrine under which a jury may increase the level of punitive damages based on third-party harm only as a measure of the reprehensibility of the defendant’s conduct and not as “direct” punishment for that harm. Compare *Philip Morris USA v. Williams*, 549 U.S. 346, 356–57 (2007) (discussing disagreement between Justice Breyer and Justice

Recall, in this regard, the discussion of excited utterances in Part III.A. An excited utterance is perhaps more likely than a reflective statement to be faithful to the actual perceptions of the accused, but it may be less likely to reflect historical fact. The degree to which an emotional appeal is appropriate may likewise depend in part on whether the court's objective is to tap into the reader's subjective perceptions—which are crucial to value ordering—or is instead concerned with persuading the reader that some set of circumstances with a well-established social meaning did or did not obtain. Emotional appeal is more likely to be appropriate in the former than the latter style of opinion.

3. *Promoting Deliberation.* — This Article has sought to demonstrate that emotion is an unwieldy category of human experience. The diversity of emotional states and the diverse contributions that emotions make to cognition and judgment are among the reasons why denying a place for pathetic argument in constitutional law or constitutional judging is too simplistic. The necessary corollary to that observation is that some emotions are likely better suited to producing the kind of deliberation that is valuable to constitutional law.⁴⁰⁸ We may believe, for example, that it is preferable to conjure emotions that promote reflection about one's deep commitments as against those likely to distract us from those commitments. We may likewise wish to support emotions that foster other-regarding rather than purely self-regarding judgments and perspectives.⁴⁰⁹

Aristotle spoke of “emotions of the soul,” such as pity and anger, that he believed were “appeals to the juryman” rather than relating to fact,⁴¹⁰ but he did not develop an elaborate taxonomy. The *Liber Pantegni*, a medieval text that remains the oldest known manual of Western medicine, used similar terminology—“accidents of the soul”—to describe six emotions associated with a physiological response, namely joy, distress, fear, anger, anxiety, and shame.⁴¹¹

Part II.A described William James's view that emotions generally are a conventional label for precisely these kinds of physiological disturbances.

Stevens over punishment for third-party harm), with id. at 360 (Stevens, J., dissenting) (“This nuance eludes me.”). See generally Benjamin C. Zipursky, Punitive Damages After *Philip Morris USA v. Williams*, 44 Ct. Rev. 134, 141 (2008) (discussing disagreement between Justice Breyer and Justice Stevens over punishment for third-party harm).

408. See Maroney, *supra* note 4, at 651 (advocating “emotional law and economics” approach, which “would seek to isolate and control the decisional contexts in which emotion . . . predictably leads to suboptimal outcomes”).

409. I do not mean to endorse either a deliberative or interest-based conception of democracy. The elaboration of constitutional law through judicial opinions lacks the reciprocity necessary to conform to leading models of appropriate democratic deliberation. Articulating the relationship between the content of judicial opinions and well-functioning democracy requires considerable work and is beyond this Article's scope.

410. Aristotle, *supra* note 1, bk. 1, ch. 1, § 4.

411. Simo Knuuttila, Emotions in Ancient and Medieval Philosophy 215 (2004) (describing six emotions named in *Liber Pantegni*).

James believed that these kinds of emotions—the “*standard* emotions” such as “[s]urprise, curiosity, rapture, fear, anger, lust, [and] greed”⁴¹²—are not aspects of cognition and are not forms of judgment.⁴¹³ He was aware that other cognitive processes exist that bear a resemblance to our intuitive understanding of emotion,⁴¹⁴ but he insisted that their cognitive structure denied them the status of emotion:

Yes! in every art, in every science, there is the keen perception of certain relations being *right* or not, and there is the emotional flush and thrill consequent thereupon. And these are two things, not one. In the former of them it is that experts and masters are at home. The latter accompaniments are bodily commotions that they may hardly feel, but that may be experienced in their fulness by *Crétins* and *Philistines* in whom the critical judgment is at its lowest ebb.⁴¹⁵

Modern cognitivists resist segregating these kinds of judgments from their emotional responses and are more apt to describe emotions by reference to their feelings and their intentional objects in combination. It is possible, then, to use some of James’s examples of objects that inspire both judgment and feeling as evidence of his views as to which emotions are more “intelligent.” As Andrew Ortony and his coauthors write, “James had essentially characterized a range of cognitive content for the emotion-producing perception from low (e.g., a mother’s delight at the sight of her beautiful baby) to high (e.g., the delight of receiving a national honor).”⁴¹⁶ Proceeding in this way, Ortony et al. continue, we can ascribe to James an appreciation of the high cognitive content of emotions such as “shame, desire, regret, etc.” that are triggered by an appreciation of social convention rather than merely instinct.⁴¹⁷

Ortony et al. have usefully generalized their own views in a monograph that aims to categorize emotional states according to their cognitive content.⁴¹⁸ Broadly, they classify emotions (or rather, emotion types)⁴¹⁹ according to “ingredients of appraisal”: Through emotions, we measure events according to their relationship to our goals, we measure the actions of agents according to standards of conduct or performance

412. James, *supra* note 130, at 189.

413. See *id.* at 202 (drawing distinction between “standard” emotions and forms of cognition and judgment).

414. See *id.* at 201 (recognizing “genuinely *cerebral* forms of pleasure and displeasure”).

415. *Id.* at 202–03.

416. Ortony et al., *supra* note 146, at 5.

417. *Id.* (quoting James, *supra* note 130, at 195).

418. *Id.* at 1 (“[O]ur approach will be concerned more or less exclusively with trying to characterize the differences between emotions in terms of the different kinds of cognitions we take to be responsible for them.”).

419. *Id.* at 15 (“An emotion type is a distinct kind of emotion that can be realized in a variety of recognizably related forms.”).

(for a nonhuman agent), and we measure objects according to attitudes.⁴²⁰ Within each of these categories we may react positively or negatively, and we may assign responsibility for our reaction or assess consequences of the event in light of our own projects or purposes or those of someone else.⁴²¹ That is, for any combination of personal identity, valence, and ingredient of appraisal we can identify an emotion type, within which lies a family of related emotions, the members of which can vary substantially in intensity. Thus, a negative valence attached to the consequence of an event that is desirable for someone else may be characterized as the emotion type of “resentment.”⁴²² If the event is undesirable for someone else the emotion type is “pity.”⁴²³ If we shift the valence to positive, the emotion types are respectively “happy-for” and “gloating.”⁴²⁴ Ortony et al. proceed in this way to construct a general taxonomy of emotion.

This Part began with the suggestion that there is reason to approve judicial appeals to emotions that foster deliberation about deep commitments and that are other- rather than self-regarding. Using the Ortony et al. framework, emotions whose ingredient of appraisal is an “attitude” toward some object have a simplistic cognitive structure that is less grounded in a deliberative judgment. Ortony et al. view the emotions in this category, what he calls the “Attraction” emotions of love and hate, as temporary states. As such, and accepting the Ortony et al. taxonomy, the normative case in favor of direct appeals to these emotions is weak.

As to other- versus self-regard, we can refine the inquiry by limiting the favored other-regarding emotions to what I will call “positive” other-regarding emotions. These are emotions that correspond to positively valenced event outcomes regarded as desirable by the affected others and negatively valenced event outcomes as undesirable by the affected others. On the Ortony et al. taxonomy, more approved emotion types would therefore include “happy-for,” “pity,” and “admiration,” and less approved types would include “resentment” and “gloating.” These latter emotions are other-regarding but not in a way that builds community by associating others’ ends with one’s own. These emotions are not empathetic, and so they double down on the radical subjectivity of emotion that makes pathetic argument perilous.

Specifying the emotions that meet all of these criteria is beyond our scope; it is a research agenda all its own. Note as well that the argument just described makes normative assumptions about the desirability of

420. *Id.* at 13 (“We argue that there are three broad classes of emotions that result from focusing on one of three salient aspects of the world—events and their consequences, agents and their actions, or objects, pure and simple.”).

421. *Id.* at 16, 19 (describing structure of theory of emotions and providing graphic depiction).

422. *Id.* at 19.

423. *Id.*

424. *Id.*

other-regarding behavior that are contestable. Hannah Arendt has described the failed political program of the Jacobins as instilling a “virtue” that consisted in “identify[ing] one’s own will with the will of the people,” and in elevating “compassion to the rank of the supreme political passion and of the highest political virtue.”⁴²⁵ An ironic myopia may accompany excessive concern for the social as against the personal; we may fail to internalize the degree to which others hold different preferences and harbor different aspirations. Resentment may breed ingenuity, which is a different kind of virtue. The key point for now is not to settle on a catalog of favored emotions. It is, rather, that concluding that emotions may vary in their degree of subjectivity begins rather than ends the conversation about when pathetic argument is appropriate.

4. *Addressing Constitutional Subjects.* — Finally, use of an emotional appeal may be more appropriate when, as in the examples from Part II.B, the appeal seeks to persuade the reader of the substance or valence of an established constitutional subject rather than seeking more directly to persuade the reader of a particular adjudicative outcome. George Kennedy refers to the case of the great Roman orator Marcus Antonius, who in the extortion trial of a war veteran, is said to have “ripped the toga from the scarred body of the old soldier to exhibit his wounds” to the jury.⁴²⁶ Antonius was not well versed in law but, according to Cicero, “[H]e never felt the need for it.”⁴²⁷ In the usual course, this will not do for constitutional argument. The concerns over the rule of law that counsel (too bluntly, I have argued) against pathetic argument are most deeply engaged when the argument skips over the usual constitutional forms and aims straight for the jugular.

IV. THE PAYOFF OF PATHOS

This Article has situated pathetic argument within constitutional practice and has sought to justify its place in light of the nature of constitutional law and modern philosophical, psychological, and biological insights into the structure and function of emotion in our intellectual life. The benefit of clearer understanding in this area is not just epistemic, though that would be enough. This Article’s descriptive and normative claims enable us to rethink a number of distinct debates within constitutional law and practice. This Part highlights three such debates: the dispute over the degree to which constitutional law is a unique discourse; the role that marginalized conceptions of the good should play in constitutional decisionmaking; and the place of sympathy in constitutional judging.

425. Hannah Arendt, *On Revolution* 75 (1965).

426. George A. Kennedy, *A New History of Classical Rhetoric* 112–13 (1994).

427. *Id.* at 113.

A. A Specialized Practical Discourse

A trenchant disagreement separates attitudinalists and pragmatists on one hand and doctrinal constitutional lawyers on the other as to whether constitutional law is a specialized discourse or is instead continuous with other practical forms.⁴²⁸ Although disputed on the margins, mainstream legal and constitutional scholars tend to agree that reasoning outside of Bobbitt's modalities or its equivalent is not recognizable as constitutional law and therefore provides at least a modest constraint on the set of available outcomes in many (though not all) cases.⁴²⁹ The classic attitudinalist position views the modalities as an elaborate dress for the policy preferences of the judge, which legal reasoning does not meaningfully constrain.⁴³⁰ Posner, representing the pragmatist view, concedes that lawyers are specially trained and use a particular vernacular but maintains that "there is no intrinsic or fundamental difference between how a judge approaches a legal problem and how a businessman approaches a problem of production or marketing."⁴³¹

This Article's descriptive claims suggest that, at least in the constitutional domain, legal discourse is both specialized and continuous with other forms of practical discourse. Constitutional practice focuses on particular subjects of argument—text, history, structure, doctrine, and institutional consequences—but it does not employ distinct modes of persuasion as to the substance or valence of those subjects. The ubiquity of resort to those subjects and the substantial number of cases on which legal scholars agree as to the outcome quite apart from policy preference suggest that the internal norms of constitutional argument exert an influence over outcomes.⁴³² But those subjects and norms do not preclude

428. See Edward Rubin & Malcolm Feeley, *Creating Legal Doctrine*, 69 S. Cal. L. Rev. 1989, 1994–95 (1996) (noting debate "has dominated political-science scholarship about judicial decisionmaking").

429. See Michael J. Gerhardt, *The Limited Path Dependency of Precedent*, 7 U. Pa. J. Const. L. 903, 905 (2005) (describing divergent positions of political scientists and legal scholars on constraining force of precedent). See generally Richard S. Markovits, *Matters of Principle: Legitimate Legal Argument and Constitutional Interpretation* 1 (1998) (advancing account of "morally-legitimate legal argument in our culture").

430. See generally Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* 2–3 (2002) ("Although the justices conventionally claim for public consumption that they do not make public policy, that they merely interpret law, the truth conforms to Chief Justice (then Governor) Charles Evan Hughes' declaration, 'We are under a Constitution, but the Constitution is what the judges say it is.'").

431. Richard A. Posner, *Law, Pragmatism, and Democracy* 73 (2003).

432. See Richard H. Fallon, Jr., *Constitutional Constraints*, 97 Calif. L. Rev. 975, 1003–04 (2009) (asserting existence of direct normative constraints on judges and Justices and noting substantial percentage of unanimous Supreme Court opinions); Jack Knight & Lee Epstein, *The Norm of Stare Decisis*, 40 Am. J. Pol. Sci. 1018, 1019 (1996) (arguing precedent constrains constitutional decisionmaking).

a role for pathetic argument as a mode of rhetoric; indeed they may require it for their sustenance.

B. Pathos and Nomos

Pathos is both gendered and raced. The rejection of pathetic argument is justified by a resistance to the influence of subjectivity on public reason. This view reserves the coercive force of the law for pursuit of a common good from which radical, lived dissent have been excised.⁴³³ As Iris Marion Young writes, "Many contemporary theorists of participatory democracy retain the ideal of a civic public in which citizens leave behind their particularity and differences."⁴³⁴ Assuming universal reason necessarily brands as outsiders those whose experiences and perspectives, aided by the intensity of emotion, generate different cognitive judgments.⁴³⁵ Assimilating that process to the rule of law turns marginalization into subjugation.⁴³⁶

Viewed in this light, Eastman's defense of "Poor Joshua!" as a beacon for his misunderstood and dispossessed clients becomes more pointed.⁴³⁷ Particularly when used in dissents or concurrences, pathetic argument is a vehicle for incorporating marginalized nomoi into the constitutional

433. See Iris Marion Young, *Justice and the Politics of Difference* 97 (1990) ("[T]he ideal of impartiality . . . masks the ways in which the particular perspectives of dominant groups claim universality . . .").

434. *Id.*; cf. Maroney, *supra* note 4, at 635 (noting derision of emotional judging as successor to "Cadi justice," form of non-Western judicial systems). But see Kathryn Abrams, *Legal Feminism and the Emotions: Three Moments in an Evolving Relationship*, 28 *Harv. J.L. & Gender* 325, 326 (2005) ("Work using emotion as an analytic tool may be premised on a foregrounding or prioritization of individual subjectivity, and an insistence on self-transparency, as well as on static, unitary understandings of women's circumstances, identities, and ways of knowing."). It is hard not to notice that the recent dust-up over the role of empathy in judging revolved around the nomination of a Latina to the Supreme Court. Both Latinos and women are typically stereotyped as overly emotional and therefore less reasonable. See Mimi Samuel, *Focus on Batson: Let the Cameras Roll*, 74 *Brook. L. Rev.* 95, 95 (2008) (reporting results of lawyer survey focused on juror selection). Justice Alito's discussion of empathy at his confirmation hearing did not receive similar attention. See *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 475 (2006) (statement of J. Samuel A. Alito, Jr.) ("[W]hen a case comes before me involving, let's say, someone who is an immigrant, . . . I can't help but think of my own ancestors [W]hen I look at those cases, I have to say to myself, and I do . . . , this could be your grandfather. This could be your grandmother.").

435. See Charles R. Lawrence, III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 *S. Cal. L. Rev.* 2231, 2252-56 (1992) (discussing perniciousness of universal view of objectivity and providing example of one woman's experience of its effects).

436. See Robert M. Cover, *Violence and the Word*, 95 *Yale L.J.* 1601, 1601 (1986) ("Interpretations in law also constitute justifications for violence which has already occurred or which is about to occur.").

437. See *supra* text accompanying note 122; see also Maroney, *supra* note 4, at 634 (examining Enlightenment view associating emotion with "common people").

conversation.⁴³⁸ It is telling that, in criticizing Justice Blackmun, Rosen compared him to Frank Murphy, “the warmhearted New Dealer who wrote emotional dissents on behalf of the poor and powerless, but whose tendency to let his heart get the better of his head deprived him of lasting influence.”⁴³⁹ Murphy’s thin legacy is surely affected more by the fact that he sat for just nine years, dying of a heart condition at the age of fifty-nine. But in that brief time he penned one of the most memorable lines of his era on the Court, writing that the government’s ancestry-based exclusion of free Japanese persons from the West Coast “falls into the ugly abyss of racism.”⁴⁴⁰ A pathetic phrase is worth a volume of logic.

That said, this Article’s conclusions do not necessarily support progressive outcomes. Appeals to emotion obviously have the capacity to and will sometimes support populist fears of the other. Moreover, the subjects of constitutional argument that invite appeals to emotion are not randomly distributed; they seem disproportionately, for example, to involve the rights of women and children.⁴⁴¹ Discouraging the use of pathetic argument wholesale could mitigate the instinct to treat relevantly similar cases differently. Emotional appeal seems a sufficiently textured rhetorical category that this kind of prophylaxis is unlikely to be effective, but readers will differ in the weights they assign the risks on either side.

C. In Defense of Sympathy

Part I.C discusses a common defense to criticism of President Obama’s “empathy” standard, namely that critics misunderstand the distinction between empathy and sympathy.⁴⁴² Empathy, some noted, is a perceptive capacity, not an emotion.⁴⁴³ But this Article has suggested that there may well be contexts in which, whether or not it is appropriate for the judge to display or experience sympathy, it may be appropriate for her to seek to persuade the reader to be sympathetic. Indeed, Part III.C.3 offered “pity” as just the kind of community-building emotion that judges should solicit more than others.

Viewed in the most generous light, “Poor Joshua!” exemplifies this kind of rhetoric. It invites the reader to assess the consequences of the ruling not just for this Joshua but for Joshuas everywhere; individualizing

438. See generally Cover, Foreword, *supra* note 27, at 25–40 (exploring how insular communities define and give meaning to constitutional principles through distinctive normative views).

439. Rosen, *supra* note 113, at 13–14.

440. *Korematsu v. United States*, 323 U.S. 214, 233 (1944) (Murphy, J., dissenting).

441. See, e.g., *Kyllo v. United States*, 533 U.S. 27, 38 (2001) (noting controversial thermal imaging technology at issue could reveal “at what hour each night the lady of the house takes her daily sauna and bath”); *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting) (“Poor Joshua!”).

442. See *supra* Part I.C.

443. See *supra* note 97 and accompanying text (discussing perspectives of empathy as perceptive capacity).

the litigant in this appellate context is not necessarily an invitation to “bias” (as in the Antonius example) as much as an invitation to the reader to contemplate the societal effects of a rule that imposes little to no duties of protection on the state. The reader who accesses his emotions when performing that assessment may better appreciate how his values relate to those consequences.⁴⁴⁴ Constitutional opinions that deliberately name homicide victims invite the same kind of sympathetic assessment.⁴⁴⁵ These examples suggest that the claim that pathos is inappropriate in any given case is often an argument internal to constitutional law about which values among equally legitimate options should be prioritized. A judge undertakes this kind of volatile argument at his peril, but with due respect to Federalist No. 78,⁴⁴⁶ constitutional judging is a perilous business.

CONCLUSION

Our ambivalence about pathetic argument reflects an ambivalence about constitutional law itself. Law that claims authority over processes of democratic decisionmaking is evidently *nonconstitutive* in ways that are important to liberalism. At a glance, pathetic appeals by judges seem to exacerbate this tension by proposing that law be constructed from materials that divide rather than bind us. On reflection it should be clear, however, that excluding pathetic argument from legal persuasion is neither desirable nor possible. Doing so both emasculates constitutional argument and unreflectively takes sides in a trenchant debate over the nature of constitutional law. Any effort to eliminate pathos from our constitutional discourse would systematically bias our evaluation of constitutional arguments in favor of the most subtle or least recognized emotional appeals.

Articulating and approving a role for pathetic argument in constitutional law supplies a needed amendment to extant descriptions of constitutional practice. It makes clear that pathetic arguments are continuous with quotidian modes of persuasion outside of constitutional discourse while preserving the distinctiveness of constitutional law as attending to particular, limited domains of argument. Separating modes of persuasion from subjects of argument gives us resources for understanding judge-made constitutional law as a practice both of

444. See Benjamin Zipursky, *DeShaney* and the Jurisprudence of Compassion, 65 N.Y.U. L. Rev. 1101, 1135 (1990) (“The judge who occupies a compassionate stance . . . can provide a more thorough interpretation of the law and the facts.”).

445. See *Lafler v. Cooper*, 132 S. Ct. 1376, 1398 (2012) (Scalia, J., dissenting) (naming victim); see also *Cooper v. Brown*, 510 F.3d 870, 1003 (9th Cir. 2007) (reproducing photos appended to *Cooper v. Brown*, No. 04-CV656-H, 2005 U.S. Dist. LEXIS 46232, at *287 (S.D. Cal. May 27, 2005) (appending photographs of murder victims to end of capital habeas opinion with no obvious analytic purpose)).

446. See The Federalist No. 78, *supra* note 249, at 465 (Alexander Hamilton) (“[T]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution . . .”).

explication and of convincing, and one whose audience extends from the judge's colleagues on the bench all the way out, at times, to the area man. Unlike speed limits, constitutional law must govern not only ourselves but our posterity,⁴⁴⁷ and as Bickel wrote at his most perspicacious, "[T]he future will not be ruled; it can only possibly be persuaded."⁴⁴⁸

447. See U.S. Const. pmb.

448. Bickel, *supra* note 106, at 98.